

# Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law

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## I. Introduction

In her 2000 article *Toward an International Fair Use Doctrine*, Professor Ruth Okediji hypothesized that the internationalization of copyright law would threaten the freedom of expression if some doctrine akin to U.S. fair use were not established as an international legal norm.<sup>1</sup> Acknowledging the central concern of the Okediji article, this Article analyzes research and legal developments since that article to determine how the present state of the “fair use” concept in international copyright law<sup>2</sup> differs from its state in 2000. The Article concludes that in the last

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<sup>1</sup> Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75, 172–75 (2000).

<sup>2</sup> This Article refers to “international copyright law” and the adoption of an “international fair use doctrine” recognizing that there is no international copyright law per se. These terms are used to refer to the collection of norms extant in the bilateral and multilateral agreements that establish minimum standards among participating nations. Domestic lawmakers are chiefly responsible for administering this “international law,” even in the highly integrated European system. Describing the prospect of developing international consensus on copyright norms, Professor Jane C. Ginsburg referred to both “supranational copyright law” and “international copyright law.” Jane C. Ginsburg, *Toward Supranational Copyright Law?: The WTO Panel Decision and the “Three-*

eight years, although there has been no formal adoption of an international fair use doctrine, the concept has escaped its disfavored status as a U.S. peculiarity and achieved some traction in international legal circles. This change is likely a reaction to legal and technological developments that have shifted the copyright balance to favor the property rights of copyright holders over the free expression rights of content users.<sup>3</sup> This conclusion is significant for both groups of rights holders. Users now have unprecedented opportunities to push the international copyright balance toward freedom of expression through expanding legal notions of the public interest. Copyright holders, meanwhile, are in a complicated position. If they insist on an economic protectionist international copyright regime in the short term, they might ultimately win a copyright balance so devoid of free expression as to yield a dearth of creativity and diversity. Or they might ultimately face a backlash that pushes the copyright balance to reckless exception from copyright holder rights.

In the end, the Okediji thesis remains vital. It is in the best interests of government, business, and consumers to exploit present legal and technological circumstances to press for the introduction into domestic legal regimes, if not into the international system, a well crafted public interest doctrine that cuts across the now common array of context-dependent copyright exceptions.

## II. Background: Globalization and the Copyright Balance

In this era of globalization, legal advocates worry that international legal regimes will supersede domestic legal norms in a manner contrary to desired national policy.<sup>4</sup> Civil rights advocates in particular worry that international law, which in many respects is increasingly dominated by trade regulation, will erode

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*Step Test*" for Copyright Exceptions, 187 REVUE INTERNATIONALE DU DROIT D'AUTEUR [R.I.D.A.] 3, 5, 7 (2001) (Fr.).

<sup>3</sup> This Article refers interchangeably to the "rights" and "interests" of copyright holders and content users, though it tends to favor the modern norm of referencing the *rights* of copyright holders in contrast to the public interest in exception to those rights. This semantic tendency does not mean to incorporate a connotation of imbalance favoring rights over interests. See Herman Cohen Jehoram, *Restrictions on Copyright and their Abuse*, 27 EUR. INTEL. PROP. REV. [E.I.P.R.] 359, 363 (2005) (U.K.) (observing this "subtle linguistic distinction" in the World Intellectual Property Organization Copyright Treaty, *infra* note 14). The tendency of European legal scholars to accept such an imbalance as the proper ordering of things might be explained by P. Bernt Hugenholtz, who commented on the differences between the U.S. judicial system, with its powerful constitutional doctrine of judicial review, and European judicial systems, in general, with their proclivity to tolerate legislative circumscription of individual rights. P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY 343, 343-45 (Rochelle Cooper Dreyfuss et al., eds., 2000) [hereinafter Hugenholtz, *Copyright and Freedom of Expression in Europe*].

<sup>4</sup> See, e.g., Okediji, *supra* note 1, at 85.

fundamental domestic liberties, which are substantially not commercial concerns.<sup>5</sup> Even when trading partners with comparable legal systems agree on fundamental values, such as the freedom of expression, significant disagreements arise over how to balance competing interests. For example, the European Data Protection Directive, adopted to protect personal privacy,<sup>6</sup> has vexed freedom of information advocates in the United States since its 1995 adoption.<sup>7</sup> Another example is found in the recent New York legislature act<sup>8</sup> that precludes state enforcement of foreign libel judgments that do not comply with the highly speech-protective doctrine of *New York Times Co. v. Sullivan*,<sup>9</sup> a U.S. judicial precedent that has fared poorly even when urged on the tribunals of other common law jurisdictions.<sup>10</sup>

Copyright law, which itself represents a balance of the property right of the copyright holder with the free expression right of the content user,<sup>11</sup> is thus susceptible to the tensions born of globalization. Information commodification has spurred a range of regulatory mechanisms that mean to extend the protections of

<sup>5</sup> See generally Okediji, *supra* note 1, at 82–84. In intellectual property, the “commodification of information” has inspired angst over its impact on cultural, social, economic, and democratic development. E.g., P. Bernt Hugenholtz & Lucie Guibault, *The Future of the Public Domain: An Introduction*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 1, 1 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006). Some saw the problem coming sooner than others. See, e.g., Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW*, *supra*, at 121, 123, 132 (citing David Lange, *Recognizing the Public Domain*, 44 *LAW & CONTEMP. PROBS.* 147 (1981)); see also Douglas L. Rogers, *Increasing Access to Knowledge Through Fair Use—Analyzing the Google Litigation to Unleash Developing Countries*, 10 *TUL. J. TECH. & INTELL. PROP.* 1, 47–73 (2007) (proposing permissive translation of copyrighted works into native languages of developing countries); Alan Story, *Essay, Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 *HOUS. L. REV.* 763, 796–801 (2003) (arguing that Berne hinders rather than facilitates information and knowledge development in the southern hemisphere).

<sup>6</sup> Council Directive 95/46/EC, Protection of Individual with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, 31 (EU).

<sup>7</sup> See, e.g., Jane E. Kirtley, *The EU Data Protection Directive and the First Amendment: Why a “Press Exemption” Won’t Work*, 80 *IOWA L. REV.* 639 (1995).

<sup>8</sup> Libel Terrorism Protection Act, ch. 66, 2008 N.Y. Sess. Laws News (S. 6687-C) (McKinney).

<sup>9</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283–92 (1964) (applying in defamation claim under state law heightened constitutional requirements such as actual malice fault standard, mandatory element of identification, elevated burden of proof, the limited presumption of damages, and enhanced appellate review).

<sup>10</sup> E.g., *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575, paras. 187–90 (Austl.) (Callinan, J., concurring) (declining to refrain from exercising Australian jurisdiction over U.S.-based defendant on grounds of the defendant-protective doctrine of *Sullivan*, observing that the free speech “marketplace of ideas” metaphor has suffered criticism, and that Australian law, in contrast, “rightly . . . places real value on reputation”).

<sup>11</sup> Assumed here is a “balance,” which is a widely recognized concept, though it has been subject to considerable critical review. See, e.g., Hugenholtz & Guibault, *The Future of the Public Domain: An Introduction*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW*, *supra* note 5, at 2 (calling it “that mythical ‘delicate balance’”).

copyright across international borders, including principally the Berne Convention for the Protection of Literary and Artistic Works (Berne),<sup>12</sup> especially since the amendments made by the 1967 Stockholm Act;<sup>13</sup> the World Intellectual Property Organization Copyright Treaty (WCT);<sup>14</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which operates under the auspices of the World Trade Organization (WTO).<sup>15</sup> Only since its 1989 domestic implementation of Berne has the United States, with its vast intellectual property market,<sup>16</sup> been a key player in developing this international legal regime. Since coming on board—and significantly since the advent of digital media and their facilitation of high-tech, high-quality piracy—the United States has become an influential advocate for copyright holders' legal interests.<sup>17</sup> Meanwhile, though, U.S. involvement also has emphasized the uniqueness of the U.S. fair use doctrine, which permits the relatively generous use of copyrighted content without the permission of the copyright holder.<sup>18</sup>

<sup>12</sup> The Berne Convention for the Protection of Literary and Artistic Works, opened for signature Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 (as revised at Paris on July 24, 1971 and amended on Sept. 28, 1979), available at <http://www.wipo.int/treaties/en/ip/berne/index.html> [hereinafter Berne].

