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Universalizing Copyright Fair Use: To Copy, or Not to Copy?

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My thanks to Abdelmajid Awad for the inspiration, Anupam Chander for his massive contribution to this article, Madhavi Sunder, Justin Tilghman, and the JIPL's Editorial Board for the efforts devoted to this article.

UNIVERSALIZING COPYRIGHT FAIR USE: TO COPY, OR NOT TO COPY?

*Taysir Awad**

* S.J.D. Candidate, 2023, Georgetown University Law Center. My thanks to Abdelmajid Awad for the inspiration, Anupam Chander for his massive contribution to this article, Madhavi Sunder, Justin Tilghman, and the JIPL's Editorial Board for the efforts devoted to this article.

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I. INTRODUCTION

In the past couple of decades, we have witnessed a universal shift from closed list catalogues, such as fair dealing, to the fair use doctrine.[1] What initially began as an opaque common law doctrine in the courts of the United States of America spread throughout the international community with increasing speed.[2] The first two countries to transplant the doctrine were Israel and South Korea, in 1993 and 2006.[3] Canada, Malaysia, the Philippines, Liberia, Taiwan, Sri Lanka, Kenya, and Singapore would soon follow.[4] Recently, Ecuador became the first South American country to employ "*uso justo*" (fair use) through the enactment of *Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación* (Code of the Social Economy of Knowledge, Creativity, and Innovation).[5] Chinese and Canadian courts have tacitly embraced the fair use doctrine, albeit these nations have not codified the doctrine.[6] South Africa is currently taking steps towards adoption.[7] Australia and New Zealand have flirted with the idea of importing the fair use doctrine on numerous occasions.[8] What explains the

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[1] *See*, *e.g.*, Niva Elkin-Koren & Neil W. Netanel, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, 72 HASTINGS L.J. 1121, 1124 (2021)(discussing the chronological history of the global transposition of the fair use doctrine).

[2] *Id.*

[3] Peter Decherney, *Fair Use Goes Global*, 31 CRITICAL STUD. IN MEDIA COMMC'N 146, 146 (2014), https://www.tandfonline.com/doi/pdf/10.1080/15295036.2014.921321?needAccess=true.

[4] Elkin-Koren & Netanel, *supra* note 1, at 1125.

[5] Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación [SAN] [Code of the Social Economy of Knowledge, Creativity, and Innovation] art. 211 (Ecuador).

[6] Tianxiang He, *Transplanting Fair Use in China? History, Impediments and the Future*, 2020 U. ILL. J.L. TECH. & POL'Y 359, 369–73 (2020); Gluseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L. J. 309, 320–24 (2008); CCH Canadian Ltd. v. L. Soc'y of Upper Canada, [2004] 1 S.C.R. 339 (Can.) (illustrating that both Canadian and Chinese courts have given the enumerated list of the fair dealing clause a liberal interpretation, eventually expanding the scope of the list to be interpreted as demonstrative, equating the fair use doctrine).

[7] *See* Sadulla Karjiker, *Should South Africa Adopt Fair Use? Cutting Through the Rhetoric*, 2021 J. S. AFR. L. 240 (2021), https://go.gale.com/ps/i.do?id=GALE%7CA688764556&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=02577747&p=AONE&sw=w&enforceAuth=true&linkSource=delayedAuthFullText&userGroupName=uga (elucidating the evolution of South Africa's copyright exceptions, though with a critical lens toward the newly introduced fair use doctrine).

[8] Emily Hudson, *Implementing Fair Use in Copyright Law: Lessons from Australia*, 25 INTELL. PROP. J. 201 (2013); *Copyright in the digital age: An economic assessment of fair use in New Zealand,* DELOITTE (Mar. 2018), https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf.

movement towards fair use in countries around the world? Strangely enough, the home jurisdiction of fair use has proven remarkably antagonistic to this movement.[9] In fact, the U.S. has conspicuously stigmatized the movement, using its annual Special 301 Report as a tactical reprisal to deter other nations from adopting the doctrine.[10] Why, if the U.S. originated fair use, does it abhor the doctrine elsewhere?

Fair dealing is a copyright exception that was first introduced in England to prevent courts from imposing "manacles [on] science."[11] It permits the use of copyrighted material for a purpose explicitly listed in the act without prior permission.[12] Some countries inherited the fair dealing doctrine from the British Empire, while others voluntarily adopted the doctrine.[13] Those countries who have refrained from adopting the fair dealing doctrine have carved out a similar type of closed list catalogue.[14] Ultimately, these exceptions are mutually limited to "certain special cases" in compliance with the Berne Convention's three-step test.[15]

Prior to the end of the 20th century, the only aberration to the closed list catalogue regime was the fair use doctrine.[16] Fair use, a progeny of fair dealing,

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[9] *See, e.g., The Scope of Fair Use: Hearing Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 113th Cong. 67 (2014) [hereinafter *The Scope of Fair Use*] (statement of Ted Deutch, Member, H. Comm. on Judiciary) (opposing the importation of the fair use doctrine to other jurisdictions, explaining that "in another country, it wouldn't mean the same thing. It could easily—the concern, obviously, is that it then becomes a loophole to completely overturn what is a really sensitive balance that we have in this country, based on volumes and volumes of precedent. There is an important balance to be struck in our trade deals. And the words "fair use" themselves, I think, don't bring us anything"); Elkin-Koren & Netanel, *supra* note 1, at 1149 ("[U.S.] copyright industry trade associations and lobbyists have resolutely opposed the adoption of fair use in other countries.").

[10] *See, e.g., 2020 Special 301 Report*, OFF. OF U.S. TRADE REPRESENTATIVE 82, (Apr. 2020), https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf (outlining how Ecuador has been on the list for three consecutive years in virtue of its adopted exceptions, including the fair use exception in article 211. "However, continuing concerns remained about how the final regulations would address issues related to copyright exceptions and limitations . . .").

[11] Cary v. Kearsley (1802) 170 Eng. Rep. 679, 680.

[12] D'Agostino, *supra* note 6, at 309.

[13] Lionel Bently, *The "Extraordinary Multiplicity" of Intellectual Property Laws in the British Colonies in the Nineteenth Century*, 12 THEORETICAL INQUIRIES L. 161, 171–81 (2011), http://www7.tau.ac.il/ojs/index.php/til/article/view/770/728.

[14] *Infra* notes 78-91.

[15] *See* Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, *as revised* July 24, 1971, *and as amended* Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter The Berne Convention] ("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.").

[16] Elkin-Koren & Netanel, *supra* note 1, at 1124.

permits the use of copyrighted material under certain circumstances without permission.[17] The list of permissible uses in § 107 of the Copyright Act of 1976, however, is illustrative, whereas fair dealing is exclusive. Similar to the U.S., courts in England had wide discretion in determining what constituted fair dealing.[18] But, this changed with enacting the Imperial Act of 1911.[19] In contrast, § 107 of the Copyright Act of 1976 is "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[20] As a result, fair use sustains its flexible character, which enables courts to effectively weigh each case based on its merit.

In recent years, tech powerhouses and conglomerates have commended the fair use doctrine and have advocated for its universality.[21] For example, Yahoo! states that "[u]nder [a fair dealing] copyright regime, very many socially useful and economically beneficial technological innovations would simply have no breathing space to emerge. They would be blocked at the first post by a copyright regime that is insufficiently flexible to accommodate technological innovation."[22] Thus, many countries have surmised that their laws were inferior to those in the U.S. For instance, David Cameron, former Prime Minister of the United Kingdom, stated, "[the U.S. has] what are called 'fair-use' provisions, which some people believe gives companies more breathing space to create new products and services. . . . I want to encourage the sort of creative innovation that exists in America."[23] To the contrary, other shifts have been instigated endogenously through the judiciary (e.g., Israel, Canada, China).[24]

In any matter, there was a common perception that fair use entailed some type of development. After thoroughly examining the postulations set forth by

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[17] This is not to be confused with fair use in trademark law. In trademark law, there is the statutory doctrine of descriptive fair use (use to describe the product rather than a source indicator), and there is the common law doctrine of nominative fair use (use to signify the actual trademarked good as there are no alternatives). William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 82, 90 (2008).

[18] Elkin-Koren & Netanel, *supra* note 1, at 1137.

[19] *Id.*

[20] H.R. REP. NO. 94-1476, at 66 (1976).

[21] *Infra* notes 22.

[22] Austl. L. Reform Comm'n, *Copyright and the Digital Economy (ALRC Report 122)* 104 AUSTL. GOV'T (Feb. 2, 2013) (citation omitted), https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/4-the-case-for-fair-use/.

[23] Decherney, *supra* note 3, at 148.

[24] Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 112–13 (2019). Though Peter Yu describes these transplants as occurring exogenously, he refers to the mechanism by which courts have referred to. In contrast, the dichotomy this research makes between exogenous and endogenous transplants refers to the influence of the transplant, either endogenously through the judiciary or exogenously through foreign corporations and conglomerates.

the judiciary and special committees of the aforementioned nations, fair use's development can be narrowed down to three dimensions: access to knowledge, responsiveness to innovative technologies, and enhancement of creative production. This Article will examine the ambit of the U.S. trajectory and assess whether fair use is better equipped than its foreign counterparts and variants with regard to these three dimensions of development. The Article will additionally provide useful guidance to other jurisdictions that are considering the transplantation, namely South Africa.[25]

Although some have drawn opaque associations between the implementation of fair use and increases in the gross domestic product ("GDP"),[26] this research adopts the Nobel Prize-winning theory of development, the capabilities approach, to evaluate whether fair use meets these expectations. Developed by Amartya Sen and Martha Nussbaum, the capabilities approach deviates from the conventional metric of development, economic growth.[27] Development, in this sense, means enabling individuals to participate, inter alia, socially, economically, and politically through the enhancement of human capabilities and freedoms.[28] The late Mahbub ul Haq stated, "[t]he real wealth of a nation is its people. And the purpose of development is to create an enabling environment for people to enjoy long, healthy, and creative lives."[29]

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[25] Letter from Cyril M. Ramaphosa, President of the Republic of South Africa, to Thandi Modise, Speaker of the National Assembly, Parliament of the Republic of South Africa (June 16, 2020), https://libguides.wits.ac.za/ld.php?content_id=55785870.

[26] *See* Jeremy de Beer, *Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions*, 19 THE J. WORLD INTELL. PROP. 150 (2016), https://onlinelibrary.wiley.com/doi/pdf/10.1111/jwip.12069 ("A series of studies funded by the Computer & Communications Industry Association (CCIA) looks at 'The Economic Contribution of Industries Relying on Fair Use.' One study includes claims like: '[f]air-use industry value added in 2008 and 2009 averaged $2.4 trillion' and '[e]mployment in industries benefiting from fair use and related limitations and exceptions increased from 16.9 million in 2002 to 17.7 million in 2008.'").

[27] AMARTYA SEN, DEVELOPMENT AS FREEDOM 6 (Alfred A. Knopf ed., 1st ed. 1999); MARTHA C. NUSSBAUM, CREATING CAPABILITIES THE HUMAN DEVELOPMENT APPROACH 10 (Belknap Press of Harv. Univ. Press 2011); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 6 (Cambridge Univ. Press 2000).

[28] SEN, *supra* note 27; NUSSBAUM, CREATING CAPABILITIES THE HUMAN DEVELOPMENT APPROACH, *supra* note 27; MAHBUB UL HAQ, ECONOMIC GROWTH WITH SOCIAL JUSTICE: COLLECTED WRITINGS OF MAHBUB UL HAQ (Oxford Univ. Press 1st ed. 2018); MAHBUB UL HAQ, REFLECTIONS ON HUMAN DEVELOPMENT (Oxford Univ. Press 1995).

[29] *Human Development Report 1999*, UNITED NATIONS DEVELOPMENT PROGRAMME 1 (1999), https://hdr.undp.org/system/files/documents//hdr1999ennostatspdf.pdf.

Scholars such as Julie Cohen,[30] Margaret Chon,[31] Madhavi Sunder,[32] and Anupam Chander[33] have laid out normative accounts of intellectual property laws grounded on the capabilities approach. The central claim of this Article is that fair use intrinsically aligns copyright law with the capabilities approach and is better equipped than its foreign counterparts with regard to this objective. Therefore, this Article observes the extant state of copyright limitations and exceptions globally and optimizes the best available framework, using the capabilities approach as a gauge.

This Article proceeds as follows. Part I is divided into two sections. In section one, this Article will elucidate fair use, fair dealing, and discrete exceptions. The Article will then briefly explain the history and function of each doctrine, differentiating them from one another. Section two delves into the history of fair use transposition across the globe. Here, the Article will examine the rationale behind each case and, thus, conclude that each nation has found that fair use promotes some type of development. These developments are then narrowed down to three separate yet intersecting dimensions. Each dimension enhances human capabilities in some way or form: access to knowledge, responsiveness to innovative technologies, and enhancement of creative production. Neil Netanel highlights fair use's role in promoting democratic and political participation.[34] Although political participation is a preponderant freedom emphasized by both Sen and Nussbaum,[35] this Article will exclusively weigh the viability of the postulations set forth by the courts and committees of the aforementioned nations, and political participation falls out of the ambit. Part II is divided into three sections. Each section examines the viability of each capability that fair use allegedly promotes. First, the Article will explain how copyrights restrain the capability of discussion. Then, the Article will compare fair use and fair dealing's approach to the issue and to what extent each alleviates the issue at hand.

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[30] JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (Yale Univ. Press 2012).

[31] Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007).

[32] MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (Yale Univ. Press 2012).

[33] Anupam Chander & Madhavi Sunder, *Copyright's Cultural Turn*, 91 TEX. L. REV. 1397 (2013) (reviewing JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (Yale Univ. Press 2012)).

[34] Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

[35] SEN, *supra* note 27, at 146–60; *see also* NUSSBAUM, CREATING CAPABILITIES THE HUMAN DEVELOPMENT APPROACH, *supra* note 27, at 34 (highlighting that "[b]eing able to participate effectively in political choices that govern one's life; [in other words] having the right of political participation" is one of several central capabilities).

II. BACKGROUND

A. Fair Use, Fair Dealing, and Discrete Exceptions

Fair use is a copyright exception that was introduced in 1841 by the District Court of Massachusetts in *Folsom v. Marsh*, though labeled as *"fair and bona fide abridgment."*[36] It was not until 1869, in *Lawrence v. Dana,* that fair use, the appellation, was coined in the U.S.[37] The perplexing confines of fair use gave it the epithet, "the most troublesome in the whole law of copyright."[38] In current years, however, scholars have observed greater consistency and predictability with regard to the application of fair use.[39] The concept was first codified in the Copyright Act of 1976,[40] which sets forth in full:

> 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—

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[36] Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (emphasis added).

[37] Saul Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. 43, 49 (1953) (citing Lawrence v. Dana, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869), https://heinonline.org/HOL/Page?handle=hein.journals/cpyrgt6&id=57&collection=journals&index=. Fair use has undergone a long metamorphosis before forming into its contemporary status. It has been conflated by courts for many varying concepts. The court in *Sheldon v. Metro-Goldwyn Pictures Corp.,* 81 F.2d 49 (2d Cir. 1936) used the expression to define, what is now known as, the idea/ expression dichotomy. In other instances, courts have confused the theory with the de minimus doctrine. *E.g., MacDonald v. Du Maurier*, 75 F. Supp. 655 (S.D.N.Y. 1948).

[38] Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). Although this case dates back to 1939, scholars and courts to this day reemphasize this statement when manifesting frustration over the vagueness of the fair use doctrine.

[39] Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2537 (2009); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated,* 1978-2019, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 11 (2020).

[40] 17 U.S.C. § 107 (1976); Clark D. Asay et al., *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 915 (2020).

> (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.[41]

Throughout the past two decades, empirical data has indicated that the application of fair use has been dictated by the transformative use criteria.[42] Transformative use was introduced by Judge Pierre Leval in "*Toward a Fair Use Standard*."[43] Leval premised that:

> [A fair] use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely 'supersede the objects' of the original. If, on the other hand, the secondary use adds value to the original - if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings - this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[44]

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[41] 17 U.S.C. § 107 (1976).
[42] Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 166 (2019); Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).
[43] Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).
[44] *Id.* at 1111.

