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Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition

NIVA ELKIN-KOREN† & NEIL WEINSTOCK NETANEL††

The fair use privilege of United States copyright law long stood virtually alone among national copyright laws in providing a flexible, open-ended copyright exception. Most countries' copyright statutes set out a list of narrowly defined exceptions to copyright owners' exclusive rights. By contract, U.S. fair use doctrine empowers courts to carve out an exception for an otherwise infringing use after weighing a set of equitable factors on a case-by-case basis.

In the face of rapid technological change in cultural production and distribution, however, the last couple decades have witnessed widespread interest in adopting fair use in other countries. Thus far, the fair use model has been adopted in a dozen countries and considered by copyright law revision commissions in several others. Yet, ironically, U.S. copyright industries—motion picture studios, record labels, music publishers, and print publishers—and, in some instances, U.S. government representatives have steadfastly opposed the transplanting of U.S. fair use to other countries. They argue, principally, that, while fair use works reasonably well in the United States, foreign courts that lack the 150 years of U.S. fair use precedent would likely apply the fair use exception in a chaotic, libertine manner, thus seriously undermining copyright protection.

This Article tests the credibility of that blanket U.S. opposition. In so doing, we present the first comprehensive study of how courts have actually applied fair use in a country outside

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the United States. We report the results of our study of the first decade of fair use case law in Israel, which enacted a fair use exception as part of its copyright law revision in 2007. We also compare Israeli fair use doctrine with that of the United States, drawing on parallel empirical studies of U.S. fair use case law.

Our study plausibly supports two general conclusions of relevance to the global debate about fair use. First, our findings counter the sweeping claim, advanced by fair use opponents, that the adoption of fair use outside the United States will inevitably open the floodgates to massive uncompensated copying and dissemination of authors' creative expression. We find that, in fact, Israeli courts have been far less receptive to fair use defenses than have U.S. courts. Far from seeing fair use as a "free ticket to copy," Israeli courts actually ruled against fair use at a far greater rate than did their American counterparts during the ten-year period of our study.

Second, our case study suggests that in one respect U.S. copyright industries raise a valid point: local courts will, indeed, develop distinct versions of fair use doctrine in line with their local jurisprudence and national policies.

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INTRODUCTION

The fair use privilege of United States copyright law long stood virtually alone among national copyright laws in providing a flexible, open-ended copyright exception. Most countries' copyright statutes set out a list of narrowly defined exceptions to copyright owners' exclusive rights. Under such "closed catalog" regimes, uses that do not fall within one of the narrowly defined exceptions or limitations set out in the statute infringe copyright, unless licensed by the copyright owner. By contrast, U.S. fair use doctrine, as codified in § 107 of the U.S. Copyright Act of 1976, empowers courts to carve out an exception for an otherwise infringing use after weighing a set of factors on a case-by-case basis.

Thus empowered, U.S. courts have given free rein to various new technological uses of creative expression, as well as to copying from existing works to convey new meanings, information, or aesthetics. In the United States, Google's Book Search Project—entailing the mass digitization of university library collections to create a searchable database of millions of books—was held to be fair use.[1] In France, a court held Google liable for copyright infringement for the same Book Search Project.[2]

Yet, in the face of rapid technological change, the last couple of decades have witnessed widespread interest in adopting fair use in other countries. Fair use proponents emphasize that legislatures are hard pressed to enact new, narrowly defined exceptions and limitations that keep up with the rapid changes wrought by digital technology in markets and media for producing, distributing, and consuming creative expression. Indeed, fair use advocates view the pliable copyright exception as a vital engine "for innovation and investment in innovation," a driving force behind the dramatic success of American technology companies.[3] Nor, they argue, can a closed catalog of narrowly defined exceptions capture the full panoply of creative, secondary uses that enrich our culture, enhance our public discourse, or provide useful information.[4] By contrast, judges can more adeptly apply open-ended standards and principles

1. Authors Guild v. Google, Inc., 804 F.3d 202, 207–08, 225 (2d Cir. 2015).

2. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., Dec. 18, 2009, 79 PTCJ 226 (Fr.).

3. IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 44 (2011), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf [hereinafter HARGREAVES REVIEW]; *see also* AUSTRALIAN L. REFORM COMM'N, COPYRIGHT AND THE DIGITAL ECONOMY: FINAL REPORT 104–08 (2013), https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_alrc_122_2nd_december_2013_.pdf (lauding fair use as an engine for innovation); COPYRIGHT REV. COMM., MODERNISING COPYRIGHT 93 (2013), https://enterprise.gov.ie/en/Publications/Publication-files/CRC-Report.pdf (advocating adoption of fair use to spur innovation in Ireland). For a seminal discussion of how fair use might spur innovation, see Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829 (2008).

4. *See* HARGREAVES REVIEW, *supra* note 3, at 41–52; AUSTRALIAN L. REFORM COMM'N, *supra* note 3, at 104–08.

in cases brought before them to rule that certain socially beneficial uses do not infringe copyright.[5]

Thus far, the fair use model has been adopted, with some variation, in eleven countries.[6] They include the Philippines (1997),[7] Liberia (1997),[8] Taiwan (1997),[9] Sri Lanka (2003),[10] Singapore (2004),[11] Canada (2004),[12] Israel (2007),[13] South Korea (2011),[14] Malaysia (2012),[15] Kenya (2014),[16] and, still

5. *See* HARGREAVES REVIEW, *supra* note 3, at 44.

6. For a helpful collection and typology of fair use model adoptions, see JONATHAN BAND & JONATHAN GERAFI, THE FAIR USE/FAIR DEALING HANDBOOK (2013); Peter K. Yu, *Customizing Fair Use Transplants*, 7 LAWS, Feb. 26, 2018, at 1. Fair use is not the only open-ended copyright exception that proponents have advanced. Some proposals would fashion an open-ended copyright exception from the three-step test set out in several multilateral intellectual property treaties as a limit on permissible copyright exceptions and limitation. *See, e.g.*, ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 6 (2006), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf.

7. Section 185.1 of the Intellectual Property Code of the Philippines is virtually identical to § 107 of the U.S. Copyright Act, except that it states explicitly that the decompilation of a computer program "may also constitute fair use." INTELLECTUAL PROPERTY CODE, § 185.1, Rep. Act. No. 8293 (Phil.).