<sup>13</sup> *Id.* (as revised at Stockholm on July 14, 1967). Okediji described the transformation of Berne from its 1886 origin as a minimalist instrument that established a principle of nondiscriminatory treatment of foreign nationals under a signatory's jurisdiction, to a modern multilateral agreement deliberately protective of copyright. Okediji, *supra* note 1, at 99–114.

<sup>14</sup> World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65 (1997), available at [http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf).

<sup>15</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81, 93–94 (1994) [hereinafter TRIPS], available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf). These treaties, as well as the European Copyright Directive, *infra* note 86, are briefly but informatively overviewed with special attention to the history of copyright exception, or restriction, in Jehoram, *supra* note 3.

<sup>16</sup> Describing an “international black hole,” John Gantz and Jack B. Rochester cataloged U.S. trade losses to the “[g]lobal scourge” of foreign piracy. JOHN GANTZ & JACK B. ROCHESTER, PIRATES OF THE DIGITAL MILLENNIUM: HOW THE INTELLECTUAL PROPERTY WARS DAMAGE OUR PERSONAL FREEDOMS, OUR JOBS, AND THE WORLD ECONOMY 219–21 (2005). Inversely, van Eechoud observed that the United States is the world's top importer of cultural goods, such as periodicals, musical instruments, paintings, sculptures, and antiques. MIREILLE VAN EECLOUD, CHOICE OF LAW IN COPYRIGHT AND RELATED RIGHTS: ALTERNATIVES TO THE LEX PROTECTIONIS 156 (2003). “Piracy isn't going away, any more than globalization.” GANTZ & ROCHESTER, *supra*, at 221.

<sup>17</sup> See, e.g., Eric Allen Engle, *When is Fair Use Fair?: A Comparison of E.U. and U.S. Intellectual Property Law*, 15 TRANSNAT'L LAW. 187, 188–90 (2002); Okediji, *supra* note 1, at 115.

<sup>18</sup> Differences between the copyright law of the United States and the copyright laws of other countries are not accidental. Commentators on the development of world copyright law have noted the unusual justification of copyright law in the United States on utilitarian and economic rationales, in contrast with the natural rights foundation that grounded the ownership of intellectual property in the European tradition. E.g., MARTIN SENFLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 17 (2004). Senfleben observed that TRIPS, which is a trade agreement driven in its formulation by the economic interests of developed countries such as

In 2000, Professor Okediji argued thoroughly for the introduction of a fair use doctrine into the international copyright regime in order to protect the freedom of expression in the United States and in the world.<sup>19</sup> At that time, the fair use doctrine was a decided outsider on the international stage.<sup>20</sup> But since 2000, the role of the U.S. fair use doctrine in the international copyright regime has changed from oddball interloper to influential force. Indeed, the international community might even be warming to U.S. fair use doctrine, or some similar "public interest" doctrine, because it is a legal norm that is more permissive of the nonconsensual use of copyrighted content than traditional common law and civil law models that have dominated the international field.<sup>21</sup> This change may well have arisen in reaction to legal and technological developments<sup>22</sup> that have shifted the "delicate balance" of copyright in favor of copyright holders, a shift apparently sanctioned by trade-oriented mechanisms such as TRIPS.<sup>23</sup> If the tide is turning to favor fair use,

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the United States, is consistent with the utilitarian justification of copyright, while Berne, having originated in western Europe in the nineteenth century, is driven by natural rights theory. *Id.* The WCT, he wrote, mixes the approaches. *Id.* The distinction is important in understanding the fate of fair use because, Senftleben contended, world acceptance of a fair use doctrine must be based on the public interest in the free flow of information, akin to natural rights theory, rather than the economic theory of market failure that principally justified fair use in the United States. *Id.* at 30–32. Incidentally, the linkage of natural rights and intellectual property rights has not escaped criticism. See, e.g., Eric Barendt, *Copyright and Free Speech Theory*, in *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES* 11, 31 (Jonathan Griffiths & Uma Suthersanen eds., 2005) (observing "artificial" nature of intellectual property); Wendy J. Gordon, *Copyright Norms and the Problem of Private Censorship*, in *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES*, *supra*, at 67, 72–73 (suggesting that judicial intervention in tort law to protect free expression may be analogized to needed judicial intervention in property law, in particular intellectual property law). Also, the United States has not escaped criticism for its drive for copyright holders' interests in international law in contrast with its liberal fair use policy at home. E.g., Engle, *supra* note 17, at 189–90.

<sup>19</sup> Okediji, *supra* note 1. Okediji described the "democratic deficit" that occurs when commerce-regulating mechanisms, such as TRIPS, are permitted to displace socially conscious international regulatory mechanisms, such as human rights treaties. Okediji, *supra* note 1, at 85–87.

<sup>20</sup> E.g., Okediji, *supra* note 1, at 114–17.

<sup>21</sup> E.g., Engle, *supra* note 17, at 194.

<sup>22</sup> See generally Dan L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, 74 *FORDHAM L. REV.* 537 (2005) (explaining, analyzing, and assessing technological access controls and their impact on intellectual property market dynamics).

<sup>23</sup> SENFLEBEN, *supra* note 18, at 34; e.g., DUNCAN MATTHEWS, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT I* (2002) (describing a new wave of trade regulation as "protecting global commercial interests to an extent not previously witnessed in relation to international protection of intellectual property interests"). This paper does not focus on any particular socioeconomic context, but it merits noting that TRIPS and the modern international copyright regime have spurred substantial debate over the copyright holder-user balance in the socioeconomic context of the developed world and developing world, given the disproportionately greater representation of copyright holders and users in each, respectively. See, e.g., Okediji, *supra* note 1, at 80–81, 87, 104–05. The more the copyright regime is imbalanced to favor copyright holder, and therefore developed world, interests over user, or developing world interests, the greater the likelihood of a legal backlash against copyright holder prerogatives. Just

then content users may seize the opportunity to press for their own favorable copyright balance. Copyright holders would be well advised to employ legal and technological mechanisms to develop fair use or public interest doctrines that copyright holders can live with.<sup>24</sup>

### III. Compatibility of International Law and the Fair Use Doctrine

Professor Okediji carefully analyzed the compatibility of TRIPS, then five years old, and the U.S. fair use doctrine and concluded that a reasonable reading of the international instrument cannot accommodate the U.S. doctrine.<sup>25</sup>

TRIPS Article 13 authorizes "limitations or exceptions" to copyright holders' rights under domestic law.<sup>26</sup> The provision adopts the language of Berne Article 9(2).<sup>27</sup> The provisions are functionally identical,<sup>28</sup> though the TRIPS article is broader because it governs all of the bundled rights exclusive to the copyright holder, whereas Berne Article 9(2) addresses specifically the copyright holder's reproduction right.<sup>29</sup> Under TRIPS, limitations or exceptions are permitted only in "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."<sup>30</sup> TRIPS thus adopts the renowned "three-step test" of Berne, its elements being, in

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as the U.S. fair use doctrine fares uncertainly under TRIPS, so do the Berne modifications that addressed the concerns of developing countries. *Cf.* Okediji, *supra* note 1, at 107-09.

<sup>24</sup> The capacity of computer technology to fine-tune the balance of interests in copyrighted works is described and favorably appraised by professionals of the Xerox Palo Alto Research Center in Mark Stefik & Alex Silverman, *The Bit and the Pendulum: Balancing the Interests of Stakeholders in Digital Publishing*, 16 COMP. LAW. 1 (1999), available at <http://www.xml.org/reference/Pendulum97Jul29.pdf>. Professor Burk similarly has proposed that technological tools that created, in turn, a risk of piracy and an overcorrection to combat that risk could be turned next to ensure balance between copyright holder and user rights. Burk, *supra* note 22; Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001).

<sup>25</sup> See Okediji, *supra* note 1, at 87, 114-23 (outlining three reasons why "the fair use doctrine violates Article 9(2) of the Berne Convention and, de facto, Article 13 of the TRIPS Agreement": (1) "the indeterminacy of the fair use doctrine," (2) "the breadth of the fair use doctrine," and (3) the "nullification and impairment of the expected benefits that trading partners reasonably should expect under the TRIPS Agreement").

<sup>26</sup> TRIPS, *supra* note 15, art. 13.

<sup>27</sup> Compare TRIPS, *supra* note 15, art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."), with Berne, *supra* note 12, art. 9(2) ("It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.").

<sup>28</sup> E.g., SENFTLEBEN, *supra* note 18, at 85-87.

