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**2006-12-15**

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http://hdl.handle.net/10539/19782

Schonwetter, T. (2006). The ‘fair use' doctrine and the implications of digitising for the doctrine from a South African perspective. The Southern African Journal of Information and Communication (SAJIC), 7, 32-53. https://doi.org/10.23962/10539/19782

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# The 'Fair Use' Doctrine and the Implications of Digitising for the Doctrine from a South African Perspective

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ABSTRACT: This article seeks to determine the scope of the "fair use" doctrine under South African copyright law. For these purposes, the legal requirements in the relevant international treaties for the doctrine are examined, particularly the so-called "three-step test". Subsequently, the legal situations in other countries and regions – South Africa's major trading partners the United States, Europe, and Australia – are described and compared. Thereafter, emphasis is placed on the impacts of digitising and the Internet on the fair use doctrine. Lastly, the article seeks possible solutions for South Africa with consideration of South Africa's unique situation as a country between the developed and developing worlds.

## Introduction

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

However, in the ancient world of Greece and Rome, the copying of a manuscript was a slow process, since no mechanical means for making multiple copies existed. Therefore and despite the fact that some ancient scholars were concerned about being recognised as the authors of their works, there was no developed copyright law.[2] All this changed when Johannes Gutenberg invented the printing press around 1440 in Germany, and for the first time a form of copyright protection was devised.[3] At first, states tried to control the distribution of printed material in order to protect the printing industry – not to protect the authors – against piracy, by granting printers local monopolies on publishing[4] and by establishing a register of licensed books. The vast majority of privileges were issued to printers; few were issued to authors (Mendis, 2003).

In the 17th Century, discussions started in Western Europe to establish the principles of authors' ownership of copyright and a fixed term of protection of copyright works.[5] These

1 Department of Commercial Law, University of Cape Town.

2 Some scholars argue, however, that the first form of protection for intellectual property took place in ancient Egypt; see e.g. Mendis, (2003) The historical development of exceptions to copyright and its application to copyright law in the Twenty-First Century, *Electronic Journal of Comparative Law*, Vol. 7.5.

3 UK Intellectual Property on the Internet website, *A history of copyright*, www.intellectual-property.gov.uk/std/resources/-copyright/history.htm, accessed 15 July 2005.

4 In the Fifteenth Century, so-called 'privileges' were awarded in Venice for protecting mechanical inventions and (later) books.

5 Web site of the Association of Research Libraries (ARL), *TIMELINE: A history of copyright in the United States*, www.arl.org/info/frn/copy/timeline.html, accessed 15 July 2005

discussions finally led to the first Copyright Act, the English Statute of Anne of 1710.[6] Subsequently, the United States introduced its first Copyright Act in 1790, and the French copyright laws of 1791 and 1793 were arguably[7] the first continental European pieces of copyright legislation.

On an international level, the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention) and the International Copyright Treaty of 1891 marked the first multilateral copyright treaties and initiated international copyright protection. Yet there is still no such thing as "international copyright" that automatically protects a work throughout the entire world. Protection against unauthorised use in a particular country essentially depends on the national laws of that country. Nonetheless, most countries do offer copyright protection to foreign works under certain conditions and these conditions have been greatly simplified by international copyright treaties and conventions.[8]

Nowadays, OH Dean defines copyright as:

> *the exclusive right in relation to work embodying intellectual content (i.e. the product of the intellect) to do or to authorise others to do certain acts in relation to that work, which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or profit (Dean, 1987: 1-1).*

However, in order to reach a balance between the contrasting interests of the authors and the public, certain limitations and exceptions to the exclusive rights of the authors exist.

Some of the most accepted exceptions, at least under Anglo-American copyright law, are the "fair use" or "fair dealing" doctrines. As an affirmative defence to an allegation of copyright infringement,[9] these doctrines allow copying without the author's consent in certain, limited circumstances. These doctrines are fundamentally based on the belief that not all copying should be banned, particularly in socially important endeavours such as criticism, news reporting, teaching and research. Thus, these doctrines safeguard the fundamental right to free speech and freedom of expression, which is widely recognised as one of the most fundamental principles in a civil society.

It has to be mentioned, however, that the concepts of fair use and fair dealing are not synonymous: the American fair use doctrine is, generally, much broader than the fair dealing

6 "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned". For the text of the Act, see Sterling (2003) *World copyright law*, Second Edition, Sweet & Maxwell, London.

7 Some authors, however, argue that Denmark's *Ordinance* of 1741 was the first continental European legislation as it recognised a general statutory right for authors.

8 Website of the Coalition for Networked Information, www.cni.org/docs/info.policies/US.Copyright.Basics.html, accessed 15 July 2005.

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

doctrine in, for example, South Africa. Yet the fundamental idea behind both doctrines remains the same. Hence this article will use the term "fair use" for both doctrines.

In South Africa, the Copyright Act 98 of 1978, which has been amended by several subsequent acts, governs all matters relating to copyright.[10] It is based on the provisions of the Berne Convention (Gibson, 2003: 706), and expressly states in section 41(4) that "no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf" (RSA, 1978).

Therefore no protection of copyright exists in terms of the common law in South Africa. Currently, the South African Copyright Act protects literary, musical and artistic works, sound recordings, cinematograph films, broadcasts, programme-carrying signals, published editions, and computer programs.[11] The Copyright Act defines each of these works in section 1. As soon as the two general requirements – originality[12] and existence in a material form[13] – are met, copyright emerges automatically as the Copyright Act dictates no formalities for copyright coming into being. The duration of copyright varies for the different types of work.[14]

The Copyright Act contains a fair use provision in section 12 for literary and musical works. In addition, section 13 allows for further unlicensed copying (such as in educational institutions). Subsequently, sections 15-19B extend the fair use provision of section 12 widely to artistic works, cinematograph films, sound recordings, broadcasts, published editions, and computer programs. The only copyright work not covered in this context is a programme-carrying signal (Gibson, 2003: 724).

Yet the precise limits of fair use in South Africa remain uncertain and vague,[15] and courts have a great deal of discretion in determining whether a certain kind of use of copyright material is fair or not in relation to the purpose for which it is used (Gibson, 2003: 725). Scholars have stated that an international standard for fair use does not exist from which any clarification regarding the scope of the fair use doctrine can be deduced (Okediji, 2000). However, most of the relevant international treaties contain the "three-step test" in order to set limits to limitations and exceptions on the authors' exclusive rights.[16] According to the test, limitations and exceptions must:

10 For a brief history of South African copyright law, see Dean (1987: 1-2A *et seq*).

11 Section 2(1) of the *Copyright Act* of 1978.

12 *Ibid*.

13 Sections 2(2) and 44 of the *Copyright Act* of 1978.

14 Section 3 (2) of the *Copyright Act* of 1978.

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

16 It has to be mentioned, however, that the three-step test in article 9(2) of the *Berne Convention* only applied to the right of reproduction.