Though not the first tribunal to embrace the transformative use criteria,[45] the Supreme Court set a benchmark for lower courts by employing the newly introduced fair use subfactor in *Campbell v. Acuff-Rose*.[46] The Court stated,

> The central purpose of this investigation is to see . . . whether the new work . . . adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks . . . whether and to what extent the new work is "transformative."[47]

The Court further emphasizes that "the more transformative the new work, the less will be the significance of other factors."[48] Thereafter, transformative use became the fair use gauge that it is today.[49]

The transformative use subfactor entails many things; most importantly, it entails that fair use is malleable. It is not limited to the purposes enumerated within the preamble of § 107.[50] The statute's language, "for purposes such as," indicates its inclusiveness. Moreover, a modern application has implicated that fair use is not confined to an *ejusdem generis* interpretation of those purposes either;[51] in other words, there is no requirement that the purpose is analogous to

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[45] *See* American Geophysical Union v. Texaco Inc., 802 F. Supp. 1 (S.D.N.Y. 1992) (illustrating the usage of the transformative use criteria in the District Courts before the Supreme Court deployed it in Campbell v. Acuff-Rose); Twin Peaks Prods., Inc. v. Publ'ns Intern., Ltd., 996 F.2d 1366 (2d Cir. 1993) (illustrating the usage of the transformative use criteria in the Appellant Courts before the Supreme Court deployed it in Campbell v. Acuff-Rose).

[46] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[47] *Id.* at 579.

[48] *Id.*

[49] Liu, *supra* note 42, at 166 (indicating that a finding of transformative use will result in a finding of fair use over ninety one percent of the time); *see also infra* note 195 (illustrating, through an extensive list, transformative use's prominence within the fair use equation post Campbell).

[50] Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) ("Beginning with the examples of purposes set forth in the statute's preamble, the Court made clear that they are 'illustrative and not limitative' and 'provide only general guidance about the sorts of copying that courts and Congress most commonly ha[ve] found to be fair uses.'" (quoting *Campbell*, 510 U.S at 577-78 (1994))).

[51] *See* PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.2.1 (Aspen Publishers 3d ed. 2022) (reaching this deviation, Goldstein resorts to the statutory construction of noscitur a sociis; however, the same conclusion could also be implicated through an ejusdem generis statutory interpretation. "The first set of examples . . . implicates the political values of a free marketplace of ideas. The second set of examples . . . implicates the cultural and social values of an educated public . . . [thus] the defendant must demonstrate that its use is one that specifically serves political or educational values. . . . Whether construed in its broad or its narrow aspect, section 107 makes the social benefit rationale a threshold for fair use decisions").

those enumerated in the statute. On numerous occasions,[52] courts have reiterated the Second Circuit's assertation that fair use is "an open-ended . . . inquiry."[53] In fact, the House Report accompanying the 1976 Act states that "the works and uses to which the doctrine of fair use is applicable are as broad as the copyright law itself."[54] Therefore, any use can constitute a fair use, so long as it repurposes the canon work and uses it in an alternate context. Courts have found fair use for myriad purposes: the use of pornographic imagery as thumbnails in a search engine,[55] the use of concert posters as historical artifacts in a biography,[56] the use of millions of books on various topics for purposes of data mining and text mining,[57] and so forth.

On the other end of the spectrum, fair dealing predates the fair use doctrine by more than three decades.[58] In fact, fair use is a progeny of fair dealing.[59] Fair dealing gradually initiated as a common law doctrine within the United Kingdom to ensure that copyright does not "put manacles [on] science."[60] Initially, courts had wide discretion to determine what constituted fair dealing.[61] However, the codification of fair dealing in the Imperial Copyright Act of 1911 curtailed this discretion and began the close-listed fair dealing model.[62] A fair dealing invocation could only prevail if the use fell under one of the enumerated permissible uses carved out by Parliament.[63] Similar to fair use, these uses reflect those that courts conventionally recognized as fair before codification, such as

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[52] Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013); Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 81 (2d Cir. 2014); Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 37 (2d Cir. 2021), *cert. granted,* 142 S. Ct. 1412 (2022); Hollander v. Steinberg, 419 F. App'x 44, 46 (2d Cir. 2011); Marano v. Metro. Museum of Art, 844 F. App'x 436, 439 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 213 (2021); Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513, 540 (S.D.N.Y. 2008).

[53] Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006).

[54] H.R. REP. NO. 94-1476, at 66 (1976).

[55] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

[56] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).

[57] Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

[58] Cohen, *supra* note 37, at 48-49 (recounting fair use, as a theory, was first introduced in 1802 by Lord Ellenborough in Cary v. Kearsley. He had used the term "[works being] used fairly." Lord Ellenborough would later use the phrase "legitimate use" and "fair quotation" in a similar context).

[59] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (discussing fair and bona fide abridgment, the court cites Lord Ellenborough on multiple occasions. Moreover, cases from the United Kingdom's Court of Chancery were referenced, such as Whittingham v Wooler and Tonson v Walker).

[60] Cary v. Kearsley (1802) 170 Eng. Rep. 679, 680.

[61] Elkin-Koren & Netanel, *supra* note 1, at 1137.

[62] *Id.*

[63] *Id.* at 1135-36.

criticism, commentary, and news broadcasting of copyrighted material.[64] The fairness assessment is also similar to that in the U.S.; it includes an evaluation of the nature of the work, quantifying the proportion appropriated within the second work, and weighing the effect that the use has on the value and marketability of the canon work.[65] Fair dealing, however, is a two-prong test. Before an adjudicator can assess the fairness, they must determine whether the use falls within a permissible use by statute; if not, the inquiry ends there.[66] The first factor of fair use, on the other hand, is not conclusive. The factors may not "be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."[67] Hence, the purpose and character of the use is merely one factor to consider within a larger equation.

In virtue of British dominance in the late 19th and early 20th century, the Imperial Act was extended to much of the empire—now known as the Commonwealth countries—in addition to self-governing dominions and protectorates of the United Kingdom.[68] Many former British colonies have retained a fair dealing clause even after independence[69] (e.g., India, South Africa, Australia, New Zealand).[70] Countries that have not necessarily adopted the appellation 'fair dealing,' notably civil law countries, have carved out some type of exception for similar types of uses (which will be referred to as "discrete exceptions"). For example, §§ 46-52 of the German Act on Copyright and Related Rights of 1965 covers most of the exceptions conventionally enumerated within a fair dealing clause (education, pastiche, parodies, news reporting, and quotation).[71] These exceptions are closer to fair dealing, in the sense that they too are rigid, but designate an entire section for a specific use with independent conditions, as opposed to a fair dealing clause that aggregates the uses under a single umbrella subject to the same criteria of fairness. Discrete exceptions are

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[64] Imperial Copyright Act of 1911, 1 & 2 Geo. 5 c. 46, § 2 (U.K.) ("Provided that the following acts shall not constitute an infringement of copyright:— (i) any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary.").
[65] Ashdown v. Tel. Grp. Ltd. [2001] EWCA (Civ) 1142 [357]-[58] (Eng.).
[66] D'Agostino, *supra* note 6.
[67] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
[68] Bently, *supra* note 13, at 172.
[69] *See, e.g.,* Richard Shay, *Fair Deuce: An Uneasy Fair Dealing-Fair Use Duality*, 49 DE JURE L.J. 105, 106 (2016), https://journals.co.za/doi/epdf/10.17159/2225-7160/2016/v49n1a7 (noting that Article 12 of the South African Copyright Act was heavily influenced by the U.K.'s Copyright Act of 1956).
[70] Jonathan Band & Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook*, INFOJUSTICE 4, 27, 42, 59 (2015), https://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf.
[71] Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BGBI I at 3037, §§ 46-52 (Ger.).

also distinguished by their precision and capability to coexisting harmoniously with a fair use clause.[72]

B. GLOBALIZING FAIR USE

Prior to the late 20th century, the U.S. was essentially the only country to have adopted an open-ended copyright exception.[73] Most other countries adopted some type of "closed catalogue regime"[74] in conformity with the Berne Conventions three-step test.[75] The past three decades, however, have seen a rapid shift of countries either outright supplanting their closed catalogue regimes with the fair use doctrine; adopting a liberal construction to their fair dealing clauses, interpreted virtually indiscernibly with the fair use doctrine; or flirting with the concept but never actually adopting it.[76] This section discusses some countries that have transplanted the fair use doctrine and others that have endeavored. Furthermore, this section will briefly discuss the rationale behind the shift and circumstances surrounding the adoption or abstinence. The following sections will then discuss whether fair use is, in fact, superior to its foreign counterparts.

Frankly, there are far more countries with a close list catalogue regime than a fair use doctrine. Band & Gerafti have identified Antigua & Barbuda, Australia, Bangladesh, Cyprus, Gambia, Grenada, Guyana, India, Ireland, Myanmar, Namibia, Nigeria, Pakistan, Saint Christian and Nevis, Solomon Islands, Swaziland, the United Kingdom, Vanuatu, and Zimbabwe, among twenty others, that have employed a fair dealing clause.[77] The rest of the world, aside from those that have recently transplanted the fair use doctrine, have employed discrete exceptions of copyright, such as Argentina,[78] Algeria,[79] Brazil,[80] Burkina Faso,[81]

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[72] *See, e.g.,* § 29, Copyright Act, 5768-2007, 2007 LSI 34 (Isr.) (illustrating how the Israeli legislature carved out an exception for performance of copyrighted works by an educational institution in § 29 of the act despite the extant presence of the fair use doctrine in § 22).
[73] Elkin-Koren & Netanel, *supra* note 1, at 1124–25.
[74] *Id.*
[75] The Berne Convention, *supra* note 15, at art. 9(2) (stating that the three-step test is an international standard imposed on domestic copyright law requiring copyright exceptions be limited to "certain special cases." Because of this, legislatures find themselves compelled to adopt the closed catalogue regime).
[76] Decherney, *supra* note 3.
[77] Band & Gerafi, *supra* note 70.
[78] Law No. 11.723, Sept. 28, 1933, art. 10, B.O. (Arg.).
[79] [Joumada El Oula] [Copyright and Neighboring Rights Act of July 19, 2003], art. 41-53 (Alg.).
[80] Decreto No. 9.610, de 19 Fevereiro de 1998, Diário Oficial da União [D.O.U] de 20.2.1998 (Braz.).
[81] [Law No. 032-99/AN] [Protection of Literacy and Artistic Property], art. 21-25 (Burk. Faso).

Lebanon,[82] Morocco,[83] Namibia,[84] Spain,[85] Switzerland,[86] Saudi Arabia,[87] Tanzania,[88] Trinidad & Tobago,[89] Tunisia,[90] Qatar,[91] etc. The U.S.'s hybrid copyright exception remained an anomaly for over a century.[92] Currently, countries are now resorting towards the transplantation of the fair use doctrine, as opposed to its foreign counterparts, which first transpired in Israel and South Korea.[93]

In Israel, the fair use doctrine was introduced in common law long before its codification in 2007.[94] In 1993, artist David Geva made a satire of Israeli society through the utilization of the character Moby Duck, a replica of Walt Disney's Donald Duck.[95] Essentially, Geva's fair use invocation flunked. Nevertheless, the court construed the term "criticism" in the Act of 1911 broadly to include parodies and satires within the ambit.[96] This would be the Israeli Supreme Court's first deviation from the closed-list model.[97] Moreover, the court applied the four-factor test embedded within § 107 of the Copyright of 1976.[98] This shift was even more transparent in *Mifal Hapais v. The Roy Export Establishment,* where the appellant used a Charlie Chaplin character in an advertisement.[99] Here, the court applied a broader construction of § 2(1)(i) of the Act explaining "the use made of a protected work —as a base for a new, original creation — can be considered, under the appropriate circumstances, to be fair dealing for the purpose of 'criticism.'"[100] Although the inclusion of

[82] Law 75 of 3 Apr. 1999 (Protection of Literary and Artistic Property) (Leb.).
[83][Law No. 2-00] [Copyright and Related Rights] art. 12-24 (Morocco).
[84] [GG 845] [Copyright and Neighboring Rights Protection Act 6 of 1994] art. 15-24 (Namib.).
[85] Royal Legislative Decree 1/1996 of Apr. 12 art. XXXI-XL (Spain).
[86] LOI FÉDÉRALE SUR LE DROIT D'AUTEUR ET LES DROITS VOISINS [SR] [Federal Act on Copyright and Related Rights] Oct. 9, 1992, SR 231.1 art. 19-28 (Switz.).
[87] Royal Decree No. M/41 Aug. 30, 2003, art. 15 (Saudi Arabia).
[88][Copyright and Neighboring Rights No. 7 of 1999] art. 12 (Tanz.).
[89] [Copyright Act 8 of 1997] art. 9-17 (Trin. & Tobago).
[90] [Law No. (36)] [Literary & Artistic Property for 1994] art. 10-16 (Tunis.).
[91] [Qatar Law. No.7 of 2002] [Protection of Copyrights and Neighboring Rights] art. 18-27 (Qatar).
[92] Decherney, *supra* note 3.
[93] *Id.*
[94] Neil W. Netanel, *Israeli Fair Use from an American Perspective*, 1 (UCLA Sch. of L. Rsch. Paper No. 03, 2009), https://ssrn.com/abstract=1327906.
[95] CivA 2687/92 Geva v. Walt Disney Co., 48(1) PD 251 (1993) (Isr.).
[96] *Id.*
[97] Netanel, *supra* note 94, at 1.
[98] *Id.* at 2.
[99] CivA 8393/96 Mifal Hapais v. The Roy Exp. Establishment, 54(1) PD 577 (2000) (Isr.).
[100] Meera Nair, *Canada and Israel: Cultivating Fairness of Use* 19 (Am. U. Washington Co. of L., PIJIP Rsch. Paper No. 2012-04, 2012) (citation omitted),

burlesques, parodies, satires, pastiches, caricatures, and homage within the ambit of "criticism" has universally been accepted, the inclusion of "use . . . as a base for a new, original creation" [101] within "criticism" was unprecedented, not to mention iin blatant defiance of the statute.[102]

The immediate rationale behind the shift is not crystal clear. But Netanel explains that the market-failure rationale of fair use has heavily influenced Israeli courts.[103] In any case, Israeli courts have touted fair use as being more developed than fair dealing. In *Geva v. Walt Disney Co.,* the court explains, "the American arrangement is much more advanced and is . . . a more desired arrangement. . . . It seems that the American legislator preferred to create a flexible arrangement, one that enables maximal consideration in the circumstances of each and every case."[104] In another instance the court stated:

> [T]oo much protection [perpetuated by fair dealing] can halt the progression and development of culture and society, which essentially progresses out of past achievements. A certain break-through or progression that serves society as a whole, by its nature occurs through the creative achievements of individuals who lead the way. Thus, there are situations in which the public interest justifies limiting the scope of copyrights protection.[105]

Eventually, the Knesset, the Israeli legislature, enacted the Copyright Law of 2007, which officially embraced the fair use doctrine.[106]

In South Korea, the Copyright Act of 1957 witnessed a chain of amendments after 1986 to match the rapid industrial and economic developments following the Korean War.[107] The amendments included an open-ended list of copyright exceptions that constituted as "fair practice" in Article

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https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1028&context=research.

[101] *Mifal HaPais*, 54(1) PD at 597.

[102] Universally, the aforementioned types of uses are often the exemplars of criticism within a typical copyright act. *See, e.g.,* Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994) (illustrating that parody, similar to the other mentioned uses, is a familiar type of criticism. "We thus line up with the courts that have held that parody, like other comment or criticism").

[103] Netanel, *supra* note 94, at 14.

[104] Elkin-Koren & Netanel, *supra* note 1, at 1151 (quoting CivA 2687/92 Geva v. Walt Disney Co., 48(1) PD 251, 256 (1993) (Isr.)).

[105] Nair, *supra* note 100, at 19 (quoting *Mifal Hapais*, 54(1) PD at 596).

[106] Copyright Act, 5768-2007, 2007 LSI 34 (Isr.).