<sup>29</sup> See TRIPS, *supra* note 15, art. 13; Berne, *supra* note 12, art. 9(2).

<sup>30</sup> TRIPS, *supra* note 15, art. 13.

sum, (1) special case, (2) supra-normal exploitation, and (3) lack of unreasonable prejudice.<sup>31</sup>

Okediji demonstrated that the U.S. fair use doctrine fares problematically under the Berne three-step test.<sup>32</sup> The problem has not since been resolved.<sup>33</sup> Both the U.S. fair use doctrine and the Berne test are "open norms" in the sense that they cut across copyright and are not facially confined to dependence on use in a narrowly defined context; however, the Berne test, dependent as it is on "special cases," was designed to accommodate the "closed norm" approach prevalent among the world's national legal systems.<sup>34</sup> U.S. fair use, though it operates upon factors codified in section 107 of the U.S. Copyright Act,<sup>35</sup> applies across the spectrum of copyrightable information, as a general defense,<sup>36</sup> closed-norm systems permit only clearly articulated, narrow exemptions for specific uses.<sup>37</sup> The difference is akin to the difference between an evolving, precedent-oriented common law system, and a fixed, statute-oriented civil system; in this area, though, the analogy is somewhat inapt, as even common law jurisdictions other than the United States tend to follow the closed-norm approach in specifically defining copyright limitations and exceptions.<sup>38</sup>

<sup>31</sup> See SENFTLEBEN, *supra* note 18, at 83–90. The Berne test has become prevalent in European laws meant to harmonize copyright. SENFTLEBEN, *supra* note 18, at 245–46; Jehoram, *supra* note 3, at 361; see also Ginsburg, *supra* note 2, at 5 (recognizing the three-step test in then-pending EU Information Society Directive). A WTO panel decision on the U.S. Copyright Act (but not the fair use doctrine) was the first adjudication under Berne Article 9(2). Ginsburg, *supra* note 2, at 37.

<sup>32</sup> Okediji, *supra* note 1, at 126–34. *But see* Tyler G. Newby, Note, *What's Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633 (1999) (arguing that TRIPS Article 13 and the WCT are broad enough to allow U.S. fair use). Tension between U.S. law and Berne dates to U.S. accession to that treaty, predating the development of TRIPS. Okediji, *supra* note 1, at 105, 114–15. Per U.S. law, Berne was not self-executing, and the President and Congress have similarly treated WTO obligations as non-self-executing. Okediji, *supra* note 1, at 137–40.

<sup>33</sup> E.g., SENFTLEBEN, *supra* note 18, at 113; Gerald Dworkin, *Copyright, the Public Interest, and Freedom of Speech: A UK Copyright Lawyer's Perspective*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES, *supra* note 18, at 153, 161–62.

<sup>34</sup> See generally SENFTLEBEN, *supra* note 18.

<sup>35</sup> 17 U.S.C. §§ 101–1332 (2006). Prior to codification, the fair use doctrine developed as a common law rule. See *infra* note 56 and accompanying text.

<sup>36</sup> E.g., Okediji, *supra* note 1, at 119.

<sup>37</sup> While the fair use doctrine exemplifies an open norm, the U.S. Copyright Act also provides for closed-norm exceptions, such as the reproduction of phonorecords by libraries and archives, 17 U.S.C. § 108, the display of audiovisual works in the course of classroom instruction, § 110(1)–(2), and the performance of work in the course of religious services, § 110(3). A closed-norm provision allowing businesses to perform radio and television transmissions, § 110(5), was the subject of a WTO panel adjudication. See *infra* note 49.

<sup>38</sup> See generally VAN ECHOU, *supra* note 16, at 159 (contrasting flexible common law systems, such as U.S. fair use and U.K. fair dealing, with civil law systems having broader copyrights coupled with narrow exceptions).

As an open norm, U.S. fair use doctrine is judicially derived<sup>39</sup> and judicially driven,<sup>39</sup> in contrast with the legislatively driven systems for which the Berne test was devised.<sup>40</sup> The loose, multifactor fair use test of the U.S. Copyright Act is highly contextual, so fair use in the United States generally must be determined on a case-by-case basis, post hoc, without the benefit of bright-line rules.<sup>41</sup> In contrast, the enumerated copyright limitations of closed-norm systems are, in theory, more susceptible of predictable application.<sup>42</sup> Other common law jurisdictions, such as the United Kingdom, allow a copyright exception for "fair dealing."<sup>43</sup> But in a closed-norm model, the fair dealing defense must invoke one of a limited range of statutorily permissible uses, such as research or news reporting.<sup>44</sup> A judicial analysis of a fair dealing defense may consider the same factors that are at play in U.S. fair use,<sup>45</sup> that is purpose of the use, nature of the work, quantity of the taking, and effect of the use on the market for the original.<sup>46</sup>

Indeed, the first three fair use factors seem pertinent to a supra-normal exploitation inquiry under the Berne test, and the effect on the market for the original overlaps with the latter two Berne inquiries (special case and lack of unreasonable prejudice).<sup>47</sup> But broad-ranging, U.S.-style fair use remains unique because it is not in the first instance circumscribed by statutory categories.<sup>48</sup> It is therefore difficult to argue that U.S. fair use is limited to "special cases" under the

<sup>39</sup> See, e.g., Okediji, *supra* note 1, at 117–20.

<sup>40</sup> See, e.g., SENFTLEBEN, *supra* note 18, at 47–50, 163–64.

<sup>41</sup> E.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>42</sup> VAN ECHOUD, *supra* note 16, at 160. In other words, in theory, U.S. courts balance copyright/user interests after the fact, while closed-norm exceptions have done the balancing already. This description, though, is relative; free speech advocates have contended that the U.S. Supreme Court has been too quick to conclude that the property/free expression balance was already done by the framers of the Copyright Clause of the U.S. Constitution, thus obviating a need for First Amendment free expression analysis in fair use cases. E.g., GRIFFITHS & SUTHERSANEN, *COPYRIGHT AND FREE SPEECH* 16 (2005); accord Gordon, *supra* note 18, at 72. See generally LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

<sup>43</sup> E.g., SENFTLEBEN, *supra* note 18, at 69, 76; see also Ysolde Gendreau, *Copyright and Freedom of Expression in Canada*, in *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION—INTELLECTUAL PROPERTY—PRIVACY* 21, 31–34 (Paul L.C. Torremans ed., 2004) (discussing the intersection of fair dealing and free expression in Canadian copyright law).

<sup>44</sup> E.g., SENFTLEBEN, *supra* note 18, at 69, 72.

<sup>45</sup> E.g., SENFTLEBEN, *supra* note 18, at 114.

<sup>46</sup> See 17 U.S.C. § 107 (2006); cf. discussion *supra* note 3 (Though common law and civil law jurisdictions alike employ closed-norm "fair dealing" exceptions, judges in common law jurisdictions might be expected to exercise more flexibility than their civil law counterparts in interpreting fair dealing.).

<sup>47</sup> See Okediji, *supra* note 1, at 87, 114–22.

<sup>48</sup> See, e.g., Newby, *supra* note 32, at 1642 (stating that most other countries do not have fair use schemes like the United States).



first step of the Berne test.<sup>49</sup> Moreover, the looseness of the U.S. test is difficult to reconcile with the strictly conjunctive nature of the Berne test.<sup>50</sup> That the U.S. fair use test operates as a multi-factor inquiry, in which no factor, even the powerful “market effect” factor, is consistently dispositive,<sup>51</sup> adds to the indeterminacy of the open norm, and thus to its distastefulness to the closed-norm world.