- be confined to certain special cases;
- not conflict with the normal exploitation of the work; and
- not unreasonably prejudice the legitimate interests of the author.

Functionally, the three-step test exerts control over the fair use exception (Senftleben, 2004: 113). Hence, a brief analysis of the three-step test is required.[17]

## The three-step test

The three-step test[18] appears in the Berne Convention (article 9.2) as well as in the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1995 (article 13), the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) of 1996 (article 10) and the WIPO Performances and Phonograms Treaty (WPPT) of 1996 (article 16). Moreover, it makes another appearance in European legislation – in article 5.5 of the EU Copyright Directive of 2001.[19] Over the years, the scope of application of the doctrine has broadened significantly from a rule of referral in the Berne Convention to a mandatory rule in both TRIPS and the WCT (Heide, 1999: 105).

Despite its incorporation in a number of important intellectual property treaties, no significant degree of agreement exists with regard to the actual meaning of the test (Heide,1999: 105).

In 2000, for the first time a supra-national body ruled on the interpretation and application of the three-step test in the context of article 13 of TRIPS (Oliver, 2002: 124), after the European Union had filed a complaint with the WTO Dispute Settlement Body (DSB) panel ("the panel"),[20] claiming that sections 110(5)(a) and (b) of the American Copyright Act – the so-called homestyle and business exceptions – violate the TRIPS Agreement since they create too broad an exception to the public performance right (Jackson, 2003: 632). In this context the panel dealt, *inter alia*, with the meaning of the three-step test contained in article 13 of the TRIPS Agreement and extensively analysed each of the steps.[21] The decision provided valuable guidance to legislatures enacting legislation to comply with the three-step test and to those interpreting existing legislation (Oliver, 2002: 170). The limited precedent value of the panel's decision should, however, be borne in mind as the decision binds only the parties to

17 For an in-depth analysis of the three-step test, see Senftleben (2004: 1).

18 This article intends to outline the *status quo* of the legal discussion regarding the three-step test. For a comprehensive treatise on this issue, see Senftleben (2004).

19 *Directive 2001/29/EC*. The three-step test also appeared in article 6(3) of the *Computer Program Directive (91/250/EEC)* and article 6 (3) of the *Database Directive (96/9/EC)*.

20 For a detailed examination of the panel decision and a brief outline of the WTO dispute settlement procedure see Oliver (2002: 119 *et seq*).

21 Prior to the panel's decision, three leading commentators had offered analyses of the three-step test in the context of the *Berne Convention* before the year 2000. First and foremost, Ricketson in his 1987 treatise *The Berne Convention: 1886-1986*; Claude Masouyé (1978) in the *WIPO guide to the Berne Convention*; and Desbois, Françon & Kéréver (1976) in *Les conventions internationales du droit d`auteur et des droits voisins.*

the legal proceedings. Neither other member states nor domestic courts are bound by the decision; even a later WTO panel would arguably not be legally obliged to follow that decision (Oliver, 2002: 133).

According to the panel, all three steps of the three-step test apply cumulatively and a failure to satisfy one of the three steps results in the exception being disallowed.[22]

*'Certain special cases'*

In its analysis of the first step, the panel considered several dictionary definitions of "certain"[23] and "special"[24] and finally stated that:

> *the first condition of article 13 [TRIPS] requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of article 13's first condition does not imply passing a judgement on the legitimacy of the exceptions in dispute. However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition.* [25]

*'Not conflict with a normal exploitation of the work'*

The panel defined the term "exploitation" as "making use of" or "utilising for one's own ends".[26] In the following, the panel went on to determine what constitutes a "normal" exploitation and it stated that the meaning of the term "normal exploitation" contains two elements, one empirical and one normative.[27]

With regard to the *empirical connotation*, the panel emphasised that in considering the "work", each right must be considered individually[28] and that a "possible conflict with a normal exploitation of a particular exclusive right cannot be counterbalanced or justified by the mere fact of the absence of conflict with a normal exploitation of another exclusive right, even if the exploitation of the latter right would generate more income."[29] Subsequently, the panel turned to the question of whether a particular use constitutes a "normal exploitation". In this respect

22 *United States - Section 110 (5) of the US Copyright Act,* document WT/DS160/R para. 6.97

23 Such as "determined, fixed, not variable; definitive, precise exact" according to the *New shorter Oxford English dictionary*: 364.

24 Such as "having an individual or limited application or purpose" according to the *New shorter Oxford English dictionary*: 2971.

25 *United States - Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.112.

26 *Ibid*. at para. 6.165

27 *Ibid*. at para. 6.166

28 *Ibid*. at para. 6.173

29 *Ibid*.

it suggested consideration of "the ways in which an author might reasonably be expected to exploit his work in the normal course of events" (Ricketson, 1987: 483). The panel went on to adopt the American approach for the empirical connotation of "normal" to ask whether "there are areas of the market in which the copyright owner would ordinarily expect to exploit the work, but which are not available for exploitation because of this exception".[30]

For the *normative connotation* of the term "normal", the panel stated that "one way of measuring the normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance." [31]

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

> *that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work..., if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprive them of significant or tangible commercial gains.* [32]

*'Not unreasonably prejudice the legitimate interests of the author'*

Regarding the third condition, the panel noted that an analysis needs to be done in several steps. Firstly, it is necessary to define the "interests" of the authors at stake and to clarify which attributes make these interests "legitimate". Secondly, the term "prejudice" needs to be interpreted and what amount of it reaches a level that should be qualified as "unreasonable".[33] In the following, the panel considered the dictionary meanings of "interests",[34] "legitimate",[35] and "prejudice",[36] and lastly examined the question of which degree of prejudice should be considered as "unreasonable". The panel held in this regard that "prejudice to the legitimate

30 *United States - Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.97

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

32 *Ibid*. at para. 6.180.

33 *Ibid*. at para. 6.183.

34 *Ibid*. at para. 6.222.

35 The panel stated (*United States - Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.223): "the ordinary meaning of the term "interests" may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It may also refer to a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person. Accordingly, the notion of "interests" is not necessarily limited to actual or potential economic advantage or detriment."

36 The panel noted in this regard (*United States - Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.224): "The term "legitimate" has the meaning of (a) conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper; (b) normal, regular, conformable to a recognized standard type."

interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner." [37]

Moreover, the panel stated that it could not find any indication that "the assessment of whether the prejudice [...] is of unreasonable level"[38] should be limited to the right holders of the complainants' country, especially since prior WTO panel decisions held that a complaining party has no obligation to show its legal interest as a prerequisite for requesting a panel.[39]

Furthermore, the panel noted that a serious loss of profit for the author should be compensated, such as through a system of compulsory licensing with equitable remuneration.[40]

### Comparison with other countries

Due to the lack of an international standard for fair use, an analysis of the legal situation in other countries and regions – South Africa's major trading partners, the United States, Europe and Australia – is useful in order to analyse whether or not these approaches can either be adopted by South Africa or, at least, serve as a model.

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

#### *United States*

The legislation of the United States provides an example of the usage of open-ended provisions.