[107] Kyu Ho Youm, *Copyright Law in the Republic of Korea*, 17 UCLA PAC. BASIN L.J. 276, 277 (1999).

28.[108] Courts, however, construed this article narrowly due to what was known as the "master-servant relationship" and in compliance with international standards.[109] In 2006, Korean courts began to realize the "importance of more flexible copyright limitations."[110] For instance, the Korean Supreme Court found that the use of thumbnail images for functional purposes of a search engine was within the confines of fair practice, albeit not explicitly enumerated within the statute.[111] In another instance, a district court echoed the verdict of the U.S. Ninth Circuit in *Lenz v. Universal Music Corp.* ,[112] in which the plaintiff uploaded content on a user-generated content-based platform of their child dancing to a snippet of a copyrighted song.[113]

The South Korean legislature eventually took drastic measures to amend the Copyright Act in 2011.[114] Along with this act was the introduction of the formal appellation "fair use."[115] These measures were the result of a bilateral trade agreement with the U.S.[116] During negotiations, the U.S. manifested its concern of a potential violation of the Berne Convention's international restriction to restrain copyright exceptions to "certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder," in conformity with the three-step test.[117] The South Korean negotiators, however, were reluctant to abide by the restriction as they feared, inter alia, it would impinge on the copyright industry and substantially curtail access to knowledge.[118] Consequentially, it was agreed that "each party may adopt or maintain . . . fair

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[108] Yunjeong Choi, Note, *Development of Copyright Protection in Korea: Its History, Inherent Limits, and Suggested Solutions,* 28 BROOK. J. INT'L L. 643, 651 (2003).

[109] Yoonmo Sang et al., *Fair Use in Practice: South Korean Film Directors' Copyright Understanding.*, 15 U.S.C. ANN. INT'L J. OF COMMC'N 927, 930 (2021) (citations omitted), https://ijoc.org/index.php/ijoc/article/view/15722/3358.

[110] Jaewoo Cho, *As Korea Implements Fair Use, Two Cases Offer Precedent For Flexible Copyright Exceptions and Limitations*, INFOJUSTICE (Feb. 18, 2013), https://infojustice.org/archives/28561.

[111] RUTH L. OKEDIJI, COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 261 n.112 (Cambridge Univ. Press 2017).

[112] *See* Lenz v. Universal Music Corp., 815 F.3d 1145 (9th Cir. 2016) (holding that the burden fell on the opponent of fair use to prove that the video of a child dancing to a song of prince in the background did not constitute a fair use. Also, determining that fair use was merely a defense (scope limiting defense), as opposed to an affirmative defense).

[113] OKEDIJI, *supra* note 111.

[114] [Act No. 11110] [Copyright Act 2011, as amended] (S. Kor.).

[115] *Id.*

[116].U.S.- Korea Free Trade Agreement, June 30, 2007, https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/FTAs/South%20Korea%20FULL.pdf.

[117] *Id.*

[118] Sang et al., *supra* note 109.

use, as long as any such limitation or exception is confined as stated in the previous sentence."[119] Hence, South Korea replicated the four-factor test of § 107 of the Copyright Act of 1976, in addition to incorporating parts of the three-step test within the text of its statute, to assure the U.S. it complied with the aforementioned standards.[120]

Similar to Israel and South Korea, Canada pursued fair use through the judiciary. Typically, courts in Canada found that the enumerated list of purposes in article 29 of the Canadian Copyright Act was exhaustive.[121] A use falling out of this context was found to be an infringement, but this changed in *CCH Canadian Ltd. v. Law Society of Upper Canada.*[122] In 2004, the Great Library reproduced a plethora of selected texts, statutes, case summaries, and other material and made them available for attorneys to facilitate legal advocacy.[123] The court found that article 29 "must not be interpreted restrictively" and that courts should accord the term "research" a "large and liberal interpretation, in order to ensure that users rights are not unduly constrained."[124] Unlike Israel and South Korea, Canada's Modernization Act of 2012 never formally adopted fair use, nor did it adopt the terminology that would signify that the enumeration is illustrative, as opposed to being exclusive (e.g., 'for purposes such as,' 'and for other purposes,' 'and similar purposes.').[125] Nonetheless, the broad construction adopted by the Supreme Court of Canada, even after adopting the Modernization

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[119] U.S. - Korea Free Trade Agreement, June 30, 2007, available at https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/FTAs/South%20Korea%20FULL.pdf.

[120] [Act No. 11110] [Copyright Act 2011, as amended] art. 35-3 (S. Kor.) ("(1) Except as provided in Articles 23 through 35-2 and 101-3 through 101-5, where a person does not unduly harm an author's legitimate profits without conflicting with the usual method of using works, etc., he/she may use such works, etc. for the purposes of coverage, criticism, education, research, etc. (2) In determining whether an act of using works, etc. falls under paragraph (1), the following matters shall be considered: 1. Purposes and characters of use, such as for-profit or non-profit; 2.Types and uses of works, etc.; 3.Proportions of used parts in the entire works, etc. and their importance; 4.Influence of the use of works, etc. over the current market or value or potential market or value of such works, etc.").

[121] *See, e.g.,* Compagnie Generale des Etablissements Michelin-Michelin & Cie v. Nat'l Auto., Aerospace, Transp. & Gen. Workers Union of Canada (1996), [1997] 2 F.C. 306 (Can.) (holding that the unauthorized use of plaintiff's logo was an infringement of copyrights. The court rejected the inclusion of parody within the scope of criticism, considering the enumerated list to be exclusive).

[122] D'Agostino, *supra* note 6.

[123] CCH Canadian Ltd. v. L. Soc'y of Upper Canada, [2004] 1 S.C.R. 339, 395 (Can.).

[124] *Id.*

[125] Copyright Modernization Act § 29 (Can.) ("Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright." Notice the exclusivity of the language used in the statute and omission of language indicative of inclusiveness.).

Act, goes well beyond conventional fair dealing.[126] Regardless of the formal adoption of the appellation 'fair use,' these constructions constitute "the hallmark of fair use."[127] As for the motive behind the shift, the Supreme Court of Canada, in *Society of Composers, Authors and Music Publishers of Canada,* states that the modern fair dealing construction "allow[s] users to employ copyrighted works in a way that helps them engage in their own acts of authorship and creativity. . . . But that does not argue for permitting only creative purposes to qualify as 'research.'"[128] Additionally, there is a social interest in assuring that "users' rights are not unduly constrained."[129]

Chinese courts have recently resorted to unconventional and exotic means of interpretation to justify uses unenumerated in the Copyright Law of China's ("CLC") twelve listed exceptions of article 22, such as thumbnails, user-generated content, fanfictions, and appropriated art.[130] Scholars have speculated that this interpretation is a response to a national policy that seeks to promote internet intermediaries (e.g., internet service providers, search engines, and social media platforms.).[131] Courts have even found the twelve listed exceptions to be

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[126] Alberta (Educ.) v. Canadian Copyright Licensing Agency (Access Copyright), [2012] 2 S.C.R. 345 (Can.); Soc'y of Composers, Authors and Music Publishers of Canada v. Bell Can., [2012] 2 S.C.R. 326 (Can.) (holding that iTunes use of song previews constituted a fair dealing through a broad construction of the term "research").

[127] MICHAEL GEIST, FAIRNESS FOUND: HOW CANADA QUIETLY SHIFTED FROM FAIR DEALING TO FAIR USE, in THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 157, 164 (Univ. of Ottawa Press 2013).

[128] *Soc'y of Composers, Authors and Music Publishers of Canada*, 2 S.C.R. at 335 (citations omitted).

[129] *CCH Canadian Ltd.*, [2004] 1 S.C.R. at 395.

[130] He, *supra* note 6; Wen Xiaoyang Su Beijing Alibaba Xinxi Jishu Youxian Gongsi Qinfan Zhuzuo Quan Jiufen An (闻晓阳诉 北京阿里巴巴信息技术有限公司侵犯著作权纠纷案) [Wen Xiaoyang v. Beijing Alibaba Info. Tech. Co.], Beijing Chaoyang District People's Ct. CMCZ No. 13556, Oct. 15, 2008 (China) http://m.law-lib.com/cpws/cpws_view.asp?id=%20200401256395; Shanghai Meishu Dianying Zhipian Chang Yu Zhejiang Xinying Niandai Wenhua Chuanbo Youxian Gongsi Huayi Xiongdi Shanghai Yingyuan Guanli Youxian Gongsi Qinhai Zhuzuo Quan Jiufen (上海 美术电影制片厂与浙江新影年代文化传播有限公司 华谊兄弟上海影院管理有限公司侵害著作权纠纷)[Shanghai Animation Film Studios v. Zhejiang Xinying Niandai Culture Ltd., et al.], Shanghai Putuo Dist. People's Ct. PM(Z)CZ No. 258, Apr. 25, 2016 (China), http://www.shzcfy.gov.cn/en/detail.jhtml?id=10006312&lmdm=lm102 (explaining how the first case revolves around a movie poster that borrows several copyrighted images of copyrighted characters of the 80's to give the feel of that genre, whereas the second case revolves around the use of images as search engine thumb nails. In both cases, the tribunals resorted to unconventional reasoning to conclude that a work that served a different function, though not doctrinally enumerated, could survive a fair dealing assessment, which, in essence, equates fair use).

[131] He, *supra* note 6, at 374 (footnote omitted).

obsolete, in light of "the rapid development of internet technology," and thus incapable of "satisfy[ing] current and future needs."[132] Moreover, in 2013, the State Council of the People's Republic of China and the National Copyright Administration of the People's Republic of China established article 21 of the Regulations for the Implementation of the CLC ("RICL") to supplement the CLC and give it more flexibility.[133] There are also propositions to enact a Chinese two-step test (a Chinese variant of fair use) that would allow civil law courts to apply a common law-styled rule.[134] Lastly, Article 43 of the latest draft of the Third Amendment to the Copyright Act proposes the provision of the text "or other circumstances" at the end of the enumerated list of exceptions.[135]

The United Kingdom, Australia, and Ireland mutually contemplated the importation of the U.S.-based doctrine on numerous occasions; however, the three countries have refrained from avoiding uncertainty, conflicts with international law, and inimical trade implications.[136] In 2010, U.K. Prime Minister David Cameron aspired to create a British-based Silicon Valley in the

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[132] *Id.* at 378 (citing Dongyang Leshi Huaer Yingshi Wenhua Youxian Gongsi Yu Beijing Douwang Keji Youxian Gongsi Xinxi Wangluo Chuanbo Quan Jiufen (东阳市乐视花儿影视文化有限公司与北京豆网科技有限公司信息网 络传播权纠纷) [Dongyang Le Shi Hua Er Co., Ltd. v. Douban.com] Beijing Chaoyang Dist. People's Ct., J0105MC No.10028, Sept. 15, 2017 (China)).

[133] *Id.* at 368.

[134] Chenguo Zhang, *Introducing the Open Clause to Improve Copyright Flexibility in Cyberspace? Analysis and Commentary on the Proposed "Two-Step Test" in the Third Amendment to the Copyright Law of the PRC, in Comparison with the EU and the US*, 33 COMPUT. L. & SEC. REV. 73, 85 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529081.

[135] Peter K. Yu, *Customizing Fair Use Transplants*, 7 LAWS 1, 10 (2018), https://scholarship.law.tamu.edu/facscholar/1264.

[136] *Regulatory Analysis: Copyright and Other Intellectual Property Law Provisions Bill 2018*, DEP'T OF BUS., ENTER., & INNOVATION,REGULATORY IMPACT ANALYSIS, 16 (2018), https://enterprise.gov.ie/en/legislation/legislation-files/regulatory-impact-analysis-copyright-other-ip-law-provisions-bill-2018.pdf ("Implementation of both Fair Use and a Private Copying exception would not, in themselves, have cost implications. However, the certainty of legal action against the State if they were introduced would have significant cost and reputational implications for the Exchequer in relation to both measures."); IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 5 (2011) [hereinafter THE HARGREAVES REPORT], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf ("The Review considered whether the more comprehensive American approach to copyright exceptions, based upon the so-called Fair Use defense, would be beneficial in the UK. We concluded that importing Fair Use wholesale was unlikely to be legally feasible in Europe and that the UK could achieve many of its benefits by taking up copyright exceptions already permitted under EU law and arguing for an additional exception, designed to enable EU copyright law to accommodate future technological change where it does not threaten copyright owners."); Austl. L. Reform Comm'n, *supra* note 22, at 106.

Shoreditch section of East London.[137] Cameron stated, "they [the U.S.] have what are called 'fair-use' provisions, which some people believe gives companies more breathing space to create new products and services. . . . I want to encourage the sort of creative innovation that exists in America."[138] The Hargreaves Report, which influenced heavy copyright reforms (but nothing that would equate to fair use) found that:

> Google . . . does argue that Fair Use was vital to the successful emergence of the indexing and search technology which has turned it into one of the most valuable and dynamic companies in the world. Facebook likewise believes that a global business based upon user generated content required a flexible legal view of copyright to enable it to emerge with its highly successful business model.[139]

Similarly, the Australian Law Reform Commission contends that "[a] technology-neutral open standard such as fair use has the dynamism or agility to respond to 'future technologies, economies[,] and circumstances—that don't yet exist, or [have not] yet been foreseen.' That is, fair use may go some way to futureproof the *Copyright Act*."[140] Subsequentially, the Copyright Committee of Ireland, appointed by the Department of Jobs, Enterprise and Innovation, came to the same conclusion, "precedents in fair use cases . . . have allowed US copyright law to find generally beneficial accommodations with new technologies . . . as they have arisen, without the need for cumbersome statutory amendment."[141]

Ironically, the nations that instigated the shift endogenously through the judiciary ended up transplanting the doctrine, mainly attracted by the internal benefits.[142] In contrast, the countries who lobbied the idea through multinational corporations and conglomerates designated committees to assess the merit of the transposition.[143] They eventually retained their closed list models, merely adding categories to the enumerated list to mitigate the deficiency, mainly

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[137] Decherney, *supra* note 3.
[138] *Id.*
[139] THE HARGREAVES REPORT, *supra* note 136.
[140] Austl. L. Reform Comm'n, *supra* note 22, at 95.
[141] *Modernising Copyright: A comparison of recommendations and actual amendments*, PUB. AFFS. IR. (Apr. 11, 2018), https://pai.ie/modernising-copyright-a-comparison-of-recommendations-and-actual-amendments/.
[142] *Supra* notes 94-135.
[143] *Supra* notes 136-141.

influenced by external consequences. The Hargreaves Report's retention of fair dealing was heavily influenced by American institutions downplaying the ultimate role of fair use, such as the Directors Guild of America and the Motion Picture Association of America.[144] American institutions, most prominently the Intellectual Property Alliance and governmental entities, have long protested the exportation of the doctrine, alleging that fair use, bereft of a century's legal precedent, is in breach of the three-step test.[145] Consequentially, the United States Trade Representative threatens punitive actions on those who transplant.[146]

C. CLOSING REMARKS

To recapitulate, the differences between fair use, fair dealing, and discrete exceptions are important. First, these doctrines are different concepts generated for the same purpose; however, each entails its own set of legal ramifications. Second, the jurisdictions which retained a textualist approach to the closed list catalogue regime and refrained from the transposition did so vicariously, as exogenous factors heavily influenced them. In contrast, jurisdictions that experienced the fair use doctrine application firsthand through the judiciary found that it was both viable and meritorious. Third, all these nations theorized that fair use entailed the development and would advance the respective countries in various dimensions. This Article narrows these developments into three dimensions: access to knowledge, responsiveness to innovative technologies, and enhancement of creative production. The following chapter will assess the accuracy of these speculations, comparing the result of similar scenarios under different frameworks. This Article adopts the capabilities approach of development to further assess each exception's capability of balancing the pendulum between property rights and development.

III. THE CAPABILITIES APPROACH TO DEVELOPMENT

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144 Elkin-Koren & Netanel, *supra* note 1, at 1145–47.