8. Section 2.7 of the Copyright Law of the Republic of Liberia was virtually identical to § 107 of the U.S. Copyright Act. 24 LIBERIAN CODE OF LAWS § 2.7 (Liber.) (repealed 2016). The Liberian Copyright Law was repealed in 2016, but it was replaced by a new law, of which § 9.8 is also virtually identical to § 107 of the U.S. Copyright Act. Liberia Intellectual Property Act, 2016, § 9.8 (Liber.).

9. Copyright Act 2016, art. 65 (Taiwan), https://topic.tipo.gov.tw/copyright-tw/cp-441-856386-81cce-301.html (click "108 Copyright (English)" to download). The phrase "or other conditions of fair use," giving courts discretion to permit uses other than those enumerated in the statute, was added in 1997. *See id.*

10. Section 11 of Sri Lanka's Intellectual Property Act is virtually identical to § 107 of the U.S. Copyright, but includes a long list of specific uses that are to be permitted without the copyright owner's authorization and refers to those uses as "acts of fair use." Intellectual Property Act No. 36 of 2003, §§ 11–12 (Sri Lanka).

11. Copyright Act 2006, ch. 63, §§ 35–37 (Sing.) (setting out a "fair dealing" exception that is structured as an open-ended fair use exception).

12. Canada's fair dealing exception was long thought to provide a closed list of uses that could qualify for the exception. But beginning in 2004, the Canadian Supreme Court has ruled that the specific permitted uses enumerated in Canada's fair dealing statute must be given a large and liberal interpretation and thus impose a low threshold, and that, in determining fairness, courts are to apply factors that overlap with those of U.S. fair use. Those rulings, together with Canadian Parliament's addition of parody, satire, and education to the list of enumerated uses, has brought a leading Canadian copyright scholar to conclude that "the current Canadian fair dealing regime now more closely resembles a flexible, open-ended fair use model." Michael Geist, *Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use*, *in* THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 157, 159 (Michael Geist ed., 2013) [hereinafter COPYRIGHT PENTALOGY]; *see also* Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada*, *in* COPYRIGHT PENTALOGY, *supra*, at 93.

13. We discuss the relevant provision, Section 19 of Israel's Copyright Law 2007, in detail in the text below. *See infra* Part III.

14. Copyright Act, No. 432, Jan. 28, 1957, *amended by* Act No. 14,083, Mar. 22, 2016, ch. 2, § 4, art. 35-3 (S. Kor.), *translated in* KOREA COPYRIGHT COMM'N, https://www.copyright.or.kr/eng/laws-and-treaties/copyright-law/chapter02/section04.do; *see also* Sang Jo Jong, *Fair Use in Korea*, INFOJUSTICE (Feb. 27, 2017), http://infojustice.org/archives/37819 (offering a brief discussion of the origin and operation of the fair use provision in South Korea).

15. Copyright Act 1987, Act 332, *amended by* Copyright (Amendment) Act 2012, Act A1420, §§ 9, 13 (Malay.), *translated in* BAND & GERAFI, *supra* note 6, at 38.

16. *See* Victor B. Nzomo, *In the Public Interest: How Kenya Quietly Shifted from Fair Dealing to Fair Use* (WIPO-WTO IP Colloquium Papers, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929252 (discussing Commc'ns Comm'n of Kenya v. Royal Media Servs. Ltd. [2014] eKLR (Kenya)).

tentatively, South Africa (2018).[17] In those countries, courts thus now have discretion, albeit typically not unbridled discretion, to apply factors akin to those set out in § 107 of the U.S. Copyright Act to permit uses that are not explicitly enumerated as copyright exceptions in the country's copyright statute.[18] China also appears poised to adopt such an open-ended copyright exception in a proposed revision to its copyright law, and some Chinese courts have already asserted the authority to permit uses that do not appear in the closed list of exceptions currently enumerated in China's copyright statute.[19] Copyright revision commissions in Australia, the European Union, Hong Kong, Ireland, Japan, New Zealand, and the United Kingdom have considered, or are considering, adopting elements of fair use in those jurisdictions as well.[20]

Yet, U.S. copyright industries—motion picture studios, record labels, music publishers, and print publishers—and, in some instances, U.S. government representatives have steadfastly opposed the transplanting of U.S. fair use to other countries. U.S. copyright industries have actively lobbied other countries not to adopt the U.S. fair use privilege. Further, the Intellectual

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17. Copyright Amendment Bill B 13B—2017 (S. Afr.). The bill has been enacted but not yet signed into law. As of this writing, South Africa's President Cyril Ramaphosa has returned the Copyright Amendment to the Parliament for reconsideration. Mike Palmedo, *South Africa's Copyright Amendment Bill Returned to Parliament for Further Consideration*, INFOJUSTICE (June 22, 2020), https://infojustice.org/archives/42426. Peter Yu has authored especially helpful, illuminating studies of fair use variants in other countries. *See* Yu, *supra* note 6; Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 ILL. L. REV. 111 (2019).

18. In some countries, the list of enumerated uses in the fair use provision imposes a degree of constraint on the court's discretion. For example, as we discuss below, while the U.S. fair use provision sets out a list of favored uses that are entirely illustrative examples, Israel's fair use provision sets out a list of uses that is understood to impose some outside limit on which types of uses may qualify as fair use. *See infra* Part III.B; *cf.* Sean Flynn & Mike Palmedo, *The User Rights Database: Measuring the Impact of Copyright Balance* 9 (Am. U. Wash. Coll. of L., Program on Info. Just. & Intell. Prop., Working Paper No. 2017-03, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082371 (characterizing "fair use" as completely open, flexible, and general).

19. *See* Yu, *supra* note 6, at 11 (describing China's proposed Article 43). In 2013, the Beijing Higher Court ruled that, in exceptional circumstances, uses that are not among the enumerated exceptions in China's Copyright Law may qualify as permitted uses. Yong Wan, *Similar Facts, Different Outcomes: A Comparative Study of the Google Books Project Case in China and the United States*, 63 J. COPYRIGHT SOC'Y U.S.A. 573, 578–86 (2016) (describing Google, Inc. v. Shen Wang, No. 1221 Gaominzhongzi (Beijing Higher Ct. 2013)).