In 1841, Justice Story promulgated the fair-use doctrine in *Folsom v Marsh*[41] for the first time. Story's fair-use commentary has continued to shape the doctrine to this day.

Nowadays, the judicially created fair-use exception has its statutory basis in section 107 of the US Copyright Act of 1976.[42] As codified, the fair-use defence is a limitation on all of the exclusive rights of the author. Under the Copyright Act,[43] four non-exclusive[44] factors are to be considered to determine whether a particular action qualifies as fair use:

- the purpose and the character of the work;
- the nature of the copyright work;

37 *Ibid*. at para. 6.229.

38 *Ibid*. at para. 6.231.

39 *Ibid*.

40 *Ibid*. at para. 6.229.

41 *Folsom v. Marsh*, [1841] 9 Fed. Cas. at 348.

42 Certain additional specific provisions are made for fair use in various fields; see for example section 117 of the *US Copyright Act* of 1976.

43 *Act* of 1976.

44 US H.R. Rep. No. 94-1476, at 66 (1976).

- the amount and substantiality of the portion used in relation to the copyright work as a whole; and
- the effect of the use upon the potential market for or value of the copyright work.

These factors were intended to give further guidance to the courts in this matter rather than to restrict courts' application of the fair-use exception to a fixed, four-part test (Goldberg, 2002: 283). The use of the word "shall" in section 107 indicates that the courts must, as a minimum, consider these four factors in their fair-use analysis (Newby, 1999: 1639).

As an open-ended provision, section 107 has the advantage of being flexible when it comes to new kinds of uses (Ricketson, 2003: 68). However, the uncertainty of fact-specific inquiries that are required in copyright infringement cases complicates a consistent and predictable application of the fair-use doctrine in the United States. Courts[45] and commentators have attempted to refine the analysis of the four factors in an effort to bring greater uniformity and predictability to the application of this doctrine of "equitable reason".[46] Moreover, several guidelines[47] have emerged in an attempt to clarify, explain, and define the scope of the doctrine. But despite all efforts, fair use is still a doctrine that courts apply on a case-by-case basis.

*EUROPE*

The legislation of the European Union, in the form of the EU Copyright Directive,[48] can be used to illustrate the "closed list" approach.

In Europe, vast differences existed and still exist at a national level regarding copyright and its limitations, due to different cultural traditions or business practices (Hugenholtz, 2000: 499-500). Therefore, harmonising legislative action at the level of the European Union was desirable.[49] However, while EU Member States are, generally, expected to act in accordance with EU legislation, they have substantial freedom as to how closely domestic legislation matches the provisions of a Directive.

The aims of the Copyright Directive are twofold (Hugenholtz, 2000: 499):

- to bring the laws within the European Union regarding copyright and related rights in accordance with the WIPO Internet Treaties; and

45 The most relevant court cases in this regard are: *Sony Corp. of America v. Universal City Studios, Inc*. (464 U.S. 417 (1984)); *Harper & Row Publishers v. Nation Enterprises* (471 U.S. 539 (1985)); *Stewart v. Abend* (495 U.S. 207 (1990)); *Campbell v. Acuff-Rose Music, Inc.* (114 S.Ct. 1164 (1994)); *Salinger v. Random House* (811 F.2d 90 (2d Cir. 1987)); *Basic Books Inc. v. Kinko's Graphics Corp*. (758 F.Supp 1522 (1991)); *Sega Enterprises v. Accolade*, *Inc*. (977 F.2d 1510 (1992)); *American Geophysical Union v. Texaco, Inc*. (60 F.3d 913 (1994)).

46 US H.R. Rep. No. 94-1476, at 65 (1976).

47 Such as the so-called "Classroom Guidelines" of 1976, the Guidelines for Educational Uses of Music of 1976, the National Commission on New Technological Uses of Copyrighted Works (CONTU) Guidelines and the Conference on Fair Use (CONFU) Guidelines .

48 *Directive 2001/29/EC*, often referred to as the "InfoSoc Directive".

49 The *Copyright Directive* was supposed to have been adopted into the domestic laws by 22 December 2002, but several States have so far not enacted domestic implementing legislation.

- to harmonise the laws of the Member States.

In short, the EU Copyright Directive harmonises a number of fundamental rights: the reproduction right (article 2); the right of communication to the public and the right of availability to the public (article 3); and the distribution right (article 4). Furthermore, the Directive deals with the protection of technological protection measures (TPMs) and rights management information (articles 6 and 7).

Article 5 of the Directive deals extensively with exceptions and limitations to the rights set out in articles 1 to 4. Altogether, article 5 provides 21 exceptions, including exceptions for private and non-commercial use,[50] for libraries and archives,[51] for teaching and research purposes,[52] for people with disabilities,[53] and for criticism and review.[54] Fair use is not explicitly included as an exception as such.[55]

While the six exceptions mentioned in articles 5.1 and 5.2 apply solely to the reproduction right, the 15 exceptions enumerated in article 5.3 may be applied to both the reproduction right and the right of communication to the public or the right of availability to the public. Article 5.4 allows, generally, exceptions to the distribution right where such an exception is made in national law and only "to the extent justified by the purpose of the authorised act of reproduction". Finally, article 5.5 adopts the three-step test and thereby draws heavily on the WIPO Internet Treaties (Senftleben, 2004: 253). It applies to all exceptions under article 5.

Article 5.1 is the only mandatory provision in article 5. It requires Member States to provide an exception to the reproduction right for certain temporary acts which are transient or incidental and an integral and essential part of a technological process to enable a transmission in a network or a lawful use. Furthermore, these acts of reproduction must have no independent economic significance. This provision aims first and foremost at browsing[56] and caching.[57]

The exceptions allowed under articles 5.2 and 5.3 are optional. Therefore, Member States are free to adopt, maintain, or ignore these exceptions in their national legislation.

50 Article 5.2.b.

51 Article 5.2.c.

52 Article 5.3.a.

53 Article 5.3.b.

54 Article 5.3.d.

55 However, the introduction of an open-ended fair use provision was considered during the deliberations for the *Copyright Directive*. See Senftleben, 2004: 249 (footnote 1220).

56 Browsing means "[t]o look at a series of electronic documents on a computer screen by means of a computer program that permits the user to view multiple electronic documents in a flexible sequence by the process of activating hypertext 'buttons' within one document, which serves as a reference to the location of related document", website of *The Webster dictionary*, www.webster-dictionary.org, accessed 18 July 2005.

57 Caching means using a "form of memory in a computer which has a faster access time than most of main memory, and is usually used to store the most frequently accessed data in main memory during execution of a program", website of *The Webster dictionary*, www.webster-dictionary.org, accessed 18 July 2005.

However, Member States may introduce or maintain no other exceptions or limitations than those mentioned in article 5.[58] It must also be pointed out that article 5.2 stipulates, for some limitations, fair compensation for the author.