145 *Id.*

146 Adopting the fair use doctrine could potentially lead to an inclusion on the "Watch List" in the Special 301 Report. Adopting fair use could thus lead to the U.S. initiating dispute settlement proceedings at the World Trade Organization, elimination of tariff preferences, unilaterally abolishing most favored nation treatment, imposition of trade sanctions, etc. *See, e.g.,* OFF. OF U.S. TRADE REPRESENTATIVE, *supra* note 10 (outlining how Ecuador has been on the list for three consecutive years in virtue of its adopted exceptions, including the fair use exception in article 211. "However, continuing concerns remained about how the final regulations would address issues related to copyright exceptions and limitations").

At the end of the twentieth century, the United Nations Development Program ("UNDP") adopted the Human Development Index to assess each nation's human development.[147] The index measures each nation's achievements with regard to three dimensions of human development: knowledge, longevity, and gross capital income per capita.[148] Developed by economist Mahbub ul Haq, the metric by which the index functioned deviated from the conventional way that the world weighed progress, Gross National Product ("GNP"), and economic growth.[149] "GNP per capita is a crude and incomplete measure of the quality of life, and yet such measures continue to be widely used when public policy is made," states ul Haq.[150] Eventually, the UNDP shifted towards the Inequality-adjusted Human Development Index ("IHDI") to compensate for the deficiency of the former.[151] With a similar deviation from the GNP criteria, the IHDI is more aligned with the "capabilities approach" theory of development.

The capabilities approach to development was first introduced and developed by economist Amartya Sen and philosopher Martha Nussbaum.[152] It is mainly concerned with enhancing capabilities in leading a life that would tend to expand an individual's ability to be more productive.[153] The individual becomes a participant in production rather than a passive recipient of welfare benefits that often have ephemeral utility.[154] From this perspective, the state

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147 *Human Development Index,* UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP] https://hdr.undp.org/en/content/human-development-index-hdi (last visited Apr. 12, 2022).

148 *Id.*

149 NUSSBAUM, *supra* note 27, at 1 ("Increased GDP has not always made a difference to the quality of people's lives, and reports of national prosperity are not likely to console those whose existence is marked by inequality and deprivation.").

150 MARTHA C. NUSSBAUM ET AL., THE QUALITY OF LIFE (Oxford Univ. Press 1993).

151 *Inequality-Adjusted Human Development Index (IHDI),* UNDP, https://hdr.undp.org/en/content/inequality-adjusted-human-development-index-ihdi (last visited Apr. 12, 2022); *see Why is Inequality-adjusted Human Development Index (IHDI) a better measure of development? Explain with the help of suitable examples.*, IASBABA (Dec. 10, 2019), https://tlp.iasbaba.com/2019/12/day-47-q-2-why-is-inequality-adjusted-human-development-index-ihdi-a-better-measure-of-development-explain-with-the-help-of-suitable-examples/ ("The difference between the IHDI and HDI is the human development cost of inequality, also termed – the overall loss to human development due to inequality. The IHDI allows a direct link to inequalities in dimensions, it can inform policies towards inequality reduction, and leads to better understanding of inequalities across population and their contribution to the overall human development cost.").

152 NUSSBAUM ET AL., *supra* note 150.

153 SEN, *supra* note 27, at 90.

154 *Id.* at 53 ("The people have to be seen, in this perspective, as being actively involved--given the opportunity--in shaping their own destiny, and not just as passive recipients of the fruits of cunning development programs. The state and the society have extensive roles in strengthening and safeguarding human capabilities. This is a supporting role, rather than one of ready-made delivery. The freedom-centered perspective on the ends and the means of development has some claim to our attention.").

provides the means rather than the ends (e.g., fishing rods as opposed to fish, seeds as opposed to produce).[155] The state is responsible for providing human freedoms, while individuals are expected to exploit these freedoms to steer their fate. Sen explains that there are particular freedoms, unexclusively, that are imperative for the empowering of individuals to ameliorate and contribute to society: political freedoms, economic facilities, social opportunities (most notably basic education and health care), transparency guarantees, and protective security.[156] Moreover, these freedoms supplement and reinforce one another.[157] For example, illiteracy can hinder participation in certain economic activities and frustrate the reception of critical information for political participation.[158]

Intellectual property rights can be inimical to basic human freedoms if applied rigorously. For example, morbidity is perpetuated by the patient's inability to pay for pharmaceuticals in virtue of patent rights,[159] access to knowledge and educative material can be frustrated by the inability to pay for the copyrighted subject,[160] speech is held hostage by the speaker's ability to license a trademark, etc.[161] The conventional way countries have mitigated this disparity is through limitations and exceptions. Justifying the laudability of educational copyright exceptions, Judge Pradeep Nandrajog of the Delhi High Court metaphorically lays it out as such:

> A melody is the outcome of the sounds created when different instruments, such as a lute, flute, timbale, harp[,] and drums[,] are played in harmony. The notes of the instruments[,] which are loud and resonating[,] have to be controlled so that the sound of the delicate instruments can be heard. But it has to be kept in mind that at proper times the sound of the drums drowns out the sound of all other instruments under a deafening thunder of the brilliant beating of the drums. Thus, it is possible that the melody of a statute may at times require a particular Section, in a limited circumstance, to so outstretch

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155 *Id.* at 53.
156 *Id.* at 38–40.
157 *Id.* at 38–45.
158 *Id.*
159 *See, e.g.,* Novartis AG v. Union of India, AIR 2013 SC 1311 (India), https://indiankanoon.org/doc/165776436/ (denoting plaintiffs attempt to patent its lifesaving drug and sell it for a relatively exorbitant price).
160 *E.g., infra* note 218 (holding that the unauthorized dissemination of copyrighted material through an educational institution constitutes copyright infringement).
161 U.S. Shoe Corp. v. Brown Grp., Inc., 740 F. Supp. 196, 198-99 (S.D.N.Y. 1990).

> itself that, within the confines of the limited circumstance, another Section or Sections may be muted.[162]

Thus, rules require some type of aperture to tolerate uses that would otherwise defy the rule to balance competing interests. Intellectual property rights are generated to incentivize authors to produce. But, when the pendulum sways too far favoring intellectual property rights, such rights may inhibit freedoms that are crucial for human development.[163] The countries discussed in Part I surmised that fair use was more capable of enabling individuals with regard to the three aforementioned dimensions of development. Some of these countries pursued the transplantations, while others retained closed-list models. This chapter will assess the credibility of these speculations, comparing the result of similar scenarios under the varying frameworks of different jurisdictions.

A. ACCESS TO KNOWLEDGE

Education and knowledge are amongst the most important freedoms to enjoy a prosperous life. The impacts of education and knowledge, however, are twofold, as these freedoms can be used to create and help exploit opportunities. Nussbaum makes a dichotomy between internal capabilities and combined capabilities.[164] Combined capabilities are external factors that hinder inner capabilities from production when imposed (e.g., monopolies, licenses, scarce resources, apprenticeship, discrimination, etc.).[165] On the other hand, internal capabilities, namely education, are the impetus that allows one to flourish and live a more productive life.[166] Therefore, before opening the market, removing the barriers, facilitating transactions, and bestowing opportunities, there is the pillar of the metaphorical edifice of capability: education. Adam Smith states that deprivation of education makes people "mutilated and deformed in a[n] . . . essential part of the character of human nature."[167]

1. Stringent Copyright Application Frustrates Access to Knowledge

In the vast majority of developing nations, educational material costs are paid by students. [168] Multiple factors contribute to the high costs of textbooks,

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[162] Univ. of Oxford v. Rameshwari Photocopy Servs., (2016) RFA(OS) 81 (India).
[163] SUNDER, *supra* note 32, at 30.
[164] NUSSBAUM, *supra* note 27, at 21.
[165] *Id.*
[166] *Id.*
[167] *Id.* at 23.
[168] Chon, *supra* note 31, at 825.

such as language restraints, state monopolies, favoritism, inefficient manufacturing methods, and reliance on imported books, among others.[169] In such developing nations, an author is unlikely to expand their market due to impoverished conditions, and the average consumer is either unwilling or incapable of purchasing exorbitant educative material. In Palestine, for example, books are theoretically available, but because of exorbitant prices, books are hardly accessible.[170] Given that a book teaching the principles of microeconomics costs approximately 140 USD,[171] a Palestinian earning minimum wage would have to pay remuneration for approximately one-third of their monthly wages, [172] or one-fifth of the monthly wages of a worker earning an average wage. [173] Hence, there is a bargaining deficit between authors in developed nations and consumers in developing nations.

Even if affordable local alternatives were available, people are still deprived of cultural exchange and unexpurgated knowledge, potentially falling susceptible to propaganda promulgated to provoke certain political reactions. Theocracies tend to overzealously censor curriculums,[174] autocracies impose skewed

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[169] *Id.*

[170] *Infra* notes 171-174.

[171] The aforementioned price is a rough estimate based on the mean price of the top nine selling books on microeconomics on Amazon.com, excluding pamphlets, eBooks, rentals, and study aids (e.g., Microeconomics in a Nutshell or Microeconomics for Dummies). As of Feb. 08, 2022, the conversion rate from USD to NIS is 3.22. Thus, converted to New Israeli Shekel, the price would equal 595 NIS. *1 USD to ILS – Convert US Dollars to Israeli New Shekels*, XE, https://www.xe.com/currencyconverter/convert/?Amount=1&From=USD&To=ILS (last visited Sept. 28, 2022); *Microeconomics,* AMAZON, https://www.amazon.com/s?k=microeconomics&dc&crid=12IUWQNQ8XKQ5&qid=1644362836&sprefix=micreconomics%2Cdigital-text%2C41&ref=sr_ex_n_0 (last visited Sept. 28, 2022).

[172] Mahmoud A. Al-Hunoud, *Gaza's Health Sector Sanitation Workers Are Deprived of their Rights*, ARJJ (Nov. 10, 2020), https://arij.net/investigations/gaza%E2%80%99s-health-sector-en/ (detailing that "the minimum wage" to "be adopted in all regions of the Palestinian National Authority," based on Cabinet Resolution No. (11) of 2012 regarding the adoption of the minimum wage in all areas of the Palestinian National Authority (Palestine), are "as follows: 1. The minimum monthly wage in all areas of the Palestinian National Authority and in all sectors shall be set at 1,450 Shekels per month. 2. The minimum wage for day laborers, especially those working on an irregular daily basis, in addition to seasonal workers, shall receive 65 Shekels per day. 3. The minimum wage for one hour of work for the workers covered by paragraph "2" above shall be set at 8.5 Shekels per hour").

[173] Ayham A. Ghosh, *Inflation in Palestine devours wages*, MAAN NEWS (Dec. 31, 2021), https://www.maannews.net/news/2057408.html (recounting that the average wage a laborer accrues in the West Bank is 119 NIS per day, or 2,618 NIS per month).

[174] Fayadh H. Alanazi, *The Perceptions of Students in Secondary School in Regard to Evolution-Based Teaching: Acceptance and Evolution Learning Experiences—The Kingdom of Saudi Arabia*, 51 RSCH. IN SCI. EDUC. 725 (2019), https://link.springer.com/content/pdf/10.1007/s11165-019-9827-y.pdf.

information through concepts like nonpersons,[175] and *damnatio memoriae* (condemnation of memory),[176] and partitioned states narrate their history in conformity to specific agendas.[177] For example, Israeli and Arabian recollections of the Massacre of Sabra and Shatila are irreconcilable; one highlights Israel's contribution, while the other contests it.[178]

2. Fair Use is Better Equipped to Foster Knowledge and Information

International treaties, such as the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")[179], were generated to promote vigorous copyright application[180] and explicitly advocate for the adoption of education-oriented limitations and exceptions to copyright.[181] In addition, virtually all copyright frameworks carve out some type of aperture for education, either in the form of library exceptions, classroom usage, private research, etc.[182] Unequivocally, fair dealing has long endorsed the

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[175] *See* E. D. HIRSCH, JR. ET AL., THE NEW DICTIONARY OF CULTURAL LITERACY 321 (Houghton Mifflin completely rev. and updated, 3d ed. 2002) ("[N]onperson: a former political leader whom a government wants the people to ignore, because the former leader's views or actions are considered unacceptable by the current government. This unusual practice is most commonly used in totalitarian states, . . . where past leaders often disappear from the official histories of one regime and reappear in the histories of another.").

[176] ERIC R. VARNER, MUTILATION AND TRANSFORMATION: DAMNATIO MEMORIAE AND ROMAN IMPERIAL PORTRAITURE 1-2 (BRILL 2004) (explaining how "damnatio memoriae" means flexible and practical methods of destroying the condemned's posthumous reputation and memory. Cancellation of a bad emperor's identity and accomplishments from the collective consciousness was one of the fundamental ideological aims of *damnatio* in the imperial period").

[177] *Infra* note 178.

[178] Abraham Rabinovich, *Journalist reckons with Israeli blame for Sabra and Shatila*, TIMES OF ISR. (Sept. 18, 2020, 10:23 AM), https://www.timesofisrael.com/journalist-reckons-with-israeli-blame-for-1982-sabra-and-shatila-massacre/; Nabil Mohamad, *Remembering the Sabra and Shatila massacre 35 years on*, ALJAZEERA (Sept. 16, 2017), https://www.aljazeera.com/opinions/2017/9/16/remembering-the-sabra-and-shatila-massacre-35-years-on.

[179] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

[180] Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 80–81 (2000).

[181] *See, e.g.*, The Berne Convention, *supra* note 15, at art. 10(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.").

[182] The United States Copyright Act consists of myriad copyright exceptions for scholarly works. *E.g.,* 17 U.S.C. § 602(a)(3)(C) (1976) (prohibiting the importation of copyrighted material with exception to "(C) importation by or for an organization operated for scholarly,

use of copyrighted material to promote scholarship, education, and science long before the codification of fair use, which is signified by the Imperial Copyright Act of 1911 and the United Kingdom's Copyright Act of 1956.[183] Additionally, many discrete exceptions promote the same values. For example, and through arbitrary selection, article 22 of the Copyright Law of People's Republic of China, article 22 of Burkina Faso's Law on the Protection of Literacy and Artistic Property, article 171 of Egypt's Law No. 82 of 2002 on the Protection of Intellectual Property Rights, and article 52 of the German Act on Copyright and Related Rights of 1965.[184]

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educational, or religious purposes and not for private gain, with respect to no more than one copy . . ."); 17 U.S.C. § 108 (a) (1976) ("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… to reproduce no more than one copy or phonorecord of a work . . . ."). In India, there are numerous scholarly exceptions as well. *E.g.,* The Copyright Act of India, 1957, § 52 (1)(h) (i-iii), https://copyright.gov.in/Exceptions.aspx ("(1) The following acts shall not constitute an infringement of copyright, namely, . . . the reproduction of any work— (i) by a teacher or a pupil in the course of instruction; or (ii) as part of the question to be answered in an examination; or (iii) in answers to such questions."). As is the case in France. *E.g.,* Loi 92-597 du 1 juillet 1992 code de la propriété intellectuelle [Law 92-597 of July 1, 1992 Intellectual Propoerty Code] art. L122-5(3), https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf ("Once a work has been disclosed, the author may not prohibit: . . . analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated . . . ."). The list goes on, and it would be an extremely exceptional case to find a copyright act that does not subsist of similar provisions.

[183] Imperial Copyright Act of 1911, 1 & 2 Geo. 5 c. 46, § 2 (1)(i) (U.K.), https://vlex.co.uk/vid/copyright-act-1911-808292065 ("[T]he following acts shall not constitute an infringement of copyright . . . . [a]ny fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary . . . ."); The Copyright Act of 1956, 4 & 5 Eliz. 2 c. 74, § 6 (1) (U.K.), https://www.legislation.gov.uk/ukpga/1956/74/pdfs/ukpga_19560074_en.pdf ("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.").