Despite the seeming incompatibility of U.S. fair use with the Berne test, Martin Senftleben argued in his 2004 book that fair use can qualify as a special case.<sup>52</sup> According to Senftleben, the conventional wisdom that fair use is too broad to pass over the special-case hurdle is inadequately deferential to common law legal systems, which after all make law through case-by-case adjudication as much as by legislative enactment.<sup>53</sup> The three-step test should not be used, he wrote, “to divest the common law countries of regulatory models rooted in their specific copyright tradition.”<sup>54</sup> With a body of precedent on fair use dating to the middle nineteenth century,<sup>55</sup> U.S. fair use is no less ascertainable or predictable than a circumscribed “special case” of U.K. fair dealing,<sup>56</sup> or than a determination of the permissibility of a copyright exception under a Berne Article 9(2) analysis.<sup>57</sup> Senftleben

<sup>49</sup> See Okediji, *supra* note 1, at 126–28 (“Unlike Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement, the fair use doctrine is a broad exception to the rights granted to authors under the Copyright Act; it clearly is not limited to ‘special’ cases.”). Though there has been no WTO dispute resolution process concerning section 107 of the U.S. Copyright Act, Okediji examined a dispute resolution process concerning section 110(5), the Fairness in Music Licensing Act, which allows businesses, such as restaurants, to perform radio and television transmissions in specified circumstances. See Okediji, *supra* note 1, at 123–36 (discussing Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000)). The panel in that case concluded that “special cases” are not merely “special purposes,” such as the public policy underpinning the fair use doctrine. Okediji, *supra* note 1, at 126–27. Key to the panel was the narrow confines of an exception, rather than the merit of the underlying policy. Okediji, *supra* note 1, at 126–27. See generally Ginsburg, *supra* note 2 (discussing that panel’s interpretation of the three-step test and noting that the WTO panel decision was “the first time an international adjudicative body ha[d] interpreted either Article 13 of TRIPs, or Article 9.2 of the Berne Convention”).

<sup>50</sup> See Okediji, *supra* note 1, at 114–22.

<sup>51</sup> E.g., Dworkin, *supra* note 33, at 160.

<sup>52</sup> SENFTLEBEN, *supra* note 18, at 162. According to Gerald Dworkin, the United States also seems to believe that the fair use doctrine and TRIPS Article 13 are compatible. Dworkin, *supra* note 33, at 162. Dworkin predicted that a TRIPS panel eventually will face the question. SENFTLEBEN, *supra* note 18, at 163.

<sup>53</sup> SENFTLEBEN, *supra* note 18, at 163.

<sup>54</sup> SENFTLEBEN, *supra* note 18, at 163.

<sup>55</sup> See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (describing “a nice balance of the comparative use made in [some] materials of [an]other”).

<sup>56</sup> SENFTLEBEN, *supra* note 18, at 163 (citing *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901)).

<sup>57</sup> See, e.g., Jennifer Suzanne Bresson Bisk, *Book Search is Beautiful? An Analysis of Whether Google Book Search Violates International Copyright Law*, 17 ALB. L.J. SCI. & TECH. 271, 309 (2007) (concluding that the compatibility of Google book search with a nation’s Berne obligations

emphasized that Berne Article 9(2) is itself an open norm, after all, even if it is susceptible of accommodating closed-norm copyright exceptions.<sup>58</sup> In contrast, however, Mihály Ficsor concluded in 2002, referencing records of the Stockholm Act, that a “special case” under Berne cannot incorporate a broad rule based in public policy, but must refer to a specific purpose.<sup>59</sup> Professor emeritus Herman Cohen Jehoram asserted flatly in 2005 that “[t]he open American ‘fair use’ system in fact violates the Berne Convention.”<sup>60</sup> Both Ficsor and Jehoram relied on Sam Ricketson’s much earlier authoritative judgment, published in 1987, that the three-step test cannot countenance “a broad kind of exemption.”<sup>61</sup>

#### IV. Global Warming Trend?: Creeping Indulgence of Fair Use

Okediji called for the express incorporation of a fair use doctrine into international law.<sup>62</sup> That has not happened, which is significant. The international community has not embraced fair use, and the threat that Okediji perceived to the fair use doctrine, and accordingly to free expression worldwide, remains extant. But also significant is another non-event: the U.S. fair use doctrine has not been directly challenged under any international dispute resolution process.<sup>63</sup> Rather, the doctrine has subsisted quietly as a seeming omission in U.S. compliance with international obligations. If there is an open question as to the compatibility of U.S. fair use with Berne Article 9(2) and TRIPS Article 13, the failure of U.S. trading partners for these many years to employ the TRIPS dispute resolution mechanism arguably speaks louder than words.<sup>64</sup> Meanwhile, and yet more significantly, legal

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is “very hard to predict”). Ginsburg concluded that the WTO analysis of the Berne three-step test in a case involving the U.S. Copyright Act resulted essentially in a balancing of interests, making future outcomes unpredictable. Ginsburg, *supra* note 2, at 57, 59. “Balancing tests are . . . notoriously imprecise, and tend to be more of a common law than a civilian adjudicative method. That does not recommend them as a supra-nationally or multi-nationally acceptable mode of analysis.” Ginsburg, *supra* note 2, at 57, 59.

<sup>58</sup> See SENFTLEBEN, *supra* note 18, at 305.

<sup>59</sup> MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* § 5.55, at 284 (2002).

<sup>60</sup> Jehoram, *supra* note 3, at 360; *see also id.* at 362 (“If ever the antiquated American ‘fair use’ would be contested for a TRIPs Panel, its fate would, I think, be sealed.”) (citations omitted).

<sup>61</sup> SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at 482 (1987), *cited in* Ficsor, *supra* note 59, § 5.55 n.93, and *quoted in* Jehoram, *supra* note 3, at 361. Ricketson is “the leading authority on the Berne Convention.” Ginsburg, *supra* note 2, at 37.

<sup>62</sup> Okediji, *supra* note 1, at 87.

<sup>63</sup> *See, e.g.*, Dworkin, *supra* note 33, at 162–63.

<sup>64</sup> Okediji already suggested this conclusion when TRIPS was only five years old, Okediji, *supra* note 1, at 121 (referring to the “deafening silence” of U.S. trade partners); eight years later, her suggestion has aged well. Senftleben observed similarly that the United States was not compelled to amend its codification of the fair use doctrine upon, or since, implementation of Berne in 1989. SENFTLEBEN, *supra* note 18, at 167. Berne dispute resolution mechanisms are not as sophisticated

developments in various influential countries suggest a growing receptiveness to free expression values and the concept of fair use.<sup>65</sup>

Two concepts in copyright law—"fair dealing" and "public interest"—have the potential to expand and encompass a broader notion of fair use than has been traditionally recognized in legal systems outside the United States. Fair dealing describes a body of enumerated statutory exceptions to copyright, each dependent on a particular context, such as research or news reporting.<sup>66</sup> Public interest is a historical common law doctrine based in the inherent power of the judiciary.<sup>67</sup> Both concepts may be found in a common law jurisdiction such as the United Kingdom.<sup>68</sup> Civil law systems are naturally limited to the statutory enumeration of copyright limitations and exceptions and may dispense with the "fair dealing" moniker.<sup>69</sup> The concept of public interest may lurk under the surface, though, as international backstops, such as the European Convention on Human Rights, overarching common and civil law norms alike.

British case law has indicated a modest willingness to indulge expansion in fair dealing or public interest. In a 2000 copyright case, *Hyde Park Residence Ltd. v. Yelland*, the Court of Appeal, per Aldous, L.J., examined both statutory fair dealing and common law public interest defenses of the use of security-video stills of Princess Diana and Dodi Fayed.<sup>70</sup> The fair dealing analysis involved elements reminiscent of the U.S. fair use doctrine, including the user's purpose and the quantity of the taking (held, excessive), but the U.K. analysis occurred within the confines of the fair dealing exception for reporting on current events.<sup>71</sup> The court considered also, though held inapplicable, a public interest defense, which would authorize the court to "refuse to enforce copyright" in case of libelous, immoral, obscene, scandalous, or irreligious content.<sup>72</sup> What makes *Yelland* noteworthy is that the contemplated public interest defense was not confined to any of the "special cases"; of fair dealing; rather, as explained by Mance, L.J., "the

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as those in the WTO system. Technically, the International Court of Justice may resolve Berne disputes, but it is an option that has not been exercised. Newby, *supra* note 32, at 1645-46.

<sup>65</sup> See *infra*, notes 70-85, 111-21 and accompanying text.

<sup>66</sup> E.g., SENFTLEBEN, *supra* note 18, at 47-50.

<sup>67</sup> E.g., Dworkin, *supra* note 33, at 165.

<sup>68</sup> E.g., Dworkin, *supra* note 33, at 159, 165.

<sup>69</sup> The range and scope of enumerated exceptions in common law and civil law jurisdictions vary greatly and do not necessarily depend on a nation's affluence. Cf. Newby, *supra* note 32, at 1643-44. For example, Newby reports limited and rigid fair dealing exceptions in Argentina, a broader notion of fair dealing in India, and widely scattered statutory copyright exceptions in Germany and Japan. Newby, *supra* note 32, at 1643-44.