The EU Copyright Directive has been criticised for different reasons. As to limitations and exceptions, scholars are doubtful whether existing differences among the Member States can be levelled out by a set of 21 mostly optional exceptions, especially when the use of exceptions and limitations is furthermore permitted "in certain other cases of minor importance where exceptions and limitations already exist under national law".[59]

*AUSTRALIA*

The Australian legislation demonstrates the midway between the approach between open-ended provisions and the "closed lists" approach.

In Australia, a fair use must be within one of the categories set out in the Australian Copyright Act of 1978. This categorisation distinguishes the Australian defence from the open-ended American fair-use concept.

With its statutory basis in sections 40 to 43 of Australia's Copyright Act, fair dealing is currently confined to four purposes:

- research or study (section 40);[60]
- criticism or review (section 41); [61]
- reporting of news (section 42); [62] and
- professional advice given by a legal practitioner or patent attorney (section 43(2)).

The guidelines set out in section 40(2)[63] are similar to the non-exclusive list of factors to be taken into account in determining fair use under section 107 of the US Copyright Act. However, section 40(2)(c) has no counterpart in the American legislation. It provides for consideration by a court of "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price". [64]

58 Yet, article 5.3.o allows for the use of exceptions and limitations in certain other cases of minor importance where exceptions and limitations already exist under national law.

59 See article 5.3.o of the *EU Copyright Directive*.

60 See also section 103C for an "audio-visual item", which is defined in section 100A as "a sound recording, a cinematograph film, a sound broadcast or a television broadcast".

61 See also section 103A for an "audio-visual item".

62 See also section 103B for an "audio-visual item".

63 See also section 103C(2).

64 The most relevant court cases in this regard are: *Blackie & Sons Ltd. v. Lothian Book Publishing Co. Proprietary Ltd.* (1921) 29 CLR 396; *University of New South Wales v. Moorhouse* (1975) 133 CLR 1; *The Commonwealth v. Walsh* (1980) 147 CLR 61; *The Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 CLR 39; *De Garis and Another v. Neville Jeffress Pidler Pty Limited* (1990) 37 FCR 99; *TCN Channel Nine Pty Ltd v. Network Ten Pty Limited* (2002) 118 FCR 417.

## The impacts of the Internet and digitising for fair use

The Internet[65] and the possibility to digitise[66] copyright material have been characterised as the most significant technological advances in relation to copyright law since the invention of the printing press (Davis, 1999: 132). However, along with the invention of the printing press, the development of photocopy machines and the introduction of broadcast technology, the digital age represents only another in the line of major technological innovations copyright law has been confronted with over the years (Menell, 2002/2003: 63-64).

The following characteristics of the digital revolution were determined at an intellectual property and technology conference in Cambridge, Mass., in 1993 (Baron, 1993: 31):

- digital material is intangible until it is processed and projected through a microprocessor-controlled device;
- digital material can be copied indefinitely with no loss of quality;
- information can be combined, altered, mixed, and manipulated with relative ease; and
- digital media have an indefinite life.

### *The impacts for copyright law generally*

Lawrence Lessig noted that copyright law is the form of intellectual property that is "the most vulnerable to the changes [brought about by] cyberspace" (Lessig, 2001: 124). The use of the Internet has the potential to violate many exclusive rights of authors (Silberberg, 2001: 643), and without a doubt, copyright infringement is omnipresent on the Internet (Davis, 1999: 130). In summary, the three significant changes caused by computer-technology, digitising and the Internet regarding copyright are these:[67]

- digitising has altered the way reproduction is being conducted.
- computer networks have altered the way distribution is being conducted.
- the World Wide Web has altered the manner of publication.

These changes entail both new challenges and opportunities for authors as well as users (Okediji, 2001: 180).

Firstly, the possibility to create unauthorised, perfect, and costless copies with ease and immediate worldwide distribution through digital technology poses a threat to authors (Correa, 2000). Each of those perfect copies can be used as the basis for further perfect copies (Samuelson & Davis, 2000: 7). Moreover, digitising makes inexpensive alteration,

65 For brief history of the Internet see Cunard *et al* (2003) *WIPO study on current developments in the field of digital rights management*: 5 *et seq*.

66 Digitising means "to put [analogue] information into the form of a series of the numbers 0 and 1, […] so that it can be processed by a computer", *Cambridge dictionaries online*, http://dictionary.cambridge.org, accessed 18 July 2005. Information is encoded by using a massive array of binary switches which can be turned on ("1" – high electronic voltage) or off ("0" – low electronic voltage).

67 Similar to Samuelson & Davis (2000) The digital dilemma: A perspective on intellectual property in the information age, paper presented to the 28th Annual Telecommunications Policy Research Conference: 7.

enhancement, and manipulation of copyright works possible (Hawke, 2001: 2); in fact, the manipulability of digitised materials has become one of the key advantages of the digital medium (Samuelson, 1994: 24).

Previously, high costs for reproduction and the decreasing quality of copies were natural barriers to widespread copyright infringement.

On the other hand, however, distribution of works has become much quicker, easier, and cheaper for authors through the new technologies (Antezana, 2003: 439). As long as there is a telephone or another network connection, online information is available to an almost unlimited audience all over the world. New digital technologies also enable authors conveniently to license materials (Silberberg, 2001: 618), and, thus, licensing has become the dominant intellectual property transaction.[68] Additionally, authors can lock up their information through technological protection measures (TPMs) (Okediji, 2001: 181), while digital rights management systems (DRMs) enable authors to monitor the use and distribution of their works.

Further characteristics of digital technology are the ease of combining digital works into a new product, the compactness of works in digital form, and new search and link capabilities.

Despite the aforementioned advantages for them, authors fear that the sale or licensing of their products will decrease significantly, which threatens their financial investment in the development of these works (Gasaway, 2000: 159). Users, however, fear that digital technologies might lead to a total technical protection of copyright works with considerably reduced access to society's intellectual and cultural heritage (Samuelson & Davis, 2000: 4).

Although digital technology was introduced more than half a century ago, it only started to affect the businesses of traditional content providers, such as the print, film, and music industry, when powerful computers became affordable for private users and after the World Wide Web was introduced in the early 1990s (Menell, 2002/03: 66 and 98-99). Subsequent innovations regarding data storage[69] and data compression (such as the introduction of the MPEG-format[70] and the sale of MP3 players) as well as faster networks and advanced network software (which allowed, among other things, for peer-to-peer (P2P) communication[71]) accelerated this development.[72] These profound changes affected the previous balance

68 For a long time in IP history, the sale of physical copies of works was predominant. For an instructive discussion of the advantages and disadvantages of sales as compared to licensing see the report of the Committee on Intellectual Property Rights, Computer Science and Telecommunication Board (2000) *The digital dilemma: Intellectual property in the information age*: 100 *et seq*, www.nap.edu/html/digital_dilemma, accessed 5 February 2005.

69 Today, the standard hard drive's capacity is with around 200 gigabytes, while the first IBM hard drive in 1956 could store five megabytes only.