[184] [Law No. 032-99/AN] [Protection of Literacy and Artistic Property], art. 22 (Burk. Faso), https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/bf/bf001en.pdf ("Where a work has been legally disclosed, the author may not prohibit, on condition that the author's name and the source are clearly indicated: analyses and short quotations justified by the critical, polemic, educational, scientific or informative nature of the work in which they are incorporated . . . ."); Copyright Law of People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991), art. 22, http://www.sino-create.net/news/laws/info111.html ("In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced: (1) use of a published work of others for the user's own private study, research or self[-]entertainment . . . ."); Law No. 82 of 2002 (Law on the Protection of Intellectual Property Rights) art. 171 (Egypt), http://www.egypo.gov.eg/PDFs/law2002e.pdf ("Without prejudice to the moral rights of the author under this Law, the author may not, after the publication of the work,

However, the legislative history of § 107 of the '76 Act reveals that fair use is more capable with regard to this objective than any of its foreign counterparts.[185] The Latman Study on Fair Use, which was prepared for U.S. Congressional reexamination of the copyright law, reminds us of the special concessions that were accorded to the scholarly and peculiarly educational uses of copyrighted material in the development of the fair use doctrine throughout its history.[186] In common law, scholarship and educational use were considered the epitome of fair use before its codification.[187] Judge Tjoflat of the Eleventh Circuit reminds us that during the process of legislating the '76 Act, "Congress devoted extensive effort to ensure that fair use would allow for educational copying under the proper circumstances and was sufficiently determined to achieve this goal . . . ."[188] Moreover, educational institutes played an imperative role in the wording of the contemporary fair use provision.[189] As a result, most of the purposes portrayed in the preamble of § 107 of the '76 Act reflect access to knowledge and information provision.[190] Furthermore, the Congressional

prevent third parties from carrying out any of the following acts: (1) Perform the work in family context or student gathering within an educational institution, to the extent that no direct or indirect financial remuneration is obtained; . . . (6) Reproduction of short extracts from a work for teaching purposes, by way of illustration and explanation, in a written form or through an audio, visual or audiovisual recording, provided that such reproduction is within reasonable limits and does not go beyond the desired purpose, and provided that the name of the author and the title of the work are mentioned on each copy whenever possible and practical. (7) Reproduction, if necessary for teaching purposes in educational institutes, of an article, a short work or extracts therefrom, provided that . . . .");
Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BGBI I at 3037, § 52(1) (Ger.), https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/de/de236en.pdf ("It shall be permissible to communicate to the public a published work . . . in the case of a lecture or performance of a work . . . on account of their social or educational purpose. This shall not apply where the event serves the profit-making purpose of a third party; in such cases the third party shall pay the remuneration.").

185 L. Ashley Aull, *The Costs of Privilege: Defining Price in the Market for Educational Copyright Use*, 9 MINN. J.L. SCI. & TECH. 573, 573-579 (2008).

186 ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS (1958), *reprinted in Studies Prepared for Subcomm. on Pats., Trademarks & Copyrights of the S. Comm. on the Judiciary*, 86th Cong. 1 (1960) (Study No. 14 Fair Use of Copyrighted Works).

187 *Id.* at 19.

188 Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1267 (11th Cir. 2014).

189 Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 869 (1987) ("The wording of the fair use provision, and the language of the committee reports accompanying it, emerged from a hard-fought compromise involving protracted, down-to-the-wire negotiations among representatives of authors, composers, publishers, music publishers, and educational institutions.").

190 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.2.2.1(b) (Aspen Publishers 3d ed. 2022) ("Educational uses, particularly classroom uses, of copyrighted works occupy a preferred place in section 107's design. They are mentioned parenthetically - '(including multiple copies

report accompanying the Act emphasizes the numerous educational-based activities, non-exclusively, that fall into the scope of fair use beyond those already illustrated within the preamble.[191] Further, there are numerous pages that delineate guidelines for educational fair use.[192]

The U.S. Supreme Court ennobles educational use by explicitly exempting it from the fair use gauge of 'transformative use.'[193] To further elaborate, 'transformative use' has emerged as the cornerstone of the fair use doctrine.[194] A finding of transformative use is determinative of a fair use verdict over ninety-one percent of the time.[195] But, the Supreme Court in *Campbell v. Acuff-Rose*, from which the transformative use doctrine emanated,[196] has asserted "transformative use is not absolutely necessary for a finding of fair use . . . ," assuring in dicta that "[t]he obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution."[197] In a

for classroom use)' - in section 107's first sentence and they are cited again as the key example - 'for nonprofit educational purposes' - in the second sentence's first factor.").

[191] *See* H.R. REP. No. 94-1476, at 65 (1976) ("[R]eproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson . . . .").

[192] *Id.* at 67-70.

[193] *Infra* note 197.

[194] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[Transformative works] . . . lie at the heart of the fair use doctrine's guarantee of breathing space . . . ."); Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 125 (2d Cir. 2021) (Sullivan, J., concurring) ("[T]he 'transformative' nature of a secondary work has become the dominant focus in determining whether that work is protected by fair use."); Fox News Network, LLC v. Tveyes, Inc., 883 F.3d 169, 182 (2d Cir. 2018) (Kaplan, J., concurring) ("First, although the majority writes that it 'is at least somewhat transformative,' it holds that the Watch function nevertheless is not a fair use of Fox's copyrighted material. Stated differently, it holds that the other factors relevant to the fair use determination carry the day in favor of Fox regardless of whether the Watch function is or is not transformative. The 'somewhat transformative' characterization therefore is entirely immaterial to the resolution of this case—in a familiar phrase, it is *obitur dictum*. I would avoid any such characterization even if I agreed with it."); Dr. Seuss Enter., L.P. v. ComicMix LLC, 983 F.3d 443, 452 (9th Cir. 2020) ("The term 'transformative' does not appear in § 107, yet it permeates copyright analysis because in *Campbell*, the Court interpreted the 'central purpose' of the first-factor inquiry as determining 'whether and to what extent the new work is "transformative."'").

[195] Liu, *supra* note 42, at 166; Asay et al., *supra* note 40, at 941–42; Neil W. Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 768, 770 (2011) ("Since 2005, the transformative use paradigm has come to dominate fair use case law and the market-centered paradigm has largely receded into the pages of history. Today, the key question for judicial determination of fair use is . . . whether the defendant used the copyrighted work for a different expressive purpose from that for which the work was created. . . . [W]hile transformative purpose is almost universally a sufficient condition for fair use . . . ."); *Andy Warhol Found. for Visual Arts*, 992 F.3d at 125 (Sullivan, J., concurring) ("I write separately only to highlight what I see as an overreliance on "transformative use" in our fair use jurisprudence . . . .").

[196] *Campbell,* 510 U.S. at 569.

[197] *Id.* at 579, 579 n.11 (citation omitted).

different Supreme Court case, Justice Blackmun observes that "there is a crucial difference between the scholar and the ordinary user. . . . When the scholar forgoes the use of a prior work, not only does his own work suffer [] but the public is deprived of his contribution to knowledge."[198]

Given the significance of knowledge and expression, Congress was cautious not to confine this right to maintain an efficient balance between the author's right to exclude and the ambit of access to information.[199] Congress found that "there is no disposition to freeze the doctrine [of fair use] in the statute, especially during a period of rapid technological change[,] . . . courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[200] Consequentially, Congress deliberately drafted fair use as a standard instead of a rule. Rules are often thorough, clearly defined, predictable, and straightforward. Legal standards are malleable; they provide adjudicators with far more discretion.[201] In light of this unfettered character, fair use preserves a well-articulated balance between the two, providing society with enough wiggle room to access pertinent material to exploit without prejudice to the author.[202] Because fair use falls into the latter category, it is better equipped than its counterparts to accommodate educational uses.

First, fair use empowers certain technologies to flourish:[203] technologies that essentially facilitate the exploitation of educative copyrighted works without consistent legislative intervention.[204] *Google Books*, for example, is the direct result of a fair use-oriented legal atmosphere.[205] Unequivocally, such technology saves scholars wearisome time and resources on books that could potentially have absolutely no bearing or pertinence on the subject matter of research. Without this search engine of the full text of books and comparable technologies, scholars

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198 Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 477-78 (1983) (Blackmun, J., dissenting); Aull, *supra* note 185, at 577–78.

199 Chon, *supra* note 31, at 806.

200 *See* Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 176 (2017)(quoting H.R. REP. No. 94-1476, at 66).

201 Dan L. Burk, *Algorithmic Fair Use*, 86 U. CHI. L. REV. 283, 287 (2019).

202 *See* Shay, *supra* note 69 (detailing the shift from the phrase 'for purposes of,' in cases of fair dealing, to the phrase 'for purposes such as' expands the scope of the exception tremendously. The scope goes from 'exclusive' to 'inclusive'); Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 538 (2009) (discussing how the expansion of the Access to Knowledge Movement necessarily entails that public interest oriented and communications policies, such as fair use, become more prominent on the agendas of communication and information regimes, alluding to the point that fair use is socially pivotal for access to knowledge and information).

203 Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 664 (2014).

204 *Infra* notes 205, 208.

205 Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

would have to maintain primitive methods of research: take a trip to the library, or buy the book, and subsequently spend tedious hours on a mere chance[206] or, as Peter Jaszi lays it out, "teaching and learning is a messy and gloriously inefficient enterprise, in which dozens of information objects may need to be sampled (and discarded) before the right one for the purpose can be identified."[207] *HathiTrust* is another progeny of fair use. It provides those with print disabilities access to the content of works in the digital library using adaptive technology, which in the traditional form is not accessible.[208]

Second, in jurisdictions that opt for discrete and specific exceptions to promote education, fair use can supplement these exceptions when they would otherwise fall short, and vice versa.[209] This strategy works best to promote the spirit of the law fully and to fulfill its true objective.[210] For example, the Canadian Supreme Court asserts, "[i]t is only if a library were unable to make out the fair dealing exception under s. 29 [under its broad contemporary interpretation] that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption."[211] Similarly, in the U.S.:

> [F]air use complements the provisions of Section 108 ("Reproduction by libraries and archives") to assure the preservation of information for future generations. Libraries and archives are only allowed to distribute digital copies made under this provision to a very limited extent, however, and consequently must rely on Section 108 and Section 107 in

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[206] *Id.* (holding that the digital reproduction of millions of books for purposes of creating the world's largest in-book search engine constitutes a fair use of the books).

[207] Peter Jaszi, *Fair Use and Education: The Way Forward*, 25 LAW & LITERATURE 33, 35 (2013).

[208] Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 91 (2d Cir. 2014) (holding that the reproduction of millions of books to facilitate their access for those with print disabilities constitutes a fair use).

[209] *E.g.*, U.S. Congress found a need to enact the Technology, Education and Copyright Harmonization Act ("TEACH Act") in spite of the fact that fair use could potentially cover the matter of using copyrighted materials in distant learning. But to avoid confusion and to ensure the public of its legality, Congress adopted this act. Technology, Education, and Copyright Harmonization Act, Pub L. No. 107-273, 116 Stat. 1910 (2002) (codified as 17 U.S.C. §§ 110(2), 112(f)).

[210] *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 113th Cong. 25 (2014) [hereinafter *Preservation and Reuse of Copyrighted Works*] (statement of Richard S. Rudick, Co-Chair, Section 108 Study Grp.) ("Libraries have come to rely heavily on fair use under section 107, in part because of the inadequacies of 108 in the digital era.").

[211] CCH Canadian Ltd. v. L. Soc'y of Upper Canada, [2004] 1 S.C.R. 395 (Can.).

> concert in order to enable the accessibility of the digital copies to the public.[212]

Another example, though in the abstract, is § 110 (1) of the '76 Act, which promotes in-class education through the display or performance of copyrighted materials, contingent on the use of lawfully made copies.[213] In *Encyclopedia Britannica Educational Corp. v. Crooks*, the District Court "prohibited, enjoined, and restrained" an educational institution from projecting a home-recorded video for in-class usage and ordered the erasure of the existing recordings as there was a presumption that home recordings constituted unlawful copies.[214] Nevertheless, through a fair use lens, the Supreme Court later legitimized recording through the VCR for purposes of time shifting, essentially expanding the range of pedagogical resources, merely a year after *Encyclopedia Britannica* was decided.[215]

3. Educational Fair Use as Applied by Courts

Despite this salience, the judicial precedent revolving around educational fair use is relatively minuscule; this could be because:

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[212] *Copyright Issues in Education and For the Visually Impaired: Hearing Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 113th Cong. 10 (2014) [hereinafter *Copyright Issues in Education and For the Visually Impaired*] (statement of Jack Bernard, Associate General Counsel, University of Michigan).

[213] 17 U.S.C. § 110(1) (1976) ("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 nonprofit 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 . . . .").

[214] Encyc. Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1188 (W.D.N.Y. 1982) ("This is a copyright infringement action which poses the question of whether an educational cooperative's large-scale videotape reproduction of copyrighted works originally broadcast and taken from the television airways constitutes fair use under the copyright laws. . . . For the foregoing reasons, plaintiffs' request for a permanent injunction is granted, and defendants, their agents, employees, representatives, and all others acting on their behalf are prohibited, enjoined, and restrained from copying plaintiffs' copyrighted works under the terms herein stated."). In any matter, the court in *Crooks* was heavily influenced by the Ninth Circuit's decision in *Universal City Studios v. Sony Corp.*, reversing the decision of the District Court that permitted the home recording of television broadcasted material. *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981). *Sony Corp.* was not yet heard before the United States Supreme Court.

[215] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984). Certainly, the premise of Sony was not concerned with the use of the VCR for in-class teaching. I merely postulate the idea that one thing led to another. The enabling of recording permitted teachers to record T.V. programs from home (time shift) to present in class for purposes of education.

> [E]ducation's highly privileged position in the universe of fair use is simply too clear ever to have . . . attracted much in the way of court challenges; in other words, copyright owners have long tolerated the unlicensed use of copyrighted material by educators precisely because they have no real choice.[216]

Early commentators—briefly after the codification of the fair use doctrine—asserted that "courts have tended to be most receptive to unauthorized use of educational, scientific, and historical works."[217] Yet, surprisingly, a fair use invocation often flunks in the rare event that a publisher decides to litigate.[218] But empirical evidence indicates that third-party commercial enterprises are often not obviated from obtaining permission.[219] To the contrary, courts tend to be more lenient toward scholars, students, teachers, and educational institutions.[220] For example, in *Princeton University Press v. Michigan Document Services*, a commercial copyshop copied segments of copyrighted material, collected them to create a unified course pack, and ultimately sold them to students for a fee.[221] The copyshop was not relieved of liability, but the court observed "[a]s to the proposition that it would be fair use for the students or

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[216] Jaszi, *supra* note 207, at 38.

[217] Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1176 (5th Cir. 1980) (citation omitted).

[218] *See* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1385-91 (6th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997) (holding that the reproduction of copyrighted material for numerous students by a copyshop for commercial purposes does not constitute a fair use); *see also* Peter Letterese & Assocs. v. World Inst. of Scientology Enters., 533 F.3d 1287, 1308-19 (11th Cir. 2008) (holding that the incorporation of copyrighted material into the course pack of a religious institution for commercial purposes does not constitute fair use); *see also* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1529-37 (S.D.N.Y. 1991) (holding that a copyshop that sold packets consisting of aggregated copyrighted material without obtaining permission constituted copyright infringement and was not obviated by fair use); *see also Encyc. Britannica*, 542 F. Supp. at 1168-69 (holing that "an educational cooperative's large-scale videotape reproduction of copyrighted works originally broadcast and taken from the television airways" does not constitute fair use).

[219] *Princeton Univ. Press*, 99 F.3d at 1381.

[220] *See Basic Books, Inc.*, 758 F. Supp. at 1536 n.13 ("Expressly, the decision of this court does not consider copying performed by students, libraries, nor on-campus copyshops, whether conducted for-profit or not.").