<sup>70</sup> *Hyde Park Residence Ltd v. Yelland*, (2001) Ch. 143 (U.K.).

<sup>71</sup> *Id.* at 157-59.

<sup>72</sup> *Id.* at 159-68.

circumstances in which the public interest may override copyright are probably not capable of precise categorisation or definition."<sup>73</sup> A common law defense, fair dealing survived the adoption of the principal Berne implementation law of the U.K., the Copyright, Designs and Patent Act of 1988 (U.K. Copyright Act), by a provision that preserved pre-existing, copyright-preclusive rules of law in the public interest.<sup>74</sup>

Okediji in 2000 dismissed the public interest articulation in *Yelland* as more like the continental notion of a public order override than "an overall philosophy of fair use."<sup>75</sup> But the following year, the public interest asserted itself again in a case that earned considerable attention in the literature, *Ashdown v. Telegraph Group Ltd.*<sup>76</sup> *Ashdown* involved the fair dealing and public interest defenses of the media publication of a leaked public record, and the Court of Appeal considered specifically the impact on copyright of Article 10, the free expression provision, of the European Convention on Human Rights.<sup>77</sup> Consistent with the U.S. approach in *Eldred v. Ashcroft*, upholding the Copyright Term Extension Act against a First Amendment challenge,<sup>78</sup> the lower court had held that the U.K. Copyright Act "already strikes the appropriate balance between the rights of owners of copyright and the right of freedom of expression."<sup>79</sup> The Court of Appeal did not agree.<sup>80</sup> The court wrote that both the statutory fair dealing defense and the common law public interest defense are grounded in the freedom of expression.<sup>81</sup> Recognizing the usual idea-expression dichotomy of copyright, the court acknowledged that Article 10 nevertheless protects the expression of both "information and ideas," and the protection of *information* allows, in "rare circumstances," a content user, such as a journalist, to reproduce "the very words used by a person."<sup>82</sup> The court considered freedom of expression in both its fair dealing and public interest analyses, on the former recognizing that "balanced reporting on a matter of current public interest" must be free of sanction as a matter of human rights.<sup>83</sup> Strikingly, the *Ashdown* court rejected the Aldous approach to public interest from *Yelland* in

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<sup>73</sup> See *id.* at 172 (Mance, L.J.).

<sup>74</sup> *Id.* at 160 (citing Copyright, Designs and Patents Act, 1988, c. 48 § 171(3) (U.K.)).

<sup>75</sup> Okediji, *supra* note 1, at 116 n.161.

<sup>76</sup> *Ashdown v. Telegraph Group Ltd.*, [2002] Ch. 149 (U.K.).

<sup>77</sup> *Id.* at 157.

<sup>78</sup> *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

<sup>79</sup> *Ashdown*, [2002] Ch. 149, ¶ 2 (citing *Ashdown v. Telegraph Group Ltd.*, [2001] Ch. 685 (U.K.)).

<sup>80</sup> See *id.* ¶¶ 2, 45, 59.

<sup>81</sup> *Id.* ¶¶ 33, 43.

<sup>82</sup> *Id.* ¶¶ 42-43, 45 (discussing *Fressoz & Roire v. France*, 31 Eur. H.R. Rep. 28, ¶ 54 (1999)).

<sup>83</sup> *Id.* ¶¶ 68-69.

favor of the Mance approach, that the circumstances in which public interest may override copyright are "not capable of precise categorisation or definition."<sup>84</sup>

In a 2004 chapter on fair dealing and free expression, Patrick Masiyakurima concluded that *Ashdown* was not a significant departure from precedent in U.K. copyright law because the public interest defense was already a familiar feature limited to a narrow class of cases concerning breach of confidence, to which class *Ashdown* indeed belonged.<sup>85</sup> Masiyakurima worried about the 2001 European Copyright Directive,<sup>86</sup> which, like the Digital Millennium Copyright Act with respect to fair use in the United States,<sup>87</sup> restricted the extension of the fair dealing defense in the digital media context—for example, by requiring, under U.K. law, compensation to the copyright holder in what might otherwise be an instance of fair dealing.<sup>88</sup> Masiyakurima examined six factors employed by U.K. courts in analyzing "fairness" in copyright defenses: (1) published or unpublished nature of the work, disfavoring use of the latter as in *Ashdown*; (2) the manner of obtaining the work, disfavoring a leak as in *Yelland*; (3) the quantity or quality of the taking, as in *Yelland*; (4) the commercial or non-commercial purpose of the use, disfavoring the former; (5) the user's motives, again disfavoring pecuniary

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<sup>84</sup> *Id.* ¶ 58.

<sup>85</sup> Patrick Masiyakurima, *Fair Dealing and Freedom of Expression*, in COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION—INTELLECTUAL PROPERTY—PRIVACY, *supra* note 43, at 87–88.

<sup>86</sup> Council Directive 2001/29/EC, Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 (EU).

<sup>87</sup> Digital Millennium Copyright Act, Pub L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

<sup>88</sup> Masiyakurima, *supra* note 85, at 94. The U.S. Digital Millennium Copyright Act (DMCA) and the European Copyright Directive are not identical, however, in their infamous anti-circumvention provisions, and the European instrument is in one respect more accommodating of the rights of content users. The DMCA *ex post* forgives the user who acted with fair intention to circumvent technological protections. See 17 U.S.C. § 1201(a)(1) (2006). In contrast, the European instrument requires that national legal systems compel copyright holders to accommodate statutorily excepted uses in the design of their technological protection measures, for example by allowing libraries to make archival copies. Council Directive 2001/29/EC, Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 (EU). This distinction is explored in Séverine Dusollier, *Fair Use by Design in the European Copyright Directive of 2001*, COMM. OF THE ACM, Apr. 2003, at 51. The liberalness of the Copyright Directive is tempered by its contemplation of closed-norm systems; there is no compulsion to accommodate broad fair use. Moreover, Dusollier was rightly skeptical of how zealously copyright holders will accommodate copyright exceptions voluntarily, and of how zealously European states will act to compel accommodation. *Id.* at 52–55. Bringing together the worst of both worlds, Australia, pursuant to a free-trade agreement with the United States, harmonized its closed-norm copyright exception regime with the DMCA model. See Copyright Amendment Act 2006, No. 158 (2006) (Austl.); Dusollier, *supra*, at 52. New Zealand recently struck out in a different direction with a more flexible adaptation of the DMCA. See Copyright (New Technologies) Amendment Act 2006, No. 27 (2008) (N.Z.); Posting of Michael Geist, New Zealand's Digital Copyright Law Demonstrates Anti-Circumvention Flexibility, <http://www.michaelgeist.ca/content/view/2829/125/> (Apr. 9, 2008).

interests; and (6) whether the user's purpose could have been achieved by other means, as descriptive words might have substituted for the photos in *Yelland*, or the content in *Ashdown* might have been communicated by paraphrase rather than exact words.<sup>89</sup> Considering these inquiries, especially insofar as they subordinate the public interest in the disclosure of truthful information to personal property interests, Masiyakurima concluded that the fair dealing and public interest defenses woefully fail to protect free expression.<sup>90</sup>

The Supreme Court of Canada lent a "large and liberal interpretation" to a statutory fair dealing defense for "research, review, private study[,] and criticism" in *CCH Canadian Ltd. v. Law Society of Upper Canada*.<sup>91</sup> The court ruled that the custom photocopying policies of the Great Library at Osgoode Hall did not infringe the copyrights of legal publishers.<sup>92</sup> As an introductory matter, the Court explained that fair dealing is poorly understood as "simply a defence" to copyright infringement, and that fair dealing is instead the embodiment of "a user's right," necessary "to maintain the proper balance between the rights of a copyright owner[']s and users' interests" and is "an integral part of the scheme of copyright."<sup>93</sup> The Court found "reasonable safeguards" in reference librarians' discretion to determine the reasonableness of a patron's copying request.<sup>94</sup> The Court found it unnecessary to decide the case in terms of specific instances of patron use of the photocopying policy; rather, the library's "general practice" provided the proper level of abstraction for fairness analysis.<sup>95</sup> The Court acknowledged "that there [i]s no set test for fairness" and recited an open-ended, multi-factor test, admittedly derived in part from the U.S. fair use analysis, considering: "(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work."<sup>96</sup> The Court indicated that fair dealing factors are highly sensitive to context.<sup>97</sup> For example, as to the quantity of taking, the Court wrote that research might sometimes require "copy[ing] an entire academic article," while criticism usually would not require copying a whole work.<sup>98</sup>

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<sup>89</sup> Masiyakurima, *supra* note 85, at 97-106.