70 Invented by the Fraunhofer Institute during the late 1980s in Erlangen, Germany

71 Such as Napster.

72 For a detailed description of a number of technological developments that have taken place see Menell (2002/03: 110-118).

reached by copyright laws between the interests of the authors, on the one hand, and the interests of the public, on the other hand (Phan, 1998: 187-189). Hence, some scholars have questioned whether copyright law is at all capable of dealing with the requirements of the digital age,[73] since new technological developments are fast-paced, whereas responding amendments of the law are generally time-consuming.

Moreover, computer and communication equipment in private households has caused a significant increase in small-scale copyright infringements by private individuals (Samuelson & Davis, 2000: 11) , while – up to now – copyright laws mainly aimed to regulate businesses and organisations whose actions had large-scale public consequences (Samuelson & Davis, 2000: 11).

Hence, copyright law may stand in need of significant reconfiguration to meet the demands of the digital age. First steps in this direction have been taken and new laws have been adopted after lengthy negotiations, such as the WIPO Internet Treaties of 1996, the DMCA of 1998 in the United States,[74] the EU Copyright Directive of 2001, and subsequently enacted laws in the EU member states as well as the Copyright Amendment (Digital Agenda) Act 2000 in Australia.

Lawmakers need to overcome a number of obstacles. Amongst others, the international dimension of the Internet must be taken into account. The infrastructure of the Internet is international, not confined to any national boundaries. However, despite some efforts regarding the harmonisation of national copyright laws,[75] considerable differences around the world still exist. Additionally, several perspectives need to be considered – law, technology, economics, psychology, sociology, and public policy (Samuelson & Davis, 2000: 15).

Finally, the enforcement of copyright rules online faces a range of difficulties. First, it is not cost-effective for authors to sue individual infringers, because there are millions of them, lawsuits are expensive, and many infringers would be liable only for minimal damages. Second, the international character of the Internet and its potential for anonymity cause enforcement problems. Infringers might move offshore or conceal their identity by using sophisticated encryption technologies. Moreover, it may be very difficult for domestic courts to find domestic assets to seize, and court orders to shut down or block access to an infringing site placed on a foreign web server might prove utterly impossible to enforce.

### *The impacts for fair use*

The fair-use doctrine is an important tool to balance the interests of authors and the interests of the public. However, the possibility to digitise copyright material, and the development of

73 See – for the US copyright law – Litman (1997) Reforming information law in copyright's image, *Dayton Law Review*, Vol. 22: 590.

74 For an all-embracing overview over American legislation regarding digital copyright see Menell (2002/03: 129 *et seq*).

75 Such as *TRIPS*, the WIPO Internet Treaties and the *EU Copyright Directive*.

the Internet with its potential to cause significant economic, social, and cultural change (Phan, 1998: 216), have, some would argue, shifted the current balance between authors and the public as the opportunities for public access have been considerably increased. Users are no longer mere passive recipients of copyright material, but active consumers, capable of interacting with the material to enhance the usability of it. Hence, the question of whether and to what extent private copying of copyright materials could be justified under the fair-use doctrine has become much more relevant in the digital environment.

Therefore, in the context of digitising and the Internet, the scope of the fair use doctrine needs to be scrutinised (Phan, 1998: 169). Some scholars argue that the factual changes brought by digitising and the Internet are merely a change in issues and not a change in doctrine (Davis, 1999: 167-168). Others argue that the changes – especially with regard to DRMs and TPMs – jeopardise the whole concept of fair use and, thus, they predict an increasingly troubled future for the doctrine (Leaffer, 2001: 849). Some even argue that the recent developments in digital technology might eventually eliminate fair use.[76] Meanwhile, there is the call from some quarters for an expansion of the fair use doctrine due to manifold opportunities for fair uses of works made possible by digital technology, such as in the fields of distance education and research. Both users and authors have used the debate over fair use in the digital age to try to expand their positions (Gasaway, 2000: 161).

Most of the cases dealing with fair use in the context of digitising and the Internet come from the United States, due to the fact that a disproportionately large number of authors are based there and the use of digital technology is widespread in that country. Generally, courts seem to apply the fair use doctrine unchanged, in a technologically neutral way, and defer to the legislature to narrow, or broaden, the fair use defence.[77]

*DRMs and TPMs.* In the past, technological advances (such as photocopying and videotaping) have posed challenges for copyright protection (Samuelson & Davis, 2000: 1) and required several amendments of national and international copyright laws.[78] Yet, significant modifications of the fair use doctrine were not necessary, since a technologically neutral interpretation of the fair use criteria led to reasonable results. However, to advance digital technologies fully, some measure of modification of the fair use doctrine is required as digital rights management (DRM) technologies enable authors for the first time to control each use of their works' material and to charge an individual fee for the use (Phan, 1998: 206). Various

76 For the educational sector see Silberberg (2001: 618).

77 The most relevant court cases in this regard are: *Religious Technology Center v. Lerma* (40 U.S.P.Q. 2d 1569 (1996)) and *Kelly v. Arriba Soft Corporation* (280 F.3d 934 (9th Cir. 2003)).

78 See for example the *US Copyright Act* of 1976, which, *inter alia*, enlarged the rights of copyright holders as a result of increasing infringements caused by technological advances such as the copy machine.

kinds of DRM systems[79] have been developed to: (a) prevent unauthorised access; (b) meter access to copyright material; (c) set out terms and conditions for the use of the material and to ensure compliance with these terms and conditions; (d) register and verify user details; and (e) track consumption patterns and dissemination of the copyright material (Longdin, 2004: 4). The United States National Institute of Standards and Technology has defined DRM as "a system of information technology components and services, along with corresponding law, policies and business models, which strive to distribute and control intellectual property and its rights" (US National Institutes of Standards and Technology, 2002).

DRM systems create, *inter alia*, a new licensing scheme. The existence of such a scheme might create a market which had not existed before (for example, because no pragmatic way to pay for a license existed). Therefore, a market impact as mentioned for example in the American fair use provision (section 107 of the Copyright Act) becomes much more likely and, accordingly, the scope of fair use might narrow significantly. Several scholars have argued that fair use should only be found where there is a market failure (Gordon, 1982: 1657).

Technological protection measures (TPMs), the measures to prevent unauthorised access, have the biggest impact on the fair use doctrine (see Visser 2006 in this volume for more on TPMs). These measures have the potential to alter the delicate balance of rights in the digital environment and to establish a new "pay-per-use" society. TPMs allow authors to lock up their works as a privatised alternative to the protection provided by copyright law and without consideration of the purpose for which an individual may want to access or copy the copyright work (such as for news reporting or private study).[80] In other words, TPMs do not distinguish among uses: fair use and piracy are viewed in the same light. Thus, the author can dictate how the content is used. The possibility to allow certain quantities for copying (such as 10% of a book) is insufficient as fair usage cannot be generally quantified. Hence, the new digital technologies force users to accept licences which restrict their traditional rights, especially their right to fair use (McGreal, 2004).