[221] *See Princeton Univ. Press*, 99 F.3d at 1381; *see also* H.R. REP. No. 94-1476, at 74 (emphasizing that "[i]t would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself").

professors to make their own copies, the issue is by no means free from doubt. We need not decide this question . . . ."[222]

More recently, Cambridge University Press sued Georgia State University for digitalizing books available to students without obtaining a license.[223] The Eleventh Circuit was much more tolerant toward the University (as a non-profit enterprise) than the Sixth Circuit was toward the commercial copyshops in *Princeton University Press*. When weighing the first factor of fair use—the transformativeness of the use—the court found that:

> Defendants' use . . . is not transformative. The excerpts . . . are verbatim copies of portions of the original books which have merely been converted into a digital format. . . . Nor do [d]efendants use the excerpts for anything other than the same intrinsic purpose . . . ."[224]

Nevertheless, the court disregards this because classroom distribution is "[t]he obvious statutory exception to . . . transformative use[]," [225] consequentially concluding that the first factor weighed in favor of fair use.[226] The remaining factors were either found to be of little importance, varying within each separate case, but mostly favoring fair use.[227] The case was remanded for a second time,[228] and the University was considered the prevailing party.[229] As a result, contemporary fair use application tends to favor educational use so long as the reproduction is conducted by the provider or recipient of the knowledge, not an intermediary.

Nonetheless, scholars and judges have impugned educational fair use's limitation to non-commercial enterprises.[230] In a dissenting opinion in *Princeton University Press*, Justice Boyce F. Martin opined that commercial enterprises should be included within the educational fair use equation, explaining:

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[222] *Princeton Univ. Press*, 99 F.3d at 1389.
[223] Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1237 (11th Cir. 2014).
[224] *Id.* at 1262-63.
[225] *Id.* at 1263 (quoting Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 n.11 (1994)).
[226] *Id.* ("Indeed, the Supreme Court has recognized in dicta that non[-]profit educational use may weigh in favor of a finding of fair use under the first factor, even when nontransformative . . . . Furthermore, where we previously held that the first factor weighed against a finding of fair use in a case involving use that was nontransformative but educational, the use in question was commercial.").
[227] *Id.*
[228] Cambridge Univ. Press v. Albert, 906 F.3d 1290 (11th Cir. 2018).
[229] Cambridge Univ. Press v. Becker, 446 F. Supp. 3d 1145 (N.D. Ga. 2020).
[230] *Infra* notes 231-233.

> The right—and its parameters—to monopolize profits from original works is created by statute and limited to those profits that provide necessary incentives to the creation of new works without unduly impeding the flow of information in the public, especially where the free flow of information serves socially significant functions, including teaching through multiple copies for classroom use.[231]

Even the majority in *Princeton University Press* asserted,

> [T]he changes in technology and teaching practices that have occurred over the last two decades might conceivably make Congress more sympathetic to the defendant[']s position today. If the law on this point is to be changed, . . . the change should be made by Congress and not by the courts."[232]

Ruth Okediji explains,

> Existing limitations and exceptions . . . do not extend to institutional, community or group needs. . . . Even where they exist, broad, open-ended doctrines, such as the U.S. fair use doctrine, do not guarantee users the dignity, security, and freedom to participate in culture . . . . [B]ooks are needed in bulk to educate entire populations . . . .[233]

However, "[b]ad is often best because it is better than the available alternative."[234] Jurisdictions that employ the open-ended doctrine or a broad construction can accommodate educative needs better than those that do not.[235] Unlike the U.S., Canada and India have made the most of fair use by allowing third-party facilitators and intermediaries to conduct the copying.[236] In contrast,

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[231] Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996) (Martin, J., dissenting).
[232] *Id.* at 1391.
[233] Ruth L. Okediji, *Does Intellectual Property Need Human Rights*, 51 N.Y.U. J. INT'L L. & POL. 1, 34-35 (2018).
[234] NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 204 (Univ. of Chicago Press 1994).
[235] *Infra* notes 236, 237.
[236] *See, e.g.,* Alberta (Educ.) v. Canadian Copyright Licensing Agency (Access Copyright), [2012] 2 S.C.R 345 (Can.) (holding that the reproduction of educative copyright material

most fair dealing-oriented jurisdictions, such as New Zealand and the U.K., exclude teachers and educational institutions from the exception and only allow students to conduct the copying.[237] If the goal is optimization, this section has explained how the fair use doctrine is the best of the available educational exception variants. In the words of Peter Jaszi in a statement prepared before Congress:

> [W]e know that in the United States[,] the fair use doctrine adds materially to our cultural choices, our learning opportunities, and our access to innovation. We can only wonder (with some bemusement) why some of our most important foreign competitors, like the European Union, [have not] figured out that fair use is, to a great extent, the "secret sauce" of U.S. cultural competitiveness. But [that is] their loss and our gain.[238]

B. TECHNOLOGICAL INNOVATION

When we think of development, there is an unexplainable intuition to associate the term with technology. After all, the rapid industrial revolution started with Watt's steam engine.[239] Sen explains that "modern technology [provides] an economically competitive edge."[240] The capabilities approach is not conspicuously concerned with technology as a "freedom" indivisible from human development; however, Sen explains that "available technology determines the production possibilities, which are influenced by available knowledge as well as the ability of the people to marshal that knowledge and to make actual use of it."[241] Sen draws an inevitable conjunction between

conducted by a commercial-based copy shop does not infringe copyrights); Univ. of Oxford v. Rameshwari Photocopy Servs., ((2016) RFA(OS) 81 (India) (discussing the fact that printing was conducted by an institution separate from the university, nor was it printed by the students themselves or the teachers, which would conventionally weigh against a fair dealing argument. This point made the case extremely controversial as the court applied a very broad interpretation to the unambiguous text of § 52 (1)(i) to conclude fair dealing).

[237] Copyright Licensing Ltd. v. Univ. of Auckland [2002] 3 NZLR 76 (HC) (New Zealand).

[238] *The Scope of Fair Use*, *supra* note 9, at 12 (statement of Peter Jaszi, Professor, Faculty Director, Glushko-Samuelson Intellectual Property Clinic, Washington College of Law, American University).

[239] HIRSCH, *supra* note 175, at 230.

[240] SEN, *supra* note 27, at 240.

[241] *Id.* at 162.

knowledge and technology, defining technology as a "translation of science."[242] In recent years, it has been evident that knowledge promotes technology and, equally, technology promotes knowledge.[243] Essentially, freedoms supplement and reinforce one another.[244] Moreover, the ability to make actual use of knowledge is what Nussbaum called a "combined capability."[245] It is one thing to attain knowledge, and it is another to be able to devise it.

1. Stringent Copyright Application Neglects Innovative Technologies

A big concern in intellectual property is that copyright laws frustrate the development of new technologies.[246] If a new technology requires the reproduction or creation of derivative works of copyrighted material, and if there is no specific exception to absolve the use from liability, the technology falls susceptible to copyright infringement. Traditional copyright exceptions have proven to be ill-equipped to accommodate the needs of rapid technological development.[247] It can be difficult for legislatures to foresee the next technological development. Andy Grove, the former CEO of Intel, once infamously speculated, "[t]he idea of a wireless personal communicator in every pocket is a pipe dream driven by greed."[248] Decades later, mobile phones are now ubiquitous.

Moreover, technological fair use cases are far more fragile and significant than the average fair use cases. Risking the legality of these uses profoundly affects people's daily lives, innovation, and the economy.[249] In fact, technology is one of the most important contributors to the American economy.[250] The U.S. Bureau of Economic Analysis found that the digital economy (fast-changing technologies), compared to other traditional industries, accounted for two trillion dollars of the GDP in 2020, translating to approximately ten percent of the U.S.

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[242] AMARTYA SEN, EMPLOYMENT, TECHNOLOGY AND DEVELOPMENT: A STUDY PREPARED FOR THE INTERNATIONAL LABOUR OFFICE WITHIN THE FRAMEWORK OF THE WORLD EMPLOYMENT PROGRAMME (Oxford Univ. Press, Indian ed. 1999).

[243] *Id.*

[244] SEN, *supra* note 27, at 38–45.

[245] NUSSBAUM, CREATING CAPABILITIES THE HUMAN DEVELOPMENT APPROACH, *supra* note 27, at 21.

[246] Chander, *supra* note 203, at 643.

[247] *Infra* notes 276-279.

[248] Peter H. Lewis, *The Executive Computer; 'Mother of All Markets' or a 'Pipe Dream Driven by Greed'?*, N.Y. TIMES (July 19, 1992), https://www.nytimes.com/1992/07/19/business/the-executive-computer-mother-of-all-markets-or-a-pipe-dream-driven-by-greed.html.

[249] Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 798 (2010).

[250] *United States,* CIA: WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/united-states/ (last visited Apr. 16, 2022).

GDP.[251] Some claim that if it seceded, Silicon Valley could prosper as the world's second-wealthiest economy.[252] Although the capabilities approach deviates from the traditional economic growth and GDP metric (previously GNP), Sen, along with Jean Drèze, recognizes that "[t]he expansion of human capabilities can clearly be enhanced by economic growth;" [253] but they also observe that "there are many influences other than economic growth that work in that direction."[254]

The concern that rigorous copyright application will hinder the development of new innovative technologies is inherent and should not be underestimated.[255] Before Authors Guild's storm of lawsuits failed,[256] Amazon deactivated the "text-to-speech" function on Kindle – which reproduces millions of books to convert text into speech- in response to ominous lawsuit threats.[257] Countries and affected industries became wary of the negative effect of inimical copyright regimes on tech companies. Prime Minister Cameron of the U.K. stated, "[t]he founders of Google have said they could never have started their company in Britain. . . . [A]nd they feel our copyright system is not as friendly to this sort of innovation as it is in the United States."[258] Yahoo! stated, "the absence of a robust principle of fair use within the existing fair dealing exceptions means that digital platforms offering search tools are not able to provide real[-]time high[-]quality communication, analysis and search services with protection under [the] law."[259] LexisNexis created a commercial database which uses legal briefs and motions filed in U.S. courts to enable lawyers to "research how other litigators have framed similar, successful arguments."[260] Universities Australia – an

[251] Tina Highfill & Christopher Surfield, *New and Revised Statistics of the U.S. Digital Economy, 2005–2020,* U.S. DEP'T OF COMM.: BUREAU OF ECONOMIC ANALYSIS [BEA] 7 (May 2020), https://www.bea.gov/system/files/2022-05/New%20and%20Revised%20Statistics%20of%20the%20U.S.%20Digital%20Economy%202005-2020.pdf.

[252] Christopher Carbone, *If Silicon Valley were a country, it would be second-wealthiest on Earth*, FOX NEWS (May 1, 2019, 1:08 PM), https://www.foxnews.com/tech/silicon-valley-second-wealthiest-country.

[253] JEAN DRÈZE & AMARTYA SEN, INDIA: DEVELOPMENT AND PARTICIPATION 36-37 (Oxford Univ. Press 2d ed. 2002).

[254] *Id.* at 37.

[255] Chander, *supra* note 203, at 643.

[256] *See* Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) (illustrating Authors Guild's lawsuit against HathiTrust for the unauthorized digital reproduction of millions of books, many of which are owned by the plaintiff); *see also* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) (illustrating another prominent lawsuit conducted by Authors Guild against Google for the unauthorized digital reproduction of millions of books, many which are owned by plaintiff).

[257] Lee, *supra* note 249, at 855-56.

[258] THE HARGREAVES REPORT, *supra* note 136, at 44.

[259] Austl. L. Reform Comm'n, *supra* note 22, at 96.

[260] *Id.* at 104.

association of Australian universities - opined that the intermediary could "not have created this useful research tool in Australia: it needed a fair use exception to do so."[261] Thus, there is a consensus amongst the tech powerhouses and others that closed catalogue regimes stifle the creative incentive and thus deter investment and expansion in these jurisdictions.

2. Fair Use is More Responsive to New Technologies

In this age, copyright exceptions must be flexible to accommodate new technologies. Congress considered this requirement into when it codified fair use and accordingly adopted a malleable exception.[262] To reiterate, "there is no disposition to freeze the doctrine [of fair use] in the statute, especially during a period of rapid technological change."[263] Unaided, closed-list catalogues, such as fair dealing, are impotent and require prompt legislative responses to the rapid technological revolution. In France, which has a closed list catalogue, Google Books' scanning of millions of books - for purposes of data mining, text mining, and creating the world's largest in-book text search engine – was found to be infringing under the French Copyright Act.[264] Similarly, in 2012, before Chinese courts began their liberal interpretation of § 22 of the Copyright Law of China, a Chinese tribunal found that Google Books infringed an author's reproduction right.[265] In contrast, the U.S. Court of Appeals for the Second Circuit had "no difficulty concluding that Google's making of a digital copy of Plaintiffs' books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose . . . ."[266]

The alternative to this conclusion is to wait and have the legislature resolve each new situation in a separate amendment. This alternative, however, does not compensate for the disparity between the rise of technology and its relevance in society. In Australia, "the lengthy delay between the emergence of a new use and the legislature's consideration of the need for a specific exception" was a major factor in the country's contemplation of transplanting the fair use doctrine.[267] With the fair dealing model and other restricted exceptions, "each new situation

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[261] *Id.*
[262] 17 U.S.C. § 107 (1976).
[263] H.R. REP. NO. 94-1476, at 66 (1976).
[264] Elkin-Koren & Netanel, *supra* note 1, at 1136.
[265] *See* He, *supra note 6, at* 381 (citing Wang Shen Su Beijing Guxiang Xinxi Jishu Youxian Gongsi Deng Qinfan Zhuzuo Quan Jiufen (王 莘诉北京谷翔信息技术有限公司等侵犯著作权纠纷) [*Wang Shen v. Google Inc. et al.*] (Beijing Higher People's Ct., GMZZ No.1221, Dec. 19, 2013) (China)).
[266] Authors Guild v. Google, Inc., 804 F.3d 202, 216 (2d Cir. 2015).
[267] Austl. L. Reform Comm'n, *supra* note 22, at 96.

needs to be considered and dealt with in separate amending legislation[,] which usually occurs well after the need is identified."[268] A successful filibuster, for example, could potentially hold back a bill for decades, consequentially frustrating a usage that otherwise constitutes infringing use.[269] Take, for example, the VCR. While those in the U.S. enjoyed the fruits of the VCR's recording option (for the purpose of time shifting),[270] their Australian peers were bereft of its use until legislative intervention legitimized time shifting 22 years after *Sony*.[271] Ostensibly, the VCR was obsolete by 2006. DVD players, peer-to-peer file-sharing networks, and online intermediaries had emerged by then.[272] In 2014, the U.K. made substantial reformations to accommodate technologies such as time-shifting.[273] But these reformations took effect more than a decade after the government took noted the issue. Frankly, it is probably more convenient for corporations to immigrate and find better-suiting jurisdictions than to wait for a mere probability that the law will become more tolerant of their uses.

The Information Society Directive, adopted by the European Parliament and Council, adds another layer of complexity and red tape as member states are not allowed to develop exceptions outside the directive's scope.[274] As a result, countries of the European Union resort to exotic excuses to allow technological uses that have become integral parts of our daily conduct; however, these excuses bypass the problem instead of solving it.[275] Take, for example, thumbnails. In the Netherlands, the Hague Court of Appeals created a defense using the European Convention on Human Rights to allow their usage.[276] In Germany,

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[268] *Id.*

[269] *Filibuster*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A dilatory tactic, esp. prolonged and often irrelevant speechmaking, employed in an attempt to obstruct legislative action. The filibuster is common in the U.S. Senate, where the right to debate is usu. unlimited and where a filibuster can be terminated only by a cloture vote of two-thirds of all members.").

[270] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[271] Austl. L. Reform Comm'n, *supra* note 22, at 96.

[272] *See History of DVD*, DID YOU KNOW?, https://didyouknow.org/dvdhistory/ (last visited Feb. 12, 2022)(connoting that the DVD players were already distributed throughout Japan and the United States by 1997); s*ee also* A & M Recs., Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)(revolving around the legitimacy of peer-to-peer file sharing networks and their emergence prior to the 21st century); William L. Hosch, *YouTube*, BRITANNICA, https://www.britannica.com/topic/YouTube (last updated Nov. 3, 2022).

[273] Yu, *supra* note 24, at 129.

[274] Shelley Greer, Copyright Law in New Zealand: Should We Adopt Fair Use? 25 (2016) (L.L.M. thesis, University of Waikato), https://researchcommons.waikato.ac.nz/bitstream/handle/10289/10806/thesis.pdf?sequence=3&isAllowed=y.