20. AUSTRALIAN L. REFORM COMM'N, *supra* note 3, at 123–60 (recommending the introduction of a fair use exception); *Commission Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules*, *Directorate General Internal Market and Services*, at 33–36 (July 2014) (reporting on consultations regarding whether the E.U. should provide for greater flexibility for copyright exceptions and limitations, including in the form of a fair use provision); COPYRIGHT REV. COMM., *supra* note 3, at 93–94 (recommending the introduction of the fair use exception as a new Section 49A of the Irish Copyright and Related Rights Act); Legislative Council, Amendments to Be Moved by the Honourable Chan Kam-Lam, SBS, JP 4, LC Paper No. CB(3) 219/15-16 (2015) (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/papers/cm20151209cb3-219-e.pdf (providing the text of the fair use proposal presented for legislative debate in Hong Kong); HARGREAVES REVIEW, *supra* note 3, at 44–47 (discussing the potential adoption of the fair use doctrine in the U.K.); GOWERS, *supra* note 6, at 61–68 (examining the same); Tatsuhiro Ueno, *Rethinking the Provisions on Limitations of Rights in the Japanese Copyright Act—Toward a Japanese-Style "Fair Use" Clause*, 34 AIPPI J. 159 (2009) (considering the adoption of a fair use clause in Japan). The New Zealand government considered but rejected adopting fair use. *See* Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1096 n.271 (2011).

Property Alliance (IIPA), a leading copyright industry trade association, has regularly cited countries' "ill-advised" adoption of fair use in petitioning the U.S. Trade Representative (USTR) to exercise that agency's statutory authority to threaten those countries with trade sanctions for inadequately protecting intellectual property rights.[21] In turn, the USTR and U.S. Department of State have joined with the copyright industries to oppose adoption of fair use in other countries and in international copyright treaties, even though they have repeatedly promoted global enactment of other provisions of U.S. copyright law.[22] They argue, principally, that, while fair use works reasonably well in the United States, foreign courts that lack the 150 years of U.S. fair use precedent would be highly susceptible to applying the fair use exception in a chaotic, libertine manner, thus seriously undermining copyright protection.

This Article tests the credibility of that blanket U.S. opposition. In so doing, we present the first comprehensive study of how courts have actually applied fair use in a country outside the United States.[23] We look to Israel as a case study to test the claims of opponents of adopting the fair use model outside the United States.

Israel's legislature, the Knesset, enacted fair use as part of that country's general copyright law revision, codified in Israel's Copyright Law 2007.[24] Israel's fair use provision, section 19 of the Copyright Law 2007, is a close translation of § 107 of the U.S. Copyright Act (with a couple key differences that we note below). Yet, like in other countries that have considered adopting fair use, U.S. copyright industries voiced the objection that transplanting fair use to Israel would severely undermine copyright owners' rights.[25]

We report below the results of our quantitative and qualitative evaluation of the first decade of fair use case law in Israel. We also compare Israel's fair use doctrine with that of the United States, drawing on parallel empirical studies of U.S. fair use case law.

Our study has significance for the global fair use debate, even recognizing that Israel's copyright law and legal system may well differ in important respects from those of other countries.[26] As noted above, ours is the first comprehensive

21. *See infra* text accompanying notes 128–138.

22. *See* Yu, *supra* note 6, at 3–4 (noting that the United States has pushed other countries to adopt broad protections for copyright holders found in the U.S. Copyright Act but has actively opposed the adoption of fair use in domestic legislation and treaties).

23. *See* Justin Hughes, *Fair Use and Its Politics—At Home and Abroad*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 234, 261 (Ruth L. Okediji ed., 2017) ("It is time to start monitoring [the jurisdictions that have adopted fair use] to see how the new provisions are being applied by courts . . . .").

24. Copyright Law, 5768–2007, SH 2119 38 (Isr.). Prior to enactment of that general copyright revision, which took effect on May 25, 2008, the Israeli copyright law was the U.K. Copyright Act of 1911, as supplemented and amended by the U.K. Copyright Ordinance of 1924. *See* Michael D. Birnhack, *Hebrew Authors and English Copyright Law in Mandate Palestine*, 12 THEORETICAL INQ. L. 201, 205, 208–10 (2011).

25. *See infra* notes 205–209 and accompanying text.

26. Given that Israel's legal system is a common law system, our study does not address the claim that fair use, as a creature of the common law, has no place in civil law systems. For an illuminating critique of that

study of how courts outside the United States have applied fair use. In addition, Israel's adoption of fair use has been repeatedly cited in deliberations in other countries that are considering whether to follow suit.[27] Israel's experience with fair use might be viewed with particular interest in other countries given Israel's prominence as a knowledge-based economy, sometimes called *start-up nation*,[28] where the high-tech industry and technological innovation are important drivers of economic growth. Fair use proponents argue that in such an environment, which relies on frequent technological advances, the flexibility offered by fair use is likely to be essential.[29]

Our study plausibly supports two general conclusions of relevance to the global debate about fair use.[30] First, our findings counter the sweeping claim, repeatedly advanced by U.S. copyright industries and other fair use opponents, that the adoption of fair use outside the United States will inevitably open the floodgates to massive uncompensated copying and dissemination of authors' creative expression. As we discuss, far from seeing fair use as a "free ticket to copy," Israeli courts actually ruled *against* fair use at a far greater rate than did their American counterparts during the ten-year period of our study.

Of course, whatever has been Israel's experience, courts in Liberia, South Africa, or another country might still interpret fair use in some manner that U.S. copyright industries regard as anathema. But Israeli case law following Israel's enactment of fair use demonstrates that the mere fact that judges outside the United States lack the experience of U.S. judges in applying fair use and the guidance of decades of U.S. fair use precedent does not necessarily lead to a chaotic or wide-open interpretation of fair use. Indeed, the Israel experience thus far raises the distinct possibility that courts in other countries might apply the user privilege more narrowly than do their U.S. counterparts. At the very least, U.S. opposition to transplanting fair use should be assessed against additional case studies of how fair use has actually been applied in other countries. Certainly, the USTR should give no weight to the mere fact that a country has adopted fair use in determining whether that country adequately protects intellectual property rights within the meaning of U.S. trade law.

Second, our case study suggests that in one respect U.S. copyright industries raise a valid point: local courts will, indeed, develop distinct versions of fair use doctrine in line with their local jurisprudence and national policies.