Yet TPMs can be circumvented through technical means. However, an increasing number of international treaties and national copyright laws contain a legal prohibition pertaining to the circumvention of TPMs.[81] This anti-circumvention legislation is based upon article 11 of the WIPO Copyright Treaty (WCT) of 1996. The introduction of anti-circumvention provisions creates new and powerful means to prevent any reproduction, including fair use. The

79 Sometimes also called electronic copyright management systems (ECMS).

80 On 17 November 2004, Sony Music Entertainment (Japan) stopped using technical copy-protection mechanisms for audio CDs which it sells in Japan. Sony justified its move by saying that Japanese consumers have learned important issues about piracy and legality of music copying. Moreover, Japan's legislation would be tougher now pertaining to piracy than it was when the copy protection mechanisms were introduced.

81 See, for example, articles 6 and 7 of the *EU Copyright Directive*, section 95a of the *German Copyright Act*, sections 296-296ZF of the *UK CDPA*, section 116A of the *Australian Copyright Act* and section 1201 of the *US Copyright Act*.

technological protection of digital works makes it complicated or even impossible to copy material for purposes which are usually exempt under the doctrine of fair use. In the United States, this issue was discussed at length in connection with the issue of including a legitimate fair circumvention in the Digital Millennium Copyright Act (DMCA) of 1998. However, US Congress decided not to introduce a general fair use exception to the anti-circumvention provisions, based on the view that fair use is too dependent on particular facts and circumstances.

## Summary and prospects for South Africa

This article has, to this point, highlighted the important role of the fair use doctrine in striking a balance between the sometimes contrasting interests of authors and the public. However, there is still significant uncertainty in determining the actual scope of the fair use doctrine. Presently, the South African regulation of fair use in section 12 *et sqq* of the Copyright Act is ambiguous and lacks predictability. Moreover, the South African copyright law does not address a number of issues, particularly regarding the educational sector, such as distance learning, conversion of works to other formats for persons with disabilities, and provisions for libraries to digitise copyright material. This is unsatisfactory. Developing countries, in particular, require legal certainty regarding the doctrine as they have an extensive demand for education and (developed world) knowledge. The obligation to pay royalties often results in retarded development and thereby hinders progression.

Despite the existence of several international treaties dealing with copyright (the Berne Convention, TRIPS, and the WCT), there is yet no international standard for fair use from which any clarification regarding the scope of the fair use doctrine can be deduced. However, the so-called three-step test, which appears in most of the relevant treaties, might be regarded as a general principle for exceptions such as fair use.

The copyright laws of other countries have introduced either open-ended provisions (such as the United States) or "closed lists" (such as the European Union). Some countries, such as Australia, have chosen the middle way, with the definition of certain exceptions within specific categories on the one hand, and several broader provisions for other kinds of fair uses on the other.

It has been suggested that the US approach should be adopted in South Africa and with it, the US four-part test laid down in section 107 of the 1976 US Copyright Act as a guideline for the interpretation of the South African fair use provisions in section 12 *et sqq* of the 1978 Copyright Act (Dean, 1987: 1-52). Section 107 offers to some extent guidance in determining whether the principles of the doctrine apply or not. However, this suggestion to adopt the US approach is rash and should be scrutinised for two reasons. Firstly, it does not sufficiently consider the enormous degree of uncertainty regarding the complete and accurate definition

of the fair use doctrine in the United States (Okediji, 2000: 114). American courts see the fair use doctrine as "the most troublesome doctrine" in American copyright law[82] and scholars complain that nobody really knows what fair use is (Weinreb, 1999: 1291-92). Some scholars deride the fair use doctrine "as among the most hopelessly vague of legal standards" (Crews, 2001: 605). In sum, the statutory factors are not determinative (Newby, 1999: 1637), and the exception is ultimately an "equitable rule of reason." [83] It defies a simple definition or description (Newby, 1999: 1637), and the US Committee on the Judiciary noted that:

> *Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.* [84]

Secondly, it is doubtful whether section 107 of the 1976 US Copyright Act complies with the three-step test of several international treaties. Some scholars argue that the American fair use doctrine is inconsistent with the three-step test because of its indeterminacy and breadth (Okediji, 2000: 126), and that it does not meet the requirement of legal certainty laid down in the first step of the three-step test ("certain *special* cases") (Cohen Jehoram, 2001: 808). In addition, Ricketson states that "'fairness' is an insufficiently clear criterion to meet the first part of the three-step test" (Ricketson, 2003: 68). Other scholars have observed a violation of the three-step test in the US fair use doctrine's missing confinement to a specific purpose ("certain special cases") (Bornkamm, 2002: 45-46). None of these views is, however, undisputed. Senftleben, for example, points out that these views wrongfully undermine the common-law tradition of determining copyright limitations through court decisions on a case-by-case basis (Senftleben, 2004: 163). Moreover, Senftleben contests the statement that the three-step test requires an exact and precise definition of copyright limitations in the sense of the civil-law tradition (Senftleben, 2004: 163-164). He also argues that the American fair use doctrine is sufficiently confined to special cases, although the use of the words "such as" in section 107 might suggest otherwise. The fact that the United States was not obliged to amend section 107 when it adhered to the Paris Act of the Berne Convention in 1989[85] seems to support this perception. An in-depth analysis of the discussion is well beyond the scope of this article. However, the brief summary highlights the legal problems the American fair use doctrine faces. After all, it stands to reason that the United States is alone with its approach

82 *Dellar v Goldwyn, Inc.* 104 F.2d 661, 662 (2d Cir. 1939).

83 *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 448 (1984) (quoting US H.R. Rep. No. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679).

84 US H.R. Rep. No. 94-1476, at 65.

85 See *The Berne Convention Implementation Act* of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in sections of 17 U.S.C.).

in the world intellectual property community, as even other common-law countries have introduced enumerated statutory exceptions to a certain extent (Leaffer, 2001: 865).

It must also be said, however, that an adoption of the "closed list" approach would be as unwise as the rash adoption of the American approach, since "closed list" legislation often lacks flexibility, especially when it relates to new technologies.

Against this background, the middle way – as chosen by Australia – seems to be the most appropriate way to deal with fair exceptions and limitations to the author's copyright. But a thoughtless adoption of the Australian fair use provisions is inappropriate, given the disparity in development between Australia and South Africa. Rather, it is necessary for South Africa to develop its own approach towards a definition of fair use which considers international treaty obligations, especially the three-step test, and also national particularities.