<sup>90</sup> See Masiyakurima, *supra* note 85, at 106-07.

<sup>91</sup> *CCH Canadian Ltd. v. Law Soc'y of Upper Can.* [2004] 1 S.C.R. 339, ¶¶ 51, 64 (Can.).

<sup>92</sup> *Id.* ¶ 88.

<sup>93</sup> *Id.* ¶¶ 48-49.

<sup>94</sup> *Id.* ¶¶ 66-72.

<sup>95</sup> *Id.* ¶ 63.

<sup>96</sup> *Id.* ¶¶ 53, 60 ("[T]here may be factors other than those listed here[.]").

<sup>97</sup> *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] 1 S.C.R. 339 ¶ 52 (Can.).

<sup>98</sup> *Id.* ¶ 56.

The fair dealing analysis of *CCH Canadian* occurs within the confines of the research exception to copyright,<sup>99</sup> and it is not unusual to see overlap between fair dealing analysis and U.S. fair use factors.<sup>100</sup> At the same time, though, the specter of fair use haunts the case. The Court's general understanding of fair dealing as an embodiment of user rights, rather than a simple articulation of exceptions to a statutory norm,<sup>101</sup> is reminiscent of the constitutional spirit that animates the U.S. fair use doctrine. Setting the level of abstraction to analyze general library policy rather than specific copy requests permitted the Court's deference to librarians to determine fairness on a case-by-case basis. But the Court's analysis offers librarians at other libraries no more certainty than U.S. fair use analysis affords librarians in the United States. The sensitivity of the fair dealing factors to context introduces only more flexibility and uncertainty, rendering a fair dealing analysis in which the multi-factor inquiry overshadows the threshold requirement of a research purpose.<sup>102</sup>

Alain Strowel and François Tulkens cited recent cases from Belgium and France demonstrating increased sensitivity to free expression in copyright.<sup>103</sup> The U.S. Supreme Court recognized parody especially as meriting fair use analysis under U.S. doctrine, in *Campbell v. Acuff-Rose Music, Inc.*<sup>104</sup> But parody has fared uncertainly on the shoals of fair dealing or civil law copyright exceptions because parody cuts across use categories and is sometimes not listed as a category unto itself.<sup>105</sup> A perpetrator of parody nevertheless prevailed in a Belgian case of both copyright and trademark, the court applying a principal employed in *Campbell* to find that the parodist used no more of the original than necessary to accomplish effective criticism.<sup>106</sup> Strowel and Tulkens reported by way of analogy that parodists similarly prevailed in trademark infringement suits in France against powerful complainants Danone and Esso or did not prevail in another case when the trademark use was excessive.<sup>107</sup> Strowel and Tulkens reported, as well, that

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<sup>99</sup> *Id.*

<sup>100</sup> *E.g.*, SENFTLEBEN, *supra* note 18, at 113.

<sup>101</sup> *CCH Canadian Ltd.*, [2004] 1 S.C.R. 339 ¶ 48.

<sup>102</sup> *Cf.* discussion of Ginsburg, *supra* note 57.

<sup>103</sup> Alain Strowel & François Tulkens, *Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation, and Access*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES, *supra* note 18, at 287.

<sup>104</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>105</sup> *E.g.*, Strowel & Tulkens, *supra* note 103, at 297. For example, Australia added a parody exception only in 2006. See Copyright Amendment Act, 2006, No. 158, sched. 6, pt. 3, § 200AB(5) (Austl.).

<sup>106</sup> Strowel & Tulkens, *supra* note 103, at 298–99 (discussing *Vers l'avenir v. L'avenir vert*, Sup. Ct., Apr. 5, 2001, *Auteurs & Media*, 2001, 400, note B. Michaux (Fr.)).

free expression was considered by Belgium, French, and Dutch courts in disputes over high-technology access to copyrighted works, even if copyright holders won in the end.<sup>108</sup> Strowel and Tulkens concluded that the international copyright regime risks a free expression backlash if it does not become more sensitive to fair use demands,<sup>109</sup> especially amid legal and technological developments that afford copyright holders control over access, in addition to the traditional control over reproduction.

The Okediji article was prescient, and scholarly concern over free expression in the international copyright regime has since multiplied. Eric Barendt might console Masiyakurima, as Barendt concluded in 2005 not only that *Ashdown* was right about the need to weigh free expression in the copyright balance, but that *Ashdown* was wrong that such a case would be "rare."<sup>110</sup>

Indeed, *Ashdown* was not the first case of its kind. Writing in 2000—the same year that the Okediji article appeared, but before *Ashdown*—P. Bernt Hugenholtz documented a number of European cases in which freedom of expression had been regarded in the copyright mix as a counterweight to the copyright holder's interests.<sup>111</sup> Hugenholtz documented a long-term recognition of freedom of expression in the German copyright balance dating to 1968,<sup>112</sup> and he cited a trial court ruling in a French case documented in later proceedings by Strowel and Tulkens.<sup>113</sup> The Dutch Supreme Court in 1995 recognized "room to move *outside* the existing system of exemptions, by balancing interests," in a dispute over copyrighted perfume bottles.<sup>114</sup> The Amsterdam Court of Appeals subsequently weighed Article 10 in its analysis of a dispute over Anne Frank diary fragments, though ruling ultimately for the copyright holder in 1998.<sup>115</sup>

<sup>107</sup> Strowel & Tulkens, *supra* note 103, at 300–02 (citing Cour d'appel [CA] [regional court of appeal] Paris, Apr. 30, 2003, 4e ch., 2003/17, 81 & note J. Verbeek & A. Wybo; *Esso v. Greenpeace*, Cour d'appel [CA] [Court of Appeal] Paris, Feb. 26, 2003, 14 ch.; *Areva v. Greenpeace*, Tribunal de grande instance [T.G.I.] [Court of First Instance] Paris, July 9, 2004).

<sup>108</sup> Strowel & Tulkens, *supra* note 103, at 305–06, 309–10 (citing *Index v. Biblio*, Ct. Cassation, Sept. 25, 2003, *RW*, [2003-2004], 1179 (Belg.); Cour Suprême [Supreme Court], Nov. 13, 2003, *JCP* 2004, no. 21–22, 955, note C. Geiger (Fr.); *Church of Scientology/Dataweb*, Gerechtshof [Hof] [ordinary court of appeals], 's-Gravenhague, 4 Sept. 2003, *Computerrecht* 2003/6, 357, *Auters & Media* 2004/1, 44, note A. Strowel & G. Gathem (Neth.)).

<sup>109</sup> Strowel & Tulkens, *supra* note 103, at 312.

<sup>110</sup> Barendt, *supra* note 18, at 15.

<sup>111</sup> Hugenholtz, *Copyright and Freedom of Expression in Europe*, *supra* note 3.

<sup>112</sup> *Id.* at 355 (discussing Kammergericht [KG] [Court of Appeals] Nov. 26, 1968, 54 *Archiv für Urheber- und Medienrecht* [UFITA] 296 (F.R.G.)).

<sup>113</sup> *Id.* at 357–58 (citing *In re Utrillo*, Tribunal de grande instance [T.G.I.] [Court of First Instance] Paris, Feb. 23, 1999, 98/7053 (unpublished) (Fr.)); *see supra* note 108.

<sup>114</sup> *Id.* (citing *Dior/Evora*, Hoge Raad der Nederlanden HR [Supreme Court of the Netherlands], 20 oktober 1995, NJ 682 (Neth.)).

<sup>115</sup> *Id.* (citing *Anne Frank Fonds/Het Parool*, Gerechtshof [Hof] [ordinary court of appeals], Amsterdam, 20 juli 1999, *Informatierecht/AMI* 116 (Neth.)).