[275] *Id.*

[276] Scientology v. Karin Spank/XS4ALL Ct. Ap. Hague [2003] AMI 217 (4 Sept. 2003) (Neth.); Greer, *supra* note 274.

the practice remained illicit until it was excused under the assumption of implicit consent.[277] The Paris Court of Appeals had to resort to Internet Service Provider ("ISP") safe harbors to achieve the same objective.[278] In a similar scenario, Commercial Court No. 5 of Barcelona resorted to both implicit consent and ISP safe harbors before being shut down on appeal.[279] Instead, the appellate court, with the confirmation of the Spanish Supreme Court, borrowed the fair use doctrine in addition to applying the doctrine of *ius usus inocui* (the right to make a harmless use of someone else's property) to permit thumbnail usage.[280] Essentially, without a flexible exception that can mitigate the deficiencies of stringent copyright application, these rationales are inconsistent, far-fetched, irrational, and cannot be reapplied in alternate scenarios. Promoting social values and embracing innovative creativity should not have to run the risk of breach of international law. Equally, it should not have to be subtle or abashed. These doctrines deserve to be conspicuously codified and become the infrastructure for logical reasoning and social development.

There is the counterargument that billion-dollar tech corporations lobby for fair use at the expense of copyright artists.[281] But, "[t]echnology companies everywhere support fair use not because they hope to steal the work of others, but because modern innovation using the Internet requires uses of information on the web that is technically copyright protected."[282] Moreover, ample evidence proves that technological fair use improves the copyright industry and introduces new opportunities. First, the VCR, which remained extant due to a fair use verdict in *Sony*,[283] exposed the movie industry to markets—movie rentals and sales—that were unheard of at the time of its introduction.[284] In fact, the VCR became the largest source of revenue for the movie industry in the U.S. despite Hollywood's antagonism.[285] Moreover, in *A. V. ex rel. Vanderhye v. iParadigms, LLC*, the appellant, iParadigm, developed the Turnitin Plagiarism Detection Service to "evaluate[] the originality of written works in order to prevent

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[277] P. B. Hugenholtz & Martin R.F. Seftleben, *Fair Use in Europe. In Search of Flexibilities* 11, INST. FOR INFO. L. (Nov. 2011), https://www.researchgate.net/publication/228186530_Fair_UseinEurope_InSearchofFlexibilities; Bundesgerichtshof [BGH] [German Federal Court] Apr. 29, 2010, I ZR 69/08 (Ger.).
[278] Cour d'appel de Paris, Pôle 5 – Chambre 1, Arrêt du 26 janvier 2011 (Fr.); Greer, *supra* note 274.
[279] S.T.S., Apr. 3, 2012 (R.A.J., No. 172) (Spain).
[280] *Id.*
[281] Yu, *supra* note 24, at 151.
[282] Sean Flynn, *Defending Fair Use in South Africa*, INFOJUSTICE (Dec. 4, 2018), https://infojustice.org/archives/40667.
[283] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).
[284] Lee, *supra* note 249, at 799.
[285] *Id.*

plagiarism," using the allegedly infringing material, contrasted with an unauthorized digital reproduction of the original work in question.[286] Not only does this service not prejudice the copyright owners of the sampled research, but it is deliberately generated to protect them from potential copyright infringement.

In Germany, before officially legalizing thumbnails in 2017,[287] news publishers urged courts to require search engines, namely Google, to either pay for posting snippets, headlines, and thumbnails as search results or outright remove them.[288] Accordingly, Google removed its content from the platform.[289] Consequentially, the news publishers lost eighty percent of the traffic on their sites.[290] These publishers eventually conceded and voluntarily asked Google to reinsert their content.[291]

3. Technological Fair Use as Applied by Courts

This section will briefly summarize some of the most prominent fair use cases in the U.S. where the court ruled in favor of the technological function, most of which have already been illustrated throughout this Article.[292] In 1983, the Supreme Court found that the time-shifting function of the VCR constituted a fair use in *Sony Corp. of America v. Universal City Studios*, the archetype of technological fair uses.[293] In 1992, the Ninth Circuit ruled that a device that complements and alters the depiction of a video game—without replacing it—can be regarded as fair use in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*[294] Later that year, the Ninth Circuit applied fair use to intermediate copying and reversed engineered software to achieve interoperability with an independent console in *Sega Enterprises Ltd. v. Accolade, Inc.*[295] In *Kelly v. Arriba Soft Corp.,* and its progeny,[296] the storage and display of images—diminished in size and

[286] A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630, 634 (4th Cir. 2009).
[287] Elkin-Koren & Netanel, *supra* note 1, at 1139.
[288] Jennifer Slegg, *German News Sites Lost 80% Google News Traffic With Snippets Removed*, SEM POST (Nov. 6, 2014), http://www.thesempost.com/german-news-sites-lost-80-google-news-traffic-snippets-removed/.
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] Lee, *supra* note 249, at 806 (listing, in chronological order, cases where courts have "recognized fair use related to [] technological functions . . .").
[293] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).
[294] Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 964 F.2d 965 (9th Cir. 1992).
[295] Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).
[296] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

quality—employed as thumbnails to facilitate the operations of search engines constituted fair use in 2003.[297]

In the last decade, many fair use verdicts were awarded in cases regarding the reproduction of abundant works for various new technologies. First, the operation of a plagiarism detecting software;[298] afterward, the operation of an in-book text search engine.[299] The in-book text search engine (iParadigms) also made books accessible to the disabled.[300] Most recently, the copying of portions of software code was required "to enable programmers to call up implementing programs that would accomplish particular tasks [in new and transformative programs]."[301]

Thus, it is fair to conclude that fair use is much more responsive to innovative technologies than its variants. In the words of Judge Harold Baer:

> I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants' [Mass Digitalization Project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the [Americans with Disabilities Act].[302]

C. ENHANCING CREATIVE PRODUCTION

The main function of copyrights is "[t]o promote the progress of . . . useful [a]rts . . . ."[303] Equally, the capabilities approach is aligned with this initiative. Discussing the ten central capabilities, Nussbaum focuses on the capability "to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth."[304] Copyright is a tool that equips the author with the right to exclude others for a certain duration as an incentive to promote the production of these

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[297] Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).
[298] A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009).
[299] Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).
[300] Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).
[301] Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1203 (2021).
[302] Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 464 (S.D.N.Y. 2012), *aff'd in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014).
[303] U.S. CONST. art. I, § 8, cl. 8.
[304] NUSSBAUM, CREATING CAPABILITIES THE HUMAN DEVELOPMENT APPROACH, *supra* note 27, at 33.

types of works.[305] But, stringent copyright application, in addition to excessive copyright terms,[306] can be counterproductive. It can restrain the production of new works that rely on incorporating other works.

Fair use enables others to use copyrighted works "as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings . . . for the enrichment of society."[307] It was enacted as a compromise, inter alia, a balancing doctrine that, in the words of the Supreme Court of Canada, "allow[s] users to employ copyrighted works in a way that helps them engage in their own acts of authorship and creativity."[308] The U.S. Supreme Court explains, "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . ."[309] Fair use allows others to recycle copyrighted material and incorporate them in a new work of authorship with a function and character distinct from the original.

1. Stringent Copyright Application Inhibits Creative Production

Paul Goldstein contends that "[t]here will rarely be a shortage of works, including public domain works, that with some ingenuity can be made to serve as equally effective vehicles . . . ."[310] And naturally, originality, ideas, creativity, and authorship are nondepletable, not to mention unquantifiable. But there are several reasons why an appropriator could feel inclined to resort to a copyrighted work. First, in the words of Justice Posner:

> In truth, in literature, [] science[,] and [] 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,

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305 U.S. CONST. art. I, § 8, cl. 8.

306 *See* The Berne Convention, *supra* note 15, at art. 7, ¶¶ (1), (6) (emphasizing that the Berne Convention sets a threshold of the life of the author and 50 years minimum for copyright protection. A member may invigorate authors through longer terms infinitely but cannot go below the minimum. Fifty years after death, within itself, is a hefty duration. "The term of protection granted by this Convention shall be the life of the author and fifty years after his death . . . . The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs").

307 *See* Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998)(quoting Leval, *supra* note 43, at 1111).

308 Soc'y of Composers, Authors and Music Publishers of Canada v. Bell Can., [2012] 2 S.C.R. 326 (Can.) ¶ 21.

309 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 589 (1994).

310 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.3.2.1(b) (Aspen Publishers 3d ed. 2022).

> science[,] and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others.[311]

Works are generally influenced by previous works, consciously and subconsciously. It is somewhat rare to create a work from scratch, entirely original, and without the influence or utilization of other works.[312] Society can become creatively barren when copyrights are rigidly applied.

Second, music, books, movies, art, poetry, and other forms of authorship "insinuate themselves deeply into our lives," gradually shaping pop culture.[313] For example, The Renaissance was generated through works of authorship from the likes of William Shakespeare, Leonardo da Vinci, and Michelangelo.[314] The Beat Generation (Beatniks)—which influenced Hippie Counterculture—formed around the literary movement of authors like Allen Ginsberg, a poet, and Jack Kerouac, a novelist.[315] These movements formed their own cultures and subcultures, heavily influencing law, politics, reformations, and social mores and behavior. Our personalities, sexualities, and appearances echo the books we read, the music we hear, and the movies we watch.

Third, rigorous copyright application causes unnecessary market failures.[316] Sen and Drèze explain, "the opportunities offered by a well-functioning market may be difficult to use when a person is handicapped by . . . the limitation of economic opportunities, which in turn can be related to . . . restraint[s] that limit[] economic initiatives."[317] In a separate chapter, they note that "social

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311 Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845); *see also id.* at §7.3.1 ("Ravel's orchestration for *Pictures at an Exhibition* clearly derived from Moussorgsky's *Suite for Piano*. But it is no less true that Moussorgsky derived the inspiration for his work from Victor Hartmann's sketches and drawings displayed in 1874 in the rooms of the St. Petersburg Society of Architects, and that Hartmann's sketches and drawings derived from subjects and compositional, stylistic and thematic elements appearing in earlier works.").

312 *Emerson*, 8 F. Cas. at 619.

313 Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 597 (2007).

314 HIRSCH ET AL., *supra* note 175, at 213.

315 *Id.* at 163.

316 *See generally* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (explaining, generally, how market failure in copyright is the cheif rationale for the legislation of the fair use doctrine).

317 DRÈZE & SEN, *supra* note 253, at 7.

intervention is often required to overcome various 'market failures' that have been extensively analyzed in public economics."[318] Throughout the past couple of decades, the prevailing theory of fair use has been the market failure theory.[319] Merely inhibiting copyright commodification within itself would not necessarily better the author, nor would tolerating the unauthorized use impinge its marketability so long as the fourth fair use factor is weighed. The inhibition merely frustrates the appropriator's progress. Toleration, on the other hand, enables the appropriator to flourish (Pareto Efficient); it could also complement the previous work by drawing attention to it (Potential Pareto Improvement). For example, when Kevin Freshwater uploaded a video of Charlotte Awbery singing a portion of "Shallow" by Lady Gaga and Bradley Cooper without obtaining a compulsory license, the immense attention caused the original to resurface on the iTunes top 40 charts.[320]

2. Fair Use Enables Others to Commodify Existing Works[321]

Fair use is far more capable of commodifying canon works than its foreign variants for two fundamental reasons. First, fair use is pliable, "an open-ended . . . inquiry." [322] Its variants are rigid and restricted to "certain special cases"[323] as obliged by TRIPS and the Berne Convention's three-step test.[324] Theoretically, the test equally constrains Copyright Act of 1976. Opinions, however, are quite polarized on whether "an open-ended . . . inquiry"[325] can satisfy the three-step test.[326] Certainly, when Justice Story invoked the fair use doctrine for the first

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[318] *Id.* at 41.

[319] SUNDER, *supra* note 32, at 33.

[320] Tara C. Mahadevan, *Watch Viral "Shallow" Singer Perform Song on 'Ellen,'* COMPLEX (Feb. 26, 2020), https://www.complex.com/pop-culture/2020/02/viral-shallow-singer-performs-song-on-ellen-show.

[321] Commodify, in this article, means the use of the previous work as raw material in a new work of authorship. In other words, to use the previous work as if it were a commodity.

[322] Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006).

[323] The Berne Convention, *supra* note 15, at art. 9(2).

[324] *Id.*

[325] *Blanch,* 467 F.3d at 251.

[326] *Compare* Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 406 (1997) ("Fair use advocates in the United States and elsewhere recognized the potential for this sort of use of draft article 12. In the United States, they brought substantial pressure to bear on the Clinton administration to instruct the U.S. delegation to Geneva to seek changes to draft article 12 to moderate its reach and preserve fair use and similar privileges in U.S. law. This effort was successful. The U.S. delegation went to Geneva with instructions to support amendments to the text of article 12 to omit the word "only" before "in certain special cases," and to conform the normal exploitation language (switching back to "a" from "the"). In addition, they were to support changes in the commentary to article 12 to make clear that fair use and other existing privileges were consistent with this article."); *with* Okediji, *supra* note

time in *Folsom v. Marsh,* his verdict was not swayed by the Charming Betsy Doctrine[327] as *Folsom* predates the three-step test by more than a century.[328] Additionally, the enactment of the Act of 1976 preceded U.S. accession to the Berne Convention.[329] Some have surmised that the U.S.'s delayed ratification was a procrastination to provide U.S. industries with a comparative advantage.[330] Ruth Okediji, Law Professor at Harvard Law School, believes economic development "was precisely the reason for the United States' long-standing abstention from Berne membership."[331] Nonetheless, Congress had no reason to take excessive measures to abide by international treaties to which the U.S. was not a signatory at the time. Essentially, other countries find themselves hesitant to adopt expansive limitations and exceptions that equate to the fair use doctrine in breadth, lest they subject themselves to additional scrutiny from the World Trade Organization.[332]

Debates on whether the fair use doctrine contravenes the three-step test often tend to hit an impasse. Can an "open-ended . . . inquiry"[333] satisfy the threshold of "certain special cases?"[334] The right question, however, is whether the first

233, at 35 ("Fair use and the three-step test are famously ambiguous, with little certainty about whether a particular user can engage in activities and under what terms or conditions she may do so.").

[327] Curtis Bradley, Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1215 (2008) (applying the Charming Betsy Doctrine means "that ambiguous congressional statutes should be construed in harmony with international law . . .").

[328] *See* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (indicating that Folsom transpired in 1841); *but see* P. Bernt Hugenholtz & Ruth Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, OPEN SOC'Y INST. 16 (Mar. 6, 2008), https://www.iprsonline.org/resources/IntLE_HugenholtzOkediji.pdf (confirming that the three-step test was adopted in 1967, more than a century after Folsom transpired).

[329] *Infra* note 381.

[330] Ruth L. Okediji, *The Limits of International Copyright Exceptions for Developing Countries*, 21 VAND. J. ENT. & TECH. L. 689, 704 (2019) ("Pointing out that the United States did not join the Berne Convention until it reached an appropriate level of development may seem trite. Nevertheless, it is important to emphasize why delayed ratification of strong standards was an expedient strategy for a younger and less resilient economy. The other industrialized countries had joined the Berne Convention before the regime (i) required expanded rules of protection for authors; (ii) limited the scope of permissible L&Es and; (iii) imposed other conditions of entry on new adherents. Eschewing Berne ratification thus provided the United States room to devise a range of important policy tools (e.g., copyright formalities) that, together with robust access to foreign literary works, helped establish domestic cultural industries and produced a literate and innovative society.").

[331] *Id.*

[332] *See* Letter from President Cyril M. Ramaphosa to Speaker of the National Assembly Thandi Modise, *supra* note 25 (vetoing the bill that had proposed fair use, in addition to other expansive exceptions, partly due to its potential to breach the three-step test).

[333] Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006).