With regard to the three-step test, some aspects need to be re-adjusted into a definite South African context, particularly regarding the requirement that the reproduction of a copyright work is permissible only if it "does not unreasonabl[y] prejudice the legitimate interests of the owner of the copyright".[86] South Africa takes up an exceptional position as a country between the developing and developed worlds with a highly unequal income distribution.[87] Despite its economic strength in comparison with most of the other countries on the African continent, South Africa remains a developing country in a number of respects, particularly in the educational sector. As such, South Africa needs extensive exceptions to copyrights and legal certainty with regard to fair use. The United Kingdom Commission on Intellectual Property Rights stated in its 2002 report, *Integrating Intellectual Property Rights and Development Policy*, that:

> *[developing countries] should be allowed to maintain or adopt broad exemptions for educational, research and library uses in their national copyright laws. The implementation of international copyright standards in the developing world must be undertaken with a proper appreciation of the continuing high level of need for improving the availability of these products, and their crucial importance for social and economic development (UK CIPR, 2002: 104).*

Despite the demand for adequate education and knowledge, many poor people can afford only unauthorised copies, if at all, of certain copyright works as these copies are available for considerably cheaper prices. The book market in South Africa is a good example in this regard. Book prices in South Africa, particularly in the educational sector, are disproportionately high in comparison with wealthier as well as some equally affluent or less

86 Section 13 of the *SA Copyright Ac*t of 1978 adopted this requirement

87 According to the World Bank's *World Development Report* (2004), South Africa is the second most unequal country in the world in this respect.

affluent countries.[88] Therefore, the book market remains relatively small, simply because books are unaffordable for the majority of the population. It has been estimated that only one to two million South Africans buy books with any regularity. Consequently, a "reading culture" has yet to develop in South Africa, and illiteracy remains at about 15%.[89] Publishers have been repeatedly asked to review their pricing policies and the publishing industry in South Africa has brought forward various arguments for high book prices, such as small print-runs and the obligatory profit-sharing with the book retailers.[90] However, the bottom line is that low income levels will in the medium term bar the majority of the people in South Africa from buying books, and, therefore, it is doubtful whether multiple copying and even online publishing of copyright material (for example, by libraries and especially in the educational sector) would have a prejudicial effect on the offline sale of printed books.[91]

The role of libraries and librarians is in any case an important one, to promote education and to build up the desired reading culture in South Africa. Hence, user groups and authors' associations agree on the necessity of substantial financial support for libraries. Yet it seems to be equally important to enhance the legal framework in this regard. The current legal regulations, particularly pertaining to the issues of fair use and online as well as offline multiple copying, are at best inadequate. Demands by publishers and other copyright holders for an expansion of pay-per-use licences and the push to eliminate inter-library loans of digitised material are counter-productive and put at risk the fulfilment of libraries' mission as information providers.

It must not be forgotten that the South African Constitution recognises a right to education in section 29. The fair use doctrine is a reasonable measure to achieve sustained improvement in the educational sector, particularly pertaining to those previously deprived of proper education. It safeguards education as it allows for teaching and study materials to be produced less expensively and without constant fear of lawsuits. At the same time, fair use exceptions not only serve the public interest but also ensure fundamental human rights, such as freedom of speech, freedom of the press, freedom of expression and freedom of information as enshrined in article 19 of the Universal Declaration of Human Rights (1948) which states:

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (UN, 1948).*

88 For example, Nelson Mandela's book *Long Walk to Freedom* is almost twice as expensive in South Africa as it is in the United States (SA price: R135; price at Amazon.com (US) on 5 February 2005: R70)

89 Ages 15 and above, according to the World Bank's South Africa Data Profile of 2002, http://devdata.worldbank.org/external/CPProfile.asp?SelectedCountry=ZAF&CCODE=ZAF&CNAME=South+Africa&PTYPE=CP , accessed 18 July 2005.

90 Accordingly, roughly 40% of the book price is retained by the book stores.

91 The same argument would apply to the criteria of "market effect" as mentioned in the *US Copyright Act* of 1976 and the related requirement of section 13 of the *SA Copyright Act*.

Similar language can be found in the International Covenant on Civil and Political Rights,[92] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[93] and many other human rights accords.

*TECHNOLOGY NEUTRALITY*

In the digital environment, a technology neutral application of the fair use doctrine could yield a significant gain in importance for the doctrine, due to the large variety of fair uses of works. The new technologies especially provide great opportunities for developing countries to access information and knowledge through, for example, digital libraries, distance learning programmes, and the ability of scientists and researchers to access online computer databases. However, DRMs and TPMs, accompanied by the legal protection against circumvention of these measures, could just as well foil any fair use exceptions provided for by copyright law. The latter would eventually widen the large gap in knowledge and know-how that presently separates developed and developing countries. Hence, countries like South Africa must ensure that an appropriate area of application for the fair use doctrine is preserved in the digital environment and that restrictions on fair use of works imposed by legal and technical means remain the exception. For this reason, in the United Kingdom, the Commission on Intellectual Property Rights advised developing countries not to implement laws prohibiting the circumvention of TPMs and to treat contract provisions which restrict fair use rights as void (UK CIPR, 2002: 109).

Some authors argue that an expansion of intellectual property rights as well as a restrictive licensing scheme are crucial for their survival in the digital age and that stronger intellectual property rights will inevitably result in increased innovation. However, the fears of authors are to a large extent unsubstantiated, and the scare stories are evocative of their fight against photocopy machines in the 1970s as well as early Internet technology in the mid-1990s (even before widespread broadband connections and peer-to-peer (P2P) technology existed). Nowadays, authors license photocopying and generate billions of rands in revenue worldwide. Moreover, publishing houses often offer their content online in addition to the paper copy and make more money than in pre-Internet days as paper-based revenues and those generated by licensed Internet usage accumulate.

As well, stronger intellectual property rights do not necessarily create a larger incentive to innovate. Rather, intellectual property rights create both incentives towards, as well as barriers against, innovation (Boyle, 2004). Databases, for example, are comprehensively protected in the European Union through the Database Directive of 1996, whereas in the United States such a protection does not exist. On the contrary, the US Supreme Court ruled

92 See article 19 of the *International Covenant on Civil and Political Rights*.

93 See article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

in *Feist Publications v. Rural Telephone Service Company*[94] in 1991 that non-original compilations of facts do not attract copyright.[95] However, Boyle has pointed out that after a one-time boost:

> *database growth [in Europe] rates have gone back to pre-Directive levels, while the anti-competitive costs of database protection are now a permanent fixture of the European landscape. The US, by contrast, gets a nice steady growth rate in databases without paying the monopoly cost (Boyle, 2004).*

Moreover, most of the databases now protected by the EU Directive would have presumably been created anyway.

Finally, many profitable businesses prosper without any intellectual property rights protection. For example, the rock band *The Grateful Dead* regularly earned more than US$50 million per year, without relying on copyright. And the successor group, *The Dead*, is continuing this tradition (McGreal, 2004). In addition, the Internet has the potential to become a unique promotional tool for lesser-known artists.

Fair use remains an essential instrument to safeguard free expression and to promote future development, particularly regarding education and scientific progress. Those who argue for broad fair use exceptions are by no means at the same time supporters of copyright infringement and theft.