Hugenholtz acknowledged that these cases were, at that time, still exceptional, often departures from precedent within their own national judicial systems.<sup>116</sup> The European Human Rights Commission had once ducked the Article 10 question, in *De Geillustreerde Pers N.V. v. Netherlands*,<sup>117</sup> and once dismissed it cavalierly, in *France 2 v. France*,<sup>118</sup> and even the German Supreme Court did not share lower German courts' enthusiasm for thinking outside the box.<sup>119</sup> But Article 10 momentum was sufficient to kindle criticism of the nascent European Copyright Directive for failing to account for the freedom of expression protected by Article 10, and for taking a closed-norm approach to permissible copyright exceptions.<sup>120</sup> Hugenholtz concluded that Article 10 of the European Convention held out promise "as a lifebuoy for bona fide users drowning in a sea of intellectual property."<sup>121</sup>

Also writing in 2000, Anna Maria Balsano identified fair use as a principal problem in information-age intellectual property law.<sup>122</sup> Contributing to a United Nations Educational, Scientific and Cultural Organization (UNESCO) study, Pouillet observed that the Internet was once touted as a "grand university forum of ideas," but is "daily more and more like a trade fair" with content "tattoo[ed]" to signal ownership and effect control.<sup>123</sup> Rather than allowing technology and contract to displace copyright law, Pouillet concluded, the international community should "insist . . . that technology should conform to [copyright]" by making use rights explicit.<sup>124</sup> According to Daniel J. Gervais, the flexibility of fair use and its adaptability to new, technology-dependent uses not contemplated by closed-norm exceptions have prompted "a number of countries currently using the more

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<sup>116</sup> See *id.* at 354 (stating that European courts are "beginning to recognize that copyright must, under exceptional circumstances, give way to the freedom of expression").

<sup>117</sup> Hugenholtz, *Copyright and Freedom of Expression in Europe*, *supra* note 3, at 358–59 (citing *De Geillustreerde Pers N.V. v. Netherlands*, 8 Eur. Comm'n H.R. Decs. & Rep. 1976, at 5 (July 6, 1976) (Neth.)).

<sup>118</sup> *Id.* at 359–60 (citing *France 2 v. France*, Case No. 30262/96, [1999] Informatierecht/AMI 115 (Eur. Comm'n H.R. Jan. 15, 1997) (Fr.)).

<sup>119</sup> *Id.* at 355–56 (citing *In re Lili Marleen*, [BGH] [Federal Court of Justice] Mar. 7, 1985, Bundesgerichtshof [GRUR] 34 (F.R.G.)).

<sup>120</sup> *Id.* at 355–56.

<sup>121</sup> *Id.* at 343–44. To be fair, Hugenholtz concluded that chance of rescue was remote. The European Court of Human Rights might rule in limited fashion, for example, that national copyright laws must allow for parody, or free political discourse, but the court will not "be easily convinced to apply Article 10 in order to restore the equilibrium" of copyright's "delicate balance." *Id.* at 363.

<sup>122</sup> Anna Maria Balsano, *An International Legal Instrument for Cyberspace?: A Comparative Analysis with the Law of Outer Space*, in *THE INTERNATIONAL DIMENSIONS OF CYBERSPACE LAW* 127, 131 (Tereso Fuentes-Camacho ed., 2000).

<sup>123</sup> Yves Pouillet, *Some Consideration on Cyberspace Law*, in *THE INTERNATIONAL DIMENSIONS OF CYBERSPACE LAW* *supra* note 122, at 152.

<sup>124</sup> *Id.* at 152–53.

restrictive fair dealing exceptions” to contemplate introduction of a fair use doctrine.<sup>125</sup>

A number of scholars have argued that not even U.S. fair use goes far enough to protect freedom of expression any longer because the utilitarian doctrine has been limited in the U.S. Congress and analyzed to the exclusion of free expression values in the U.S. Supreme Court.<sup>126</sup> Lamenting the absence of express human rights norms amid the careful protection of intellectual property rights in TRIPS, Uma Suthersanen argued for a public interest balancing rule in international copyright law.<sup>127</sup> Pointing to the “categorisation” language of *Ashdown*, Gerald Dworkin also proposed founding invigorated protection for free expression on an expanded public interest defense.<sup>128</sup> Marshall Leaffer proposed “a public benefit approach” to save fair use from global market-driven irrelevance in U.S. law.<sup>129</sup> Robert Burrell and James Stellios argued for an expansive fair dealing analysis in Australian copyright cases to accommodate the “implied freedom of political communication” recognized in Australian constitutional law.<sup>130</sup>

Tempering her colleagues’ enthusiasm, Fiona Macmillan documented judicial skepticism of public-interest arguments, citing *Eldred* in the United States, *Yelland* in the United Kingdom, and cases from Australia.<sup>131</sup> Moreover, in a Danish case, the court rejected a challenge, based in part on Article 10 of the European Convention on Human Rights, to the first sale doctrine under the European Copyright Directive.<sup>132</sup> *Laserdisken ApS* objected to the European rule that a

<sup>125</sup> Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTEL. PROP. L. REV. 1, 27 (2005).

<sup>126</sup> See, e.g., Gordon, *supra* note 18, at 72, 76–78; see also Neil Weinstock Netanel, *Copyright and the First Amendment: What Eldred Misses—and Portends*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES, *supra* note 18, at 127, 129, 144, 146, 148, 150; cf. *supra* note 42.

<sup>127</sup> Uma Suthersanen, *Towards an International Public Interest Rule? Human Rights and International Copyright Law*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES, *supra* note 18, at 111, 121, 124.

<sup>128</sup> Dworkin, *supra* note 33, at 164–65, 167. Kevin Garnett cataloged British cases in which an *Ashdown* approach might have varied the outcome. Kevin Garnett QC, *The Impact of the Human Rights Act 1998 on UK Copyright Law*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES, *supra* note 18, at 171, 193–207.

<sup>129</sup> Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 OHIO ST. L.J. 849, 854–55 (2001).

<sup>130</sup> Robert Burrell & James Stellios, *Copyright and Freedom of Political Communication in Australia*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES, *supra* note 18, at 257, 279–85. For the referenced analysis, see *Lange v. Australian Broad. Corp.*, (1997) 189 C.L.R. 520 (Austl.).

<sup>131</sup> Fiona Macmillan, *Commodification and Cultural Ownership*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES, *supra* note 18, at 35, 64.

<sup>132</sup> *Laserdisken ApS v. Kulturministeriet*, Case No. C-479/04, Østre Landsret [Grand Chamber], 2006 E.C.R. I-08089, Sept. 12, 2006 (Den.) (upon reference for preliminary ruling).

copyright holder's right of distribution to control resale of work is exhausted only after first sale in the European Community, as opposed to first sale outside the Community.<sup>133</sup> The court concluded that the European copyright rule satisfied the Article 10 test for "necess[ity] in a democratic society" and proportionality between legislative means and legitimate ends.<sup>134</sup> The Court did at least entertain the Article 10 question.<sup>135</sup>

Jeremy Phillips cited a French case rejecting a free expression argument as inapplicable to defend a commercial use.<sup>136</sup> Raymond T. Nimmer argued plainly that high technology access controls are consistent with free expression principles because fair use is not a constitutional imperative, but an equitable convenience subject to legislative definition.<sup>137</sup>

All legislative and scholarly wrangling aside, U.S.-style fair use has plainly gained ground in at least one jurisdiction: Israel, where the Knesset in 2007 enacted a copyright law with a statutory fair use doctrine, effective May 2008.<sup>138</sup> The Israeli Copyright Act permits fair use "for purposes *such as*," listing closed-norm prototypes only as exemplars: "private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution."<sup>139</sup> Clearly modeled after U.S. Copyright Act section 107, the act tests fair use according to four factors: "(1) [t]he purpose and character of the use; (2) [t]he character of the work used; (3) [t]he scope of the use, quantitatively and qualitatively, in relation to the work as a whole; [and] (4) [t]he impact of the use on the value of the work and its potential market."<sup>140</sup> The Act further provides that "[t]he Minister may make regulations prescribing the conditions under which a use shall be deemed as fair use."<sup>141</sup> Stanford Fellow Zohar Efroni wrote that this latter section "permits the minister to introduce some more certainty into fair use law, by

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<sup>133</sup> *Id.* ¶¶ 3–5.

<sup>134</sup> *Id.* ¶¶ 60–66. As characterized by P. Bernt Hugenholtz in the free expression area, the test for "necessity in a 'democratic society'" takes account of four factors: "the degree of public interest in the speech," "the substantiality of the restrictions," "the aim of the regulation," and "the level of European consensus." Hugenholtz, *supra* note 3, at 362.

<sup>135</sup> *Laserdisken*, *supra* note 132, at 64–65.