[334] The Berne Convention, *supra* note 15, at art. 9(2).

prong of the three-step test is justified. Why should a convention that predates the last three legislated copyright acts dictate intellectual property laws that are required to keep pace with rapid technology development? The first step is no more than a means to satisfy the latter two. If "reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author,"[335] what is the value of restricting the use to "certain special cases?"[336]

Second, fair dealing is often restrained by the contingency the new work bears on the canon work. Different jurisdictions employ different exams to evaluate this matter. In the U.K., courts inquire into the availability of alternatives to achieve the same purpose.[337] The Supreme Court of Canada asks whether the use was "reasonably necessary to achieve the ultimate purpose."[338] Fair use is not completely absolved of this subfactor; courts and scholars have theorized that the Supreme Court distinguished parodies and satires deliberately to signify the relevance of this subfactor.[339] In the U.S., however, this subfactor is neither decisive nor regularly considered;[340] this could be due to several factors. First, unlike fair dealing, the fairness assessment in the fair use equation is dictated by statute, and the omission of certain factors implies *expressio unius est exclusion alterius*.[341] For example, currently, good faith is seldom weighed within the fair

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[335] *Id.*

[336] *Id.*

[337] D'Agostino, *supra* note 6, at 343.

[338] CCH Canadian Ltd. v. L. Soc'y of Upper Canada, [2004] 1 S.C.R. 368 (Can.).

[339] Chander & Sunder, *supra* note 313, at 618 ("The critical legal inquiry is: Is there a viable substitute for the copyrighted work? That is, can the later writer employ a public domain work or invent a wholly original work as an alternative vehicle for expressing his or her critique? . . . If a viable substitute exists, it is no longer necessary to use the copyrighted work. The focus on substitutability explains why courts generally favor parody over satire. For satire, as Goldstein reminds us, a substitute generally exists. But if the point is to comment on a particular work, and to seek to resignify it for oneself, there is no substitute for the use of the original work.").

[340] *See, e.g.,* Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022) (illustrating how the necessity criteria-which appears in some cases and not in others-is not weighed by the court); *see also* Lenz v. Universal Music Corp., 801 F.3d 1126 (9th Cir. 2015) (illustrating the fact that the court does not ask whether the first work bears on the latter); Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013) (illustrating how the court in this case does not ask whether any alternatives could've achieved the same purpose, nor whether it was necessary to use the specific work in question).

[341] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (Thomson/West 2012) ("*Expressio unius*, . . . [i]n English, [] is known as the negative-implication canon, . . . [t]he expression of one thing implies the exclusion of others.").

use equation,[342] albeit historically a part of the fairness inquiry.[343] Second, courts and prominent scholars have acknowledged that though this subfactor is somewhat pertinent, a work can be fair without bearing on the canon. Judge Pierre Leval, in *Authors Guild v. Google*, states, "[a] taking from another author's work for the purpose of making points that have no bearing on the original may well be fair use, but the taker would need to show a justification."[344] Even the Supreme Court admits that a "satire can stand on its own two feet and so requires justification for the very act of borrowing."[345] Hence, fair use can feasibly use a work without necessarily bearing or commenting on the canon work,[346] even if that marginally debilitates its proponent's argument.

Moreover, the question of whether there are alternative means to achieve the same purpose is perplexing. The purpose of a work is, to an extent, subjective. When courts assess the suitability of alternatives, they are essentially putting themselves in the artist's shoes. In the words of Justice Holmes, "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[347] Weighing accessible alternatives to achieve the aesthetic purpose of a work is essentially making artistic assessments on the artist's behalf. Of course, some arts are deliberately esoteric. In *TCA Television Corp. v. McCollum,* defendants used '*Who's on First?'* verbatim in their Broadway play *Hand to God*.[348] Tyrone, a sock puppet, and Jason, his friend, partially perform '*Who's on First?'* and when Jessica asks Jason whether he wrote the joke, he hesitantly replies, "yes," which triggers a laugh from the audience, who recognize the lie.[349] The plaintiff prevailed on the first factor of fair use due to the defendant's (the proponent of fair use) failure to show how the use "was

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[342] Barton Beebe, *supra* note 39, at 607-09 ("The data suggest that considerations of fairness, propriety, and good or bad faith have not played a significant role in our fair use case . . . . Otherwise, the fairness consideration appeared rarely to be decisive. This is consistent with the regression results reported in Table 9, in which the bad faith variable failed to produce a significant coefficient.").

[343] LATMAN, *supra* note 186, at 17 ("The state of mind of the user, ordinarily immaterial to the determination of infringement has been considered relevant to the question of fair use. It was stated in the early case of *Lawrence v. Dana*[] that 'evidence of innocent, intention may have a bearing upon the question of "fair use."' 'Innocent intention' in this context has been roughly equated with 'good faith."').

[344] Authors Guild v. Google, Inc., 804 F.3d 202, 215 (2d Cir. 2015).

[345] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581 (1994).

[346] Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 38 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022) ("[W]e rejected the proposition that a secondary work must comment on the original in order to qualify as fair use.").

[347] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[348] TCA Television Corp. v. McCollum, 839 F.3d 168, 175-76 (2d Cir. 2016).

[349] *Id.*

necessary to this purpose."[350] Essentially, the premise of the joke was the lie, not the underlying joke. For the scene to provoke the dramatic effect, the defendant alleged the need for "an instantly recognizable 'cultural' touchstone in the relevant scene;" the court alluded that the defendant could have used an alternative from the public domain to trigger the same reaction, such as the claim that he "invent[ed] the Internet" or "travel[ed] to Mars."[351] But, the defendant needed something that was beyond obvious or trite. The defendant needed something believably oblivious to Jessica, and '*Who's on First?*' accomplished that desired balance. It was a joke that was not too far back to lose its recognizability and not too obvious to lose its believability (such as *Romeo and Juliet*), but just enough to catch the attention of a sophisticated adult audience (considering the play was to some extent blasphemous and lewd).

3. Productive Fair Use as Applied by Courts

Perhaps *Cariou v. Prince* is the quintessential fair use case to portray the sustainable, commodifying use of canon works.[352] Cariou, a photographer, published '*Yes Rasta*,' a book that portrays images of the Rastafarian tribe and landscapes of Jamaica.[353] Richard Prince, an artist, incorporated these images into a series of paintings and canvases that altered the overall look of the original photographs, which sold for millions to the likes of Tom Brady, Brad Pitt, Robert DeNiro, Damien Hirst, etc.[354] Cariou, whose portraits sold for much less than those of Richard Prince, sued for copyright infringement.[355] Essentially, Prince availed the fair use defense and prevailed in all but five cases. [356] Indeed, *Cariou v. Prince* shared its fair proportion of criticism,[357] even from the Second Circuit,

[350] *Id.* at 179.
[351] *Id.* at 184.
[352] Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).
[353] *Id.* at 698.
[354] *Id.* at 709.
[355] *Id.* at 704.
[356] *Id.* at 704, 712.
[357] Anthony R. Enriquez, *The Destructive Impulse of Fair Use After Cariou v. Prince*, 24 DEPAUL J. ART TECH. & INTELL. PROP. L. 1 (2013) (illustrating, in general, *Cariou v. Prince's* adverse effect on the fair use doctrine); *see also* Julian Azran, *Bring Back the Noise: How Cariou v. Prince Will Revitalize Sampling*, 38 COLUM. J.L. & ARTS 69 (2014) (illustrating how *Cariou v. Prince* reinvigorated sampling); Jennifer Gilbert-Eggleston, *Cariou v. Prince: Painter or Prince of Thieves?*, 2011 DEN. U. SPORTS & ENT. L.J. 117 (2011); Iona Silverman, *The US Court of Appeals Considers Transformative Use in Cariou v Prince: How Far is Too Far?*, 8 J. INTELL. PROP. L. & PRAC. 755 (2013), https://academic.oup.com/jiplp/article/8/10/755/850192; Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014); *Cariou*, 714 F.3d at 694 (Wallace, J., concurring in part and dissenting in part).

whence it emanates.[358] Most cases, however, of commodifying copyrighted materials are not as contentious as the aforementioned.[359] Prior to *Cariou v. Prince*, the Second Circuit found fair use when a publisher compiled and reproduced several copyrighted images of famous music groups in the process of producing a biography of the Grateful Dead.[360] Similarly, Koons, a famous artist, altered a copyrighted photo of a pair of legs taken by Blanch and used it, amongst other images, for his billboard '*Niagara*.'[361] The Second Circuit concluded fair use.[362]

Fair use enables others to cultivate copyrighted material and exploit it in markets to which the author would otherwise not avail themselves. When applying these hypotheticals in a fair dealing-oriented jurisdiction, courts struggle to justify the second user's conduct, not as a matter of ignorance but rather due to a lack of legal resources. In China, a film producer used several images of cartoons that reminisced about the 80s in a poster to promote his film, '*The Struggle of the 80s*.'[363] He was sued for copyright infringement.[364] Though the producer prevailed, the court had to "go beyond the law and introduce exotic justifications (e.g., the fair use test from the U.S.)[,] . . . [which] has caused inconsistencies among courts in China."[365] An Australian federal court concluded copyright infringement when local artists Men at Work appropriated portions of the song '*Kookaburra Sits in the Old Gumtree*.'[366] In contrast, a U.S. District Court absolved Nicki Minaj, a music artist, under similar circumstances by virtue of the fair use doctrine.[367] Surely, however, there are instances where the sampling and copying of music can amount to copyright infringement under U.S. copyright laws, and fair use will not always exculpate the infringer. Moreover, courts have often resorted to the *de minimus* use exception to excuse

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[358] Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 125 (2d Cir. 2021), ("[A]s we have previously observed, [Cariou v. Prince] has not been immune from criticism.").
[359] Johannsongs-Publ'g, Ltd. v. Lovland, No. 20-55552, 2021 WL 5564626, at *1 (9th Cir. Nov. 29, 2021) (illustrating how the Ninth Circuit, among other circuits, retained the substantial similarity test of *Cariou v. Prince*, regardless of its critics).
[360] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).
[361] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).
[362] *Id.*
[363] He, *supra* note 6, at 371 (citation omitted).
[364] *Id.*
[365] *Id.* at 371–74.
[366] *EMI Songs Australia Pty Ltd. v. Larrikin Music Publ'g Pty Ltd.* (2011) 191 FCR 444 (Austl.).
[367] Chapman v. Maraj, 2:18-CV-09088-VAP-SSx, 2020 WL 6260021 (C.D. Cal. Sept. 16, 2020). The dispute did not go any further as it was later settled for 450,000 USD.

trivial sampling.[368] At least, however, fair use is weighed in the equation.[369] Fair dealing was not even mentioned in the Australian Federal Court case.

Fair use always provides users with considerable latitude, unlike fair dealing. This is because fair use contemplates a myriad of uses so long as it functions with a different purpose.[370] And even if it is used for the same purpose, substantial transformation can still justify fair use.[371] Thus, fair use gives the user a chance. The fair dealing equation is not even contemplated if the use does not fall within the limited number of licit purposes.

In 2001, Alice Randall published her novel '*The Wind Done Gone*,' which was an alternative account of Margaret Mitchell's '*Gone with the Wind*.'[372] Randell's work aims to reveal the malevolence of the antebellum South before and after emancipation, which Mitchell portrays with an idealized depiction in her novel.[373] Randell was sued for alleged copyright infringement and prevailed on the grounds of fair use, as her work was protected as a parody.[374] Though parodies are not explicitly within the scope of § 107, courts have considered them "a form of comment and criticism [within § 107] that may constitute a fair use . . . ."[375] Theoretically, through a broad interpretation, courts within a fair dealing jurisdiction could exploit the same logic assuming parody is not explicitly enumerated within the statute.[376] In reality, however, this has not always been the case. For example, though the United Kingdom's enumerated fair dealing purposes were said to be "liberally construed," courts would not construe

[368] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016) (holding that the de minimus exception applied in the case of marginal sampling of music); *see also* Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (holding that the use of the plaintiff's segment of a sound recording was a de minimus use, thus not infringing).

[369] Moreover, this is another example of how fair use can often supplement discrete exceptions whenever they would otherwise fall short. Thus, even if a court cannot find de minimis use, it may still resort to the fair use doctrine.

[370] Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006) ("As the words of section 107 indicate, the determination of fair use is an open-ended and context-sensitive inquiry.").

[371] *See, e.g.,* Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013) (holding that the transformative use of the plaintiff's images by the defendant as art canvases sold or displayed in galleries constituted a fair use, bearing in mind that this was a market that the plaintiff had already exploited themselves).

[372] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1258 (11th Cir. 2001).

[373] *Id.*

[374] *Id.* at 1267, 1272, 1276-77.

[375] *Id.* at 1268 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

[376] There are numerous jurisdictions that have enumerated parodies and satires, or burlesques, specifically for fair dealing purposes. *See, e.g.*, *Copyright Act of 1968* (Cth) s 41A (Austl.) ("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 parody or satire.").

"criticism" in a way that would include parodies within its ambit.[377] Additionally, before resorting to a broad construction, Canadian courts speculated that "[i]f Parliament had wanted to exempt parody as a new exception under the fair dealing provision, it would have done so."[378]

D. CLOSING REMARKS

Fair use is more capable of providing access to knowledge, responding to technological developments, and promoting creative production, considering its flexible character, compared to other limitations, such as fair dealing. This flexibility provides courts with discretion to weigh the fairness of each case, assessing whether the transformative uses of a canon work in a specific case actually "prejudice the legitimate interests of the author."[379] Consequentially, courts in fair use jurisdictions are much more responsive, prompt, and effective regarding preserving the three dimensions of development. Moreover, courts can overturn and repeal expeditiously erroneous court verdicts, whereas legislatures generally lack the ability to make timely adjustments.[380] The U.S. has long enjoyed the flexibility of the fair use doctrine by virtue of its codification, preceding U.S. accession to the Berne Convention.[381] The fair use doctrine is not necessarily in contrast with the three-step test, but it is fair to assume that the doctrine is, rightly, less concerned with conformity than other jurisdictions.

IV. CONCLUSION

Copyright is not the only impediment that hinders access to knowledge, stifles the development of new technologies, and imposes market barriers. Furthermore, fair use is not an outright solution to compensate for this deficiency.[382] The goal of this Article, however, is to optimize the best available framework, and fair use is better equipped than its variants in promoting development within the three aforementioned dimensions, answering my first

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[377] D'Agostino, *supra* note 6, at 338.
[378] Compagnie Generale des Etablissements Michelin-Michelin & Cie v. Nat'l Auto., Aerospace, Transp. & Gen. Workers Union of Canada, [1997] 2 F.C. 306, 358 (Can.).
[379] The Berne Convention, *supra* note 15, at 6.
[380] *See, e.g.,* Austl. L. Reform Comm'n, *supra* note 22 (illustrating that the Australian legislator legalized the VCR 22 years after the United States had done so promptly through the judiciary).
[381] 17 U.S.C. § 107 (1976); *see also World Intellectual Property Organization, Berne Notification No. 121: Accession by the United States of America*, WIPO https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_121.html (last visited May 11, 2022) (clarifying that the United States accession happened in 1989).
[382] Niva Elkin-Koren, *The New Frontiers of User Rights*, 32 AM. U. INT'L L. REV. 1, 42 (2016).

question, 'What explains the movement towards fair use in countries around the world?'

'Why, if the U.S. originated fair use, does it abhor it elsewhere?' It could be implied that the U.S.'s protest is a form of "'precapitalist' constraint."[383] Sen argues that:

> There are many people whose interests are well served by the smooth functioning of markets, but there are also groups whose established interests may be hurt by such functioning. If the latter groups are politically more powerful and influential, then they can try to see that markets are not given adequate room in the economy.[384]

Indeed, the fair use doctrine allows the U.S. "[t]o widen the market and to narrow the competition."[385] As Okediji points out, "the United States did not join the Berne Convention until it reached an appropriate level of development. . . . Eschewing Berne ratification thus provided the United States room to devise a range of important policy tools."[386]

[383] SEN, *supra* note 27, at 121.
[384] *Id.* at 120.
[385] *Id.* at 123; Adam Smith, *Wealth of Nations*, *in* THE TWO NARRATIVES OF POLITICAL ECONOMY 109 (Nicholas Capaldi & Gordon Lloyd eds., John Wiley & Sons, Inc. 2011).
[386] Okediji, *supra* note 330, at 704.