The global trend towards restrictive intellectual property provisions, particularly through the conclusion of bi- or multilateral free trade agreements (FTAs) such as the FTA sought by the US with the countries of the Southern African Customs Union (SACU), and the reduction of the scope of fair use, have a detrimental impact on developing countries as they hamper access to essential information, educational and learning materials and cultural resources. The "TRIPS-plus" clauses in trade agreements might eventually further limit the ability of governments to make education and learning materials affordable. Ultimately, copyright is intended to encourage the dissemination of knowledge, and fair use must be preserved to achieve this worthy goal. ❑

94 499 U.S. 340 (1991)

95 *Ibid*. at 362 *et seq*.

## References


Antezana, M (2003) The European Union Internet Copyright Directive as even more than it envisions: Toward a supra-EU harmonisation of copyright policy and theory, *Boston College International & Comparative Law Review*, Vol. 26, No. 2, 415-441, http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bciclr/26_2/10_FMS.htm, accessed September 2006.

Baron, D (1993) Digital technology and the implications for intellectual property, *WIPO Worldwide Symposium on the Impact of Digital Technology on Copyrights and Neighboring Rights*, WIPO, Geneva.

Bornkamm, J (2002) Der Dreistufentest als urheberrechtliche Schrankenbestimmung – Karriere eines Begriffs, *Festschrift fuer Willi Erdmann zum 65. Geburtstag*.

Boyle, J (2004) A natural experiment, *Financial Times*, 22 November, http://news.ft.com/cms/s/4cd4941e-3cab-11d9-bb7b-00000e2511c8.html

Cohen Jehoram, H (2001) Einige Grundsätze zu den Ausnahmen im Urheberrecht *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*.

Correa, C (2000) Fair use in the digital era, UNESCO website, http://webworld.unesco.org/infoethics2000/documents/paper_correa.rtf, accessed September 2006.

Crews, KD (2001) The law of fair use and the Illusion of fair-use guidelines, *Ohio State Law Journal*, Vol. 62.

Cunard, JP, Hill, K & Barlas, C (2003) *Current developments in the field of digital rights management*, WIPO, Geneva, http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_10_2.pdf, accessed September 2006.

Davis, K (1999) Fair use on the Internet: A fine line between fair and foul, *University of San Francisco Law Review*, Vol. 34:129-169.

Dean, OH (1987) *Handbook of South African copyright law*, Juta, Cape Town.

European Union (2001) *EU Copyright Directive* (*EUCD*), Brussels.

Gasaway, LN (2000) Values conflict in the digital environment: Librarians versus copyright holders, Columbia – *VLA Journal of Law and the Arts*, Vol. 24.

Gibson, J (2003) *South African mercantile and company Law*, Juta, Cape Town

Goldberg, HP (2002) A proposal for an international licensing body to combat file sharing and digital copyright infringement, *Boston University Journal of Science and Technology Law*, Vol. 8, Issue 1.

Gordon, W (1982) Fair use as market failure: A structural and economic analysis of the Betamax case and its predecessors, *Columbia Law Review*, Vol. 82.

Hawke, CS (2001) *Computer and Internet use on campus: A legal guide to issues of intellectual property, free speech, and privacy*, Jossey-Bass, San Francisco

Heide, T (1999) The Berne three-step test and the proposed copyright directive, *European Intellectual Property Review*, Vol. 21.

Hugenholtz, B (2000) Why the Copyright Directive is unimportant, and possibly invalid, *European Intellectual Property Review*, Vol. 11.

Jackson, M (2003) Harmony or discord? The pressure toward conformity in international copyright, *IDEA: The Journal of Law and Technology*, Vol. 43.

Leaffer, M (2001) The uncertain future of fair use in a global information marketplace, *Ohio State Law Journal*, Vol. 62.

Lessig, L (2001) *Code and other laws of cyberspace*, Basic Books, New York.

Litman, J (1997) Reforming information law in copyright's image, *Dayton Law Review*, Vol. 22.

Longdin, L (2004) Copyright and fair use in the digital age, *University of Auckland Business Review*, Vol. 6, No. 1, http://www.uabr.auckland.ac.nz/files/articles/Volume6/v6i1-longdin.pdf, accessed September 2006.

McGreal, R (2004) Stealing the goose: Copyright and learning, *International Review of Research in Open and Distance Learning*, Vol. 5, No. 3, http://madlib.athabascau.ca/oldirrodl/content/v5.3/mcgreal.html, accessed September 2006.

Mendis, D (2003) The historical development of exceptions to copyright and its application to copyright law in the Twenty-First Century, *Electronic Journal of Comparative Law, Vol. 7.5*, http://www.ejcl.org/75/art75-8.html, accessed 15 July 2005.

Menell, P (2002/2003) Envisioning copyright law's digital future, *New York Law School Law Review*, Vol. 46, http://www.nyls.edu/pdfs/v46n1-2p63-200.pdf, accessed September 2006.

Newby, T (1999) What's fair here is not fair everywhere: Does the American fair use doctrine violate international copyright law? *Stanford Law Review*, Vol. 51.

Okediji, R (2000) Toward an international fair use doctrine, *Columbia Journal of Transnational Law*, Vol. 39.

Okediji, R (2001) Givers, takers, and other kinds of users: A fair use doctrine for cyberspace, *Florida Law Review*, Vol. 53, http://www.flr.law.ufl.edu/pdf/okediji.pdf, accessed September 2006.

Oliver, J (2002) Panel discussion: Copyright in the WTO: The panel decision on the three-step test, *Columbia Journal of Law and the Arts*, Vol. 25.

Phan, D (1998) Will fair use function on the Internet? *Columbia Law Review*, Vol. 98, No. 1.

Republic of South Africa (RSA) (1978) *Copyright Act*, as amended, Government Printers.

Ricketson, S (1987) *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Kluwer, London

Ricketson, S (2003) *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, WIPO, Geneva, http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf, accessed September 2006.

Samuelson, P (1994) Copyright's fair use doctrine and digital data, *Communications of the ACM*, Vol. 37, Issue 1.

Samuelson, P & Davis, R (2000) The digital dilemma: A perspective on intellectual property in the information age, Paper presented to 28th Annual Telecommunications Policy Research Conference, http://www.ischool.berkeley.edu/~pam/papers/digdilsyn.pdf, accessed September 2006.

Senftleben, M (2004) *Copyright, limitations and the three-step test*, Kluwer, The Hague

Silberberg, C (2001) Preserving educational fair use in the Twenty-First Century, *Southern California Law Review*, Vol. 74.

Sterling, A (2003) *World copyright law*, Second Edition, Sweet & Maxwell, London.

UK Commission on Intellectual Property Rights (CIPR) (2002) *Integrating intellectual property rights and development policy*, www.iprcommission.org/graphic/documents/final_report.htm, accessed 18 July 2005.

United States National Institute of Standards and Technology (2002)

A quick-reference list of common terms, organisations and standards for digital rights management, www.itl.nist.gov/div895/docs/NIST241assm.9oct.pdf, accessed October 2006.

UN (1948) *Universal Declaration of Human Rights*, New York.

Weinreb, L (1999) Fair use, *Fordham Law Review*, Vol. 67.