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claim, see Martin Senftleben, *The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions*, 33 AM. U. INT'L L. REV. 231 (2017).

27. *See, e.g.*, AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, INTELLECTUAL PROPERTY ARRANGEMENTS: PRODUCTIVITY COMMISSION INQUIRY REPORT NO. 78, at 9 (2016), https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf; HARGREAVES REVIEW, *supra* note 3, at 45.

28. DAN SENOR & SAUL SINGER, START-UP NATION: THE STORY OF ISRAEL'S ECONOMIC MIRACLE (2009).

29. *See, e.g.*, Letter from Michael Cooley, Pub. Pol'y and Gov't Rels. Couns., Google Austl., to Dir., Copyright L. Section, Dep't of Commc'ns and the Arts (July 4, 2018), https://www.communications.gov.au/sites/default/files/submissions/google_0.pdf?acsf_files_redirect.

30. We take no position on claims of U.S. technology companies and other fair use proponents that fair use is highly conducive to technological innovation. Such claims are beyond the scope of our study of case law.

The courts might cite leading U.S. fair use cases. However, they are unlikely to coalesce around a single, uniform, America-led version of fair use. Indeed, courts might develop distinct local variants of fair use even in countries, like Israel, where the legislature enacts a fair use provision that closely tracks the language of § 107 of the U.S. Copyright Act.

Israel's experience should be no surprise. Local variation is what the scholarly literature on legal transplants tells us to expect. Courts in countries that purport to transplant statutory regimes from elsewhere generally come to interpret—and effectively alter—the transplanted foreign law in line with local conditions, legal traditions, and jurisprudence.[31] Israel's adoption of fair use, in near-literal translation of the American statute, is a prime example of that phenomenon. As interpreted by Israeli courts, fair use looks quite different from the doctrine that courts have developed in the United States. Such local variation does not mean, however, that transplanting fair use will inevitably lead to massive uncompensated copying. That clearly has not been the case in Israel.

Our discussion proceeds as follows. In Part I, we briefly explicate U.S. fair use doctrine and further contrast it with copyright laws that provide a closed list of exceptions. In Part II, we document repeated U.S. government and copyright industry opposition to fair use in other countries and in international fora. In Part III, we chronicle Israel's adoption of fair use and the U.S. copyright industry's opposition to enacting fair use in Israel. Part IV presents our comparative study of Israeli and U.S. fair use case law during the decade following the effective date of the Copyright Law 2007 and in light of a more recent, landmark ruling of the Israeli Supreme Court.[32] In Part V, we conclude.

I. FAIR USE VERSUS CLOSED LISTS OF COPYRIGHT EXCEPTIONS

The open-ended, flexible character of U.S. fair use doctrine presents a sharp contrast to the closed catalogue regimes in both civil law countries and many countries that have adopted the British fair dealing exception. At the same time, the differences between the two regimes are not as wide as might appear.

31. *See* Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427 (2010) (discussing the transplantation and subsequent adaptation and transformation of the Statute of Anne through judicial development); Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 16–22 (Sujit Choudhry ed., 2006) ("Legal transplants could only occur if both the rule and its context could be transferred between legal systems, an exceedingly unlikely prospect. In its new context, a legal rule 'is understood differently by the host culture and is, therefore, invested with a culture-specific meaning at variance with the earlier one'. In other words, it becomes a different rule."); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004). As Peter Yu has illuminated with respect to fair use, countries might also enact an altered version of a foreign statute to begin with, as the legislature seeks to tailor the foreign transplant to local law, policy, and perceived needs. *See* Yu, *supra* note 6; Yu, *supra* note 17. Michael Birnhack presents a cogent argument that courts should avoid reflexive transplantation of foreign doctrine and should, instead, adapt foreign doctrine to local needs by understanding the doctrine's theoretical underpinnings. *See* Michael Birnhack, *Judicial Snapshots and Fair Use Theory*, 5 QUEEN MARY J. INTELL. PROP. 264 (2015).

32. CivA 3425/17 Société des Produits Nestlé v. Espresso Club Ltd. (2019) (Isr.).

Fair use is more consistent and predictable than critics charge, and courts in closed catalogue regimes have carved out a degree of flexibility in the face of the regimes' generally restrictive character. This Part fleshes out the fundamental contrast between fair use and closed catalogue regimes but also notes the ways in which courts have mitigated some of the sharp differences. We also explicate central elements of U.S. fair use doctrine to provide background for our comparative study of U.S. and Israeli fair use.

A. Fair Use

Fair use is a creature of judge-made Anglo-American common law. The doctrine is widely said to have sprung from Justice Story's test for "a fair and bona fide abridgement," set out in his 1841 decision in *Folsom v. Marsh*.[33] Yet, fair use has even earlier roots. Its origins lie in fair abridgement cases litigated in English courts of law and equity extending back to 1710.[34]

When Congress codified fair use in § 107 of the Copyright Act of 1976, it maintained the doctrine's judge-made character. Section 107 provides that courts are to determine whether a defendant's use qualifies as fair use on a case-by-case basis, using as guidelines four statutory factors that Congress gleaned from prior case law. The court may also consider any other factor it deems relevant. The four statutory factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[35]

Importantly, the fair use claimant need not satisfy each factor in order for the use to qualify as fair use.[36] Nor are the four factors meant to set out some kind of mathematical equation whereby, if at least three factors favor or disfavor fair use, that determines the result. Rather, the factors serve as guidelines for holistic, case-by-case decision. As the Supreme Court has instructed, "All [factors] are to be explored, and the results weighed together, in light of the purposes of copyright."[37]

In that vein, in its preamble paragraph, § 107 provides a list of several examples of the types of uses that can qualify as fair use. The examples, which include "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, [and] research,"[38] are often thought to be

33. Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901).
34. Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1373 (2011).
35. 17 U.S.C. § 107.
36. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
37. *Id.*
38. 17 U.S.C. § 107.

favored uses for qualifying for fair use. Importantly, however, the list of favored uses is not dispositive. Rather, fair use's open-ended framework imposes no limits on the types of uses that courts may determine are "fair."[39] As iterated in the House Report to the Copyright Act of 1976, § 107 was meant to give courts considerable leeway in adapting fair use doctrine to new circumstances and technologies:

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.[40]

Fair use jurisprudence since 1976 is very much in line with that congressional intent. In interpreting and applying § 107, U.S. courts have repeatedly exercised the flexibility accorded to them to determine the types of uses that may qualify as "fair." Notably, these include new uses made possible by digital technology that Congress could not have contemplated in 1976 and thus that do not appear among examples of uses enumerated in § 107. Courts have made clear, for example, that user-posted remixes on social media, digital sampling of recorded music, displaying copyrighted material in search engine results, and mass digitization of books and other works may all qualify as fair use, depending on the particular facts of each case.[41] U.S. courts have also recognized fair use in using existing works as raw material for new expressive purposes and aesthetics even if the use falls outside traditional fair use categories like scholarship, news reporting, and parody.[42]

Fair use's flexible, open-ended character has led some critics, both within the United States and without, to charge that the doctrine is arbitrary, ad hoc,

39. As the Supreme Court has stated: "The text employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses." *Campbell*, 510 U.S. at 577–78 (citations omitted).

40. H.R. REP. NO. 94-1476, at 66 (1976); *see also* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 875–77 (1987) (summarizing the House hearings on fair use).

41. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1166 (9th Cir. 2007) (image search engine results); Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005) (determining that the fair use defense may be available for digital sampling of sound recording even if *de minimis* copying defense is not); Estate of Barré v. Carter, 272 F. Supp. 3d 906, 930 (E.D. La. 2017) (holding that digital sampling may qualify as fair use but that fair use defense was not sufficient to support a motion to dismiss under the facts as alleged in the complaint); Lenz v. Universal Music Corp., 815 F.3d 1145, 1152 (9th Cir. 2016) (determining that sender of DMCA notice to take down user-posted video featuring copyrighted music must consider fair use); Authors Guild v. Google, Inc., 804 F.3d 202, 207–08 (2d Cir. 2015) (mass digitization and search engine results).

42. *See, e.g.*, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609–10 (2d Cir. 2006) (use of concert poster art for rock band biography); Cariou v. Prince, 714 F.3d 694, 706–07 (2d Cir. 2013) (use of photographs in artwork); A.V. *ex. rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 638–40 (4th Cir. 2009) (use of student papers copied for plagiarism detection service).

and unpredictable.[43] Yet empirical studies of fair use case law have cast considerable doubt on that claim. Contrary to the charge that fair use is wholly unpredictable, the empirical studies uncover considerable order and consistency in fair use case law. For example, Barton Beebe's quantitative, empirical study and regression analysis illuminates which factors and sub-factors exert the most influence on fair use case law.[44] Likewise, Pamela Samuelson finds consistency in fair use precedent by creating a taxonomy of uses.[45] She discovers greater predictability of results when examining like cases based on the type of use than when looking at fair use case law as a whole.[46] Further, Matthew Sag presents a regression analysis finding statistically significant correlations between case outcomes and combinations of various factual variables, such as the legal identity of the parties and whether the defendant used the plaintiff's work as part of a commercial product or service.[47]

In addition, one of us, Neil Netanel, has shown that identifying historical trends in fair use case law makes further sense of fair use.[48] The Supreme Court's 1994 ruling in *Campbell v. Acuff-Rose Music, Inc.*[49] initiated a dramatic shift in fair use doctrine, a shift that took several years fully to take hold. In fundamental ways, fair use is a different doctrine today than it was twenty or thirty years ago. So, if we compare fair use cases from the 1980s to present-day cases, it is no wonder that fair use might look like a chaotic mix of ad hoc, contradictory decisions. By contrast, if we compare only cases decided over the past fifteen years or so, we find far greater consistency. In particular, the issue that overwhelmingly dominates fair use analysis today is whether and to what extent the defendant's use is "transformative," a term that *Campbell* introduced to fair use case law.[50] But prior to the doctrinal shift initiated by *Campbell*, the dominant questions in fair use analysis were, instead, whether the defendant's use was "commercial" and whether the use harmed the potential market for the plaintiff's work.[51]

43. *See* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 716–17 (2011) (quoting critics).

44. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 594–617 (2008).

45. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009).

46. *Id.* at 2541–42.

47. Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 72–78 (2012); *see also* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004) (presenting a more theoretical, but also illuminating systematization of fair use doctrine).

48. *See* Netanel, *supra* note 43.

49. Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

50. *See* Netanel, *supra* note 43, at 736–46; *see also* Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 912–13 (2020) (summarizing the results of their quantitative empirical study showing that within the past decade the vast majority of both appellate and district courts apply the transformative use paradigm in their opinions and that courts' determinations of whether the defendants' use is transformative correlate with fair use outcomes at extremely high rates).

51. *See* Netanel, *supra* note 43, at 736–46.

Jiarui Liu's empirical research also highlights the emerging dominance and far-reaching impact of the transformative use approach to fair use in the United States. In his comprehensive study of fair use rulings from January 1, 1978 (the effective date of the Copyright Act of 1976) to January 1, 2017, Liu found that, in the decade preceding 2017, close to 90% of fair use cases considered whether the defendant's use is "transformative."[52] Moreover, if a U.S. court finds the defendant's use to be "transformative," it will almost inevitably rule that the use is a fair use (unless the court characterizes the use as only "somewhat" or "minimally" transformative). Liu found that in 94% of cases in which the court found the use to be transformative, the court went on to hold that the use was fair use.[53] By contrast, the same lopsided percentage, 94%, of non-transformative uses were held not to be fair use.[54]

The definition of what uses qualify as transformative is thus obviously key to unpacking fair use doctrine. In that regard, first and foremost, a use is "transformative" if the alleged copyright infringer has used the copyrighted work for a fundamentally different expressive purpose from that of the work's author.[55] Copying a work for purposes of parody or criticism of the original work would be a paradigmatic transformative use.[56]

Importantly, a use for a fundamentally different expressive purpose may qualify as transformative even if the alleged infringer copies the work in its entirety without altering it.[57] Google's digitization of books was held to be "highly transformative" because Google copied them and displayed short snippets of text relevant to search queries for the "purpose of enabling a search for identification of books containing a term of interest to the searcher," not to enable the public to read the books.[58] The publisher of an illustrated history of the Grateful Dead made a transformative use of images of Grateful Dead concert posters that it featured in the book because the original posters served the purposes of concert promotion and artistic expression, while the defendant copied them as "artifacts to document and represent" historical events.[59]

More controversially, some courts have held that copying for the same general expressive purpose, while using the original as raw material for a

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52. Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 166, 175 (2019).

53. *See id.* at 167, 180.

54. *Id.* A more recently published quantitative empirical study of all district court and appellate court fair use opinions between 1991 and 2017 similarly concludes that fair use outcomes correlate overwhelmingly with whether the court finds that the defendant's use is transformative but also notes that only about half of defendants win the transformative use inquiry. *See* Asay et al., *supra* note 50, at 913.

55. *See* Netanel, *supra* note 43, at 746–51.

56. *See* Samuelson, *supra* note 45, at 2549–56.

57. *See* Liu, *supra* note 52, at 170 (finding that of the decisions finding different expressive purpose, but no physical modification of the original work, 60.7% found the use to be transformative).

58. Authors Guild v. Google, Inc., 804 F.3d 202, 216–18 (2d Cir. 2015).

59. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609–10 (2d Cir. 2006).

"drastically different . . . aesthetic," may also qualify as a transformative use.[60] For example, the Second Circuit held that the artist, Prince, made fair use of black-and-white photographs that depicted the natural beauty of Rastafarians and their Jamaican surroundings.[61] Key for the court was that Prince had incorporated the photographs into hectic and provocative artworks that manifested an entirely distinct aesthetic, with fundamental differences in composition, presentation, scale, color palette, and media.[62] Under that reasoning, a user remix encompassing bits of popular movies and music recordings would thus qualify as a transformative use if it combines those works to produce a drastically different aesthetic, even without doing so for a different expressive purpose such as criticism or documenting a particular facet of popular culture.

Notably, as Liu's findings indicate, while uses found to be transformative will almost always be held to be fair use, non-transformative uses may also qualify, albeit in relatively few cases. Most famously, the Supreme Court held in *Sony Corp. of America v. Universal City Studios, Inc.*, that consumers' analog recording of television programs for later viewing was fair use.[63] Lower courts have subsequently extended *Sony* to digital recordings of television programs and to reproducing a copy of a work that a consumer legally owns in order to transfer it from one consumer device to another.[64]

Finally, of importance in comparing fair use to closed catalogue regimes, fair use is not the only exception to copyright holder rights in U.S. law. Rather, § 107 stands alongside lengthy, detailed provisions, § 108 to § 122 of the Copyright Act, that set out a long list of narrowly tailored exceptions and limitations for uses ranging from public performance of music in retail establishments to making audio and braille copies for the visually impaired. In comparing the U.S. fair use model with closed catalog regimes, it is important to highlight that U.S. fair use operates independently from those narrowly

60. Cariou v. Prince, 714 F.3d 694, 706–07 (2d Cir. 2013). In his comprehensive study of transformative use case law, Liu compares fair use outcomes for cases involving transformative purpose but no physical transformation with those in which the defendant physically modified the copyrighted work but did so with the same expressive purpose as original author. Liu finds that courts ruled in favor of fair use in 60.7% of the cases involving transformative purpose but no physical transformation, but in favor of fair use in just 32.7% of the cases involving physical transformation but no transformative purpose. Liu, *supra* note 52, at 207.

61. *Cariou*, 714 F.3d at 698–99.

62. *Id.* at 706–07; *see also* Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176–78 (9th Cir. 2013) (holding a rock band's use of an artist's illustration of a screaming face in a video backdrop of the band's stage show to be a transformative use because it was raw material conveying a different expressive message and meaning).

63. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 454–56 (1984). Recently, the Second Circuit has sought to recast *Sony* as a transformative use case. *See* Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 661 (2d Cir. 2018) ("In *Sony*, the 'apparent reasoning was that a secondary use may be a fair use if it utilizes technology to achieve the transformative purpose of improving the efficiency of delivering content without unreasonably encroaching on the commercial entitlements of the rights holder' . . . ." (quoting Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 177 (2d Cir. 2018)).

64. *See, e.g.*, Fox Broad. Co. v. Dish Network L.L.C., 747 F.3d 1060, 1068–70 (9th Cir. 2014).

tailored exceptions and limitations.[65] No copyright holder authorization is required for uses that meet the requirements of one of the specific exceptions or limitations, even if the use would not qualify as fair use. And, unlike closed catalog copyright systems, a use that does qualify as fair use is non-infringing even if it does not fall within any of the specific exceptions and limitations.

B. Closed List Copyright Exceptions

1. *Civil Law Regimes*

Until the late 1990s, the United States was the only country in the world with an open-ended fair use privilege. Copyright laws of continental European and other civil law countries typically set out a closed list of narrowly defined permitted uses. For example, Article L122-5 of the French Intellectual Property Code provides that once an author has disclosed his or her work to the public, the author may not prohibit (1) "private and gratuitous performances carried out exclusively within the family circle," (2) "copies . . . reserved strictly for the private use of the copier and not intended for collective use," (3) "short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated," "press reviews," and "the dissemination . . . through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings," (4) "parody, pastiche and caricature," (5) noncommercial reproductions made for purposes of conservation or preservation and accessible from within publicly accessible libraries, museums, or archives, and (6) a couple additional similarly narrow and expressly defined uses.[66] Similarly, the European Union's Copyright in the Information Society Directive of 2001 lists twenty specific exceptions and limitations that member states are entitled to enact.[67] Pursuant to the Copyright in the Information Society Directive, E.U. country copyright statutes provide that copying or publicly communicating a copyright-protected work in a manner that the statute does not expressly identify as a copyright exception requires the copyright owner's permission and, absent permission, infringes the copyright owner's exclusive rights.

Further, courts may not fashion new exceptions, and the traditional rule in many countries, including those of the European Union, is that copyright

65. *See* Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 23, at 12 (discussing policy justifications for and interplay between fair use and enumerated exceptions and limitations in U.S. copyright law).

66. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L122-5 (Fr.).

67. Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5, 2001 O.J. (L 167) 10, 16 [hereinafter E.U. Copyright Directive].

limitations and exceptions must be narrowly construed.[68] It does not matter how socially beneficial the use might be or whether it is a type of use that the legislature did not and could not have contemplated when it enacted the relevant provision of the copyright statute. Consequently, Google's scanning of millions of library books was held to be infringing under French copyright law.[69] For that matter, Google's library partners' creation of a searchable database of those books would also infringe because France's exception for copying by libraries and archives is limited to copying for purposes of preservation. By contrast, the Second Circuit held that the digital copying of library books by Google's library partners to establish an online searchable database qualified as fair use, just as a different Second Circuit panel held that Google itself had made fair use of the books that it digitized.[70]

Of note, some closed catalog regimes also include an open-ended standard like fair use. The E.U. Copyright in the Information Society Directive, for example, incorporates the three-step test that has become standard in intellectual property treaties, including the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights, and the WIPO Copyright Treaty.[71] However, the three-step test operates to impose a restriction on the specific exceptions and limitations set out in the Directive, not as an open-ended, flexible exception like fair use.[72] Article 5(5) of the Directive provides that the specific exceptions and limitations "shall only be applied in [1] certain special cases which [2] do not conflict with a normal exploitation of the work or other subject-matter and [3] do not unreasonably prejudice the legitimate interests of the rightholder."[73] Unlike fair use, the Copyright Directive's three-step test is not a freestanding exception that may be applied even if the use falls outside the specific exceptions or limitations. Nor are the specific exceptions and limitations independent from the three-step

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68. *But see* P. Bernt Hugenholtz, *Flexible Copyright: Can the EU Author's Rights Accommodate Fair Use?*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 23, at 275, 284–86 (discussing the three-step test constraint and traditional rule of narrow construction but noting that recent decisions of the Court of Justice of the European Union "reflect a more liberal manner of interpreting limitations and exceptions," even while "still providing lip service to the rule of narrow construction").

69. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., Dec. 18, 2009, 79 PTCJ 226 (Fr.).

70. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 97 (2d Cir. 2014); Authors Guild v. Google, Inc., 804 F.3d 202, 207–08, 225 (2d Cir. 2015).

71. *See* Guido Westkamp, *The "Three-Step Test" and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making*, 56 J. COPYRIGHT SOC'Y U.S.A. 1, 3, 11 (2008) (discussing the three-step test in E.U. law); Christophe Geiger, Daniel Gervais & Martin Senftleben, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV. 581, 583–611 (2014) (discussing the historical evolution of the three-step test in international treaties).

72. *See* Westkamp, *supra* note 71, at 25 (concluding that in the context of the E.U. Copyright Directive, the three-step test "must be understood so as to coerce member states to interpret existing limitations 'in the light' of the three-step test, which results naturally in more restrictive legislative choices").

73. E.U. Copyright Directive, *supra* note 67, art. 5(5).

test. Per Article 5(5), a specific exception or limitation may only be applied in a particular case if doing so would comport with the three-step test.[74]

2. Fair Dealing Regimes

The United Kingdom and former British colonies and dominions that followed its example provide for a "fair dealing" exception to copyright. Fair dealing differs in some respects from the civil law approach to copyright exceptions. But, today, fair dealing is also typically understood to permit only a closed list of exceptions.[75]

Until 1911, United Kingdom fair dealing doctrine was much like American fair use.[76] Courts had wide latitude to determine fairness, unconstrained by any statutorily mandated closed list.[77] As such, U.K. courts permitted fair abridgement as needed to prevent copyright from putting "manacles upon science."[78] But that judicial discretion was sharply curtailed after Parliament codified fair dealing case law in 1911. The U.K. Copyright Law of 1911 provided that "[a]ny fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary" did not constitute copyright infringement.[79] Courts interpreted that language to set out a closed list of permissible uses—to mean that fair dealing could apply only for one of the five types of uses enumerated in the statute.[80] Former British colonies and dominions such as Australia,[81] Canada,[82] India,[83] New Zealand,[84] and South Africa[85] enacted similar closed-list versions of fair dealing. Likewise, of particular relevance to our study, the U.K. Copyright Law of 1911, including the closed-list fair dealing exception, took effect in British Mandate Palestine following

74. Case C-476/17, Pelham GmbH v. Hütter, ECLI:EU:C:2019:624, ¶ 62 (July 29, 2019).

75. Singapore and Sri Lanka, two British Commonwealth countries that each recently enacted an open-ended exception modeled on fair use, are exceptions to that general rule. They continue to denominate the exception as "fair dealing" rather than adopting the "fair use" appellation. *See supra* notes 10–11.

76. *See* Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1074 (2011). *See generally* ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 155–233 (2010) (situating the fair dealing exception within the general approach to copyright infringement in U.K. law prior to the Copyright Law 1911).

77. *See, e.g.*, Wilkins v. Aikin (1810) 34 Eng. Rep. 163, 165; 17 Ves. 422, 426 (Eng.) (holding that "a legitimate use of [a] publication in the fair exercise of a mental operation, deserving the character of an original work" does not infringe copyright); Smith v. Chatto (1874) 31 L.T. 775 (Eng.).

78. Cary v. Kearsley (1803) 170 Eng. Rep. 679, 680; 4 Esp. 168, 170 (Eng.).

79. Copyright Act 1911, 1 & 2 Geo. 5 c. 46, § 2(1)(i) (U.K.).

80. As Ariel Katz has cogently argued, it is far from clear that Parliament intended to set out a closed list rather than a list of illustrative examples. But courts in the U.K. and other countries have generally, albeit perhaps not decisively, interpreted the 1911 fair dealing exception to set out a closed list. *See* Ariel Katz, *Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?*, *in* THE CAMBRIDGE HANDBOOK OF COPYRIGHT LIMITATIONS AND EXCEPTIONS 111 (Shyamkrishna Balganesh, Ng-Loy Wee Loon & Haochen Sun eds., 2020).

81. *Copyright Act 1968* (Cth) pt III div 3 (Austl.).

82. Copyright Act of 1921, R.S.C. 1985, c C-42, s. 29 (Can.).

83. Copyright Act, 1957, §§ 51–52 (India).

84. Copyright Act 1994, ss 42–43 (N.Z.).

85. Copyright Act 98 of 1978 § 12 (S. Afr.).

World War I and was incorporated into Israeli law upon the establishment of the State of Israel in 1948.[86]

Courts in the United Kingdom and elsewhere have applied various judge-made factors to determine whether a use meets the test of "fairness." But with the notable recent exception of Canada's Supreme Court, they have held that even if the test of fairness is met, fair dealing cannot apply to types of uses that are not listed in the statute.[87] Rather, like the E.U. Copyright Directive's rule regarding the three-step test, "fairness" operates only as a constraint on applying the exception to listed uses in particular cases. Even if a particular use falls within one of the enumerated uses, it will not qualify as "fair dealing" unless it would be "fair" to exempt the use from copyright holder authorization under the circumstances.[88] The United Kingdom's current fair dealing provisions, as set out in the Copyright, Designs and Patents Act 1988, similarly enumerate a closed list of exceptions to copyright, in line with the European Union Copyright Directive.[89]

C. Some Perspective on the Differences

The fair use and closed catalog models differ substantially in their basic approach to carving out exceptions to copyright owner rights. However, the differences are not quite as stark as might appear.

From the fair use side, as the empirical studies have shown, U.S. fair use does not truly operate as a fully open-ended, standard-based regime in the sense that courts exercise virtually unbridled discretion to weigh the equities in each individual case. Rather, U.S. courts tend to coalesce around more precise rules for standard fact patterns. For example, copying for purpose of parody, criticism

86. *See* Michael D. Birnhack, Colonial Copyright: Intellectual Property in Mandate Palestine 283–84 (2012).

87. *See* L. Bently, B. Sherman, D. Gangjee & P. Johnson, Intellectual Property Law 229 (5th ed. 2018) (contrasting the restricted, closed catalog approach of U.K. fair dealing with the general fair use defense under U.S. copyright law).

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> To claim fair dealing under U.K. law, a defendant must prove three elements: 1) the dealing must fall into an enumerated category; 2) the dealing must be fair in accordance with common-law criteria; and 3) there must be sufficient acknowledgement of the original work in cases of criticism/review and reporting current events.

Seagull Haiyan Song, *Reevaluating Fair Use in China—A Comparative Copyright Analysis of Chinese Fair Use Legislation, the U.S. Fair Use Doctrine, and the European Fair Dealing Model*, 51 IDEA 453, 469 (2011); *see also* Graeme W. Austin, *Four Questions About the Australian Approach to Fair Dealing Defenses to Copyright Infringement*, 57 J. Copyright Soc'y U.S.A. 611, 616–17 (2010) (noting that to qualify for the fair dealing exception in Australian law, the defendant's use must both be "fair" and fit within one of the statutory categories); Yu, *supra* note 17, at 124–27 (discussing closed catalog character of fair dealing).

89. Copyright, Designs and Patent Act 1988, 36 & 37 Eliz. 2 c. 48, §§ 29–31 (U.K.). *But see* Tanya Aplin & Lionel Bently, Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works 2–3 (2020) (arguing that Berne Convention Article 10(1), which requires countries to provide a copyright exception for quotations that accord with "fair practice," and the UK quotation exception should be broadly interpreted to permit a broad spectrum of secondary uses and thus to serve as a flexible exception akin to fair use).

of the copied work, introduction of the work in evidence in litigation (unless the copied work was initially created for possible use in litigation), and comparative advertising almost always qualify as fair use.[90] As such, fair use's flexibility lies in enabling courts effectively to tailor fair use for new uses, fact patterns, and policy choices.

For their part, closed catalog regimes provide somewhat greater flexibility than is often assumed. First, closed catalog regimes operate within a system of constitutional and general private law that sometimes provides courts with openings to find flexibilities outside the copyright statute. For example, European courts have occasionally looked to the right to free expression grounded in a national constitution or the European Convention on Human Rights to interpret a copyright exception broadly or even to override the rules of copyright.[91] Likewise, in the Google Thumbnails case, the German Federal Supreme Court ruled that even though Google's display of images through its image search engine did not fall within any copyright exception, Google's use of the images was lawful under the doctrine of implied consent.[92] Germany's Supreme Court reasoned that the copyright owner had implicitly consented to the use of her images in the image search service by making her images available online without employing readily available technical means to block the search engine's indexing and display of the images.[93]

Second, a degree of flexibility can be obtained through narrowly defining the scope of authors' exclusive rights, in particular the right of adaptation (the equivalent of the right to prepare derivative works under U.S. copyright law). As Bernt Hugenholtz and Martin Seftleben point out, both Germany and the Netherlands allow a degree of freedom to adapt another's work when the adaptation is sufficiently distinct from the underlying work.[94] The relative freedom to adapt is not defined as an exception to copyright holder rights.

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90. *See* Samuelson, *supra* note 45, at 2550–53 (parody and criticism), 2592–93 (litigation), 2597–99 (comparative advertising); *see also* Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 163 (2017); Justin Hughes, *The* Sub Rosa *Rules of Copyright Fair Use*, 34 HARV. J.L. & TECH. (forthcoming 2021) (characterizing fair use as a mechanism for courts to create specific exceptions that are akin to rules). For a seminal discussion of the dynamic standards-rules continuum in property law generally, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

91. *See, e.g.*, Case C-469/17, Funke Medien NRW GmbH v. Bundesrepublik Deutschland, ECLI:EU:C:2019:623, ¶ 70 (July 29, 2019) (stating that freedom of expression does not justify a copyright exception beyond those specified in the E.U. Copyright Directive, but that the right to free expression may inform interpretation of a specified exception); *see also* P. Bernt Hugenholtz & Martin R.F. Seftleben, Fair Use in Europe. In Search of Flexibilities 11 (Nov. 2011) (unpublished manuscript), https://www.researchgate.net/publication/228186530_Fair_Use_in_Europe_In_Search_of_Flexibilities (click "Download full-text PDF" to download) (discussing the *Germania 3* decision of the Federal Constitutional Court of Germany and the *Scientology v. XS4ALL* ruling of the Court of Appeal of the Hague, both of which permitted extensive quotations from copyright-protected works); Christophe Geiger & Elena Izyumenko, *Towards a European "Fair Use" Grounded in Freedom of Expression*, 35 AM. U. INT'L L. REV. 1, 34–37 (2019).

92. Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 29, 2010, I ZR 69/08, paras. 14–15, juris (Ger.), summarized in Hugenholtz & Senftleben, *supra* note 91, at 12.

93. Hugenholtz & Senftleben, *supra* note 91, at 12.

94. *See id.* at 26–27.

Rather, German and Dutch courts narrowly construe the copyright holders' exclusive right to adapt their work such that it does not extend to adaptations that are sufficiently distinct.[95] But the effect is similar. German and Dutch law could conceivably