<sup>136</sup> Jeremy Phillips, *Databases, the Human Rights Act and EU Law*, in COPYRIGHT AND FREE SPEECH, *supra* note 18, at 411–12 (discussing *Société Reed Expositions France v. Société Tigest Sarl*, Cour d'appel [CA] [Court of Appeal] Paris, [2003] E.C.D.R. 206 (Fr.)).

<sup>137</sup> Raymond T. Nimmer, *First Amendment Speech and the Digital Millennium Copyright Act: A Proper Marriage*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES, *supra* note 18, at 376–77.

<sup>138</sup> Copyright Act, 5768–2007 2007 LSI 34 (Isr.), available at <http://www.tau.ac.il/law/members/birnhack/IsraeliCopyrightAct2007.pdf> (unofficial trans.).

<sup>139</sup> *Id.* § 19(a) (emphasis added).

<sup>140</sup> *Id.* § 19(b); cf. 17 U.S.C. § 107 (2006).

<sup>141</sup> Copyright Act, 5768–2007 2007 LSI 34, § 19(c).

creating irrefutable presumptions (so I read it) that no liability attaches under certain stipulated conditions."<sup>142</sup> Greater certainty in the application of fair use can only make the doctrine more palatable to analysis under Berne and TRIPS, both treaties to which Israel is a signatory.

#### V. Implications and Conclusion: A Fertile Field for a New Norm

At first blush, it is ironic that the United States is at once the home of the liberal fair use doctrine and an instigator of the information-commodified, TRIPS-style approach to international copyright law. Eric Allen Engle, however, saw not irony, but a strategy to "consolidat[e] U.S. global hegemony" in the international market for intellectual property by simultaneously championing a free trade regime at home and reinforcing an economic protectionist regime abroad.<sup>143</sup> That strategy, Engle predicted, will backfire.<sup>144</sup> If globalization is a stronger force than U.S. foreign policy, and it likely is, the economic protectionist regime of the international marketplace will diminish, if not kill, fair use in the United States.<sup>145</sup> Indeed, Engle suggested, the United States itself might surrender to the temptation to abolish fair use doctrine.<sup>146</sup> But Engle proposed a better U.S. strategy: *export fair use*.<sup>147</sup> In the end, he concluded simply, the world would be better served by a TRIPS regime that embraces fair use than by one that eschews it.<sup>148</sup>

Okediji proposed the formal introduction of fair use into international copyright law in 2000, but at that time, her proposal ran against the grain. Now the row might be easier to hoe. Engle feared that U.S. insistence on a model of international copyright law in the information-commodification vein, failing to account for free expression, would backfire by squelching free expression values in the U.S. domestic market. However, information commodification in international copyright might be backfiring in a different way: the international field might be reacting with a fertile receptiveness to free-expression values. Legal and technological restraints on copyright exceptions, facilitated by economically protectionist interpretations of TRIPS Article 13 and Berne Article 9(2) as incompatible with the concept of fair use, might be prompting the reactive growth of the free-expression protectionism. This may be occurring through various

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<sup>142</sup> Zohar Efroni, *Israel's Fair Use*, STANFORD CENTER FOR INTERNET AND SOCIETY, Jan. 30, 2008, 2:05, <http://cyberlaw.stanford.edu/node/5670>.

<sup>143</sup> Engle, *supra* note 17, at 189.

<sup>144</sup> Engle, *supra* note 17, at 190.

<sup>145</sup> Engle, *supra* note 17, at 190 (discussing the conflict between globalization, intellectual property protections, and the United States' position on fair use in the context of the TRIPS).

<sup>146</sup> Engle, *supra* note 17, at 190.

<sup>147</sup> Engle, *supra* note 17, at 191.

<sup>148</sup> Engle, *supra* note 17, at 191.

nations' adoption of fair use doctrine, through invigoration of a public interest doctrine, or through expansion of the fair dealing doctrine. The international copyright regime might now, more than ever, be receptive to a U.S.-driven interpretation of TRIPS and Berne that is compatible with a broad public policy exception for copyright. The adoption of fair use in Israel—a signatory to both Berne and TRIPS—signals, on the one hand, the dwindling of the possibility that fair use will ever be ruled incompatible with international copyright law, and, on the other hand, the escalating possibility that fair use will make headway as an international norm.

This shift is indicated by many more authorities than occupied the marketplace of ideas when Okediji posited her thesis in 2000. Senftleben advanced a thesis that not even Okediji would stake out in 2000—that the fair use doctrine can be squared with the Berne three-step test. The fair use doctrine has now stood the test of time, having survived U.S. accession to Berne by two decades and U.S. accession to TRIPS by a dozen years, and having been imported into Israeli law. Whatever “special case” meant at the time of the 1967 Stockholm Act—there is no reason to doubt Ficsor, Jehoram, and Ricketson as an originalist matter—it is exceedingly difficult today to argue that the century-old fair use doctrine is less susceptible of predictable adjudication than the fair dealing defense in the United Kingdom or the scattered array of statutory copyright exceptions in Germany. The proliferation of new technologies, to which the fair use test is immediately adaptable (if not contravened by legislative mandate), has only further befuddled rigid civil law exceptions to copyright.

Meanwhile, Okediji's sensitivity to free expression values in 2000 has now been echoed and amplified by a chorus of researchers and, albeit in limited fashion, by courts in the wake of *Ashdown*. This invigorated the European Convention Article 10 arguments, which were forecast by Hugenholtz, but which went nowhere in *Yelland*, *Laserdisken ApS*, *De Geïllustreerde*, and *France 2*. The Canadian Supreme Court in the exemplary *CCH Canadian* case recognized the equivalent magnitude of copyright holder and user rights and accordingly described a fair dealing analysis that, while purporting to remain within the confines of a statutory exemption for research and criticism, smacked of both the flexibility and the uncertainty inherent in U.S. fair use analysis. Strowel and Tulken reported consideration in continental courts of free expression values in cases of intellectual property parody and technological access. Reaching beyond the utilitarian foundation of the U.S. fair use doctrine, Suthersanen, Dworkin, Leaffer, and Burrell and Stellios all called for some concept of a broad copyright exception to be based in the public interest, cutting across the narrow category-dependent exceptions of traditional domestic copyright law.

Admittedly, not everyone is on the same bandwagon. Doomsayers still warn of the death of fair use, and there is evidence to support that prediction. The lack of consideration of fair use in the access control regimes of the U.S. Digital Millennium Copyright Act and the European Copyright Directive suggests that the

Engle forecast of the possible U.S. surrender of fair use has not yet been dispelled. The view that the copyright balance of property rights and free expression is properly drawn by the legislature in the first instance remains alive and well in the twenty-first century, expressed by courts in Europe, Australia, and the United States, and by influential scholars such as Raymond T. Nimmer.

Both content users and copyright holders should be cognizant of this tension over fair use in the international copyright regime. Copyright users are in a better position than ever to press national governments to adopt a fair use concept, particularly by pressing for expansion of existing notions of fair dealing and the public interest and by referencing the impact on the domestic law of international human rights instruments such as the European Convention. Copyright holders, meanwhile, must be careful in their strategic choices. For U.S.-based intellectual property owners, insistence on economic protectionism in the international market might well result in strangled fair use and a diminished free information trade in the domestic market. Alternatively, for copyright holders everywhere, insistence on economic protectionism in the international market might well result in a strong, reactive assertion of fair use. There is already seedling evidence of such a movement before the developing world has weighed in.

The better strategic goal for governments, copyright holders, and consumers alike, essentially as proposed by Engle and Okediji, remains the controlled introduction of a fair use or public interest doctrine. The changing international legal landscape suggests that it might no longer be necessary to formally incorporate a fair use doctrine into international law. But a confluence of interests urges that governments incorporate into their domestic laws some manner of public interest copyright exception that cuts across the traditional categories of copyright limitations and exceptions.

A copyright system out of balance, disproportionately favoring copyright holders, could chill creative productivity in the international marketplace and threaten to extinguish altogether creative output from the developing world. Such a flat creative market is not in the ultimate interests of businesses or consumers. Alternatively, a copyright system out of balance could fuel a backlash that, at best, corrupts the Berne/TRIPS system with an unmanageable public interest exception, kicking copyright out of balance in the opposite direction, or, at worst, condones rampant piracy in the global market. Certainly those results are not in the ultimate interests of businesses or consumers.

Business and government would do better to have a say now in the development of a workable fair use or public interest doctrine. The same technology controls that have been developed to restrain access can be employed instead to facilitate use in the public interest. Both domestic and international legal systems seem more receptive now than ever to such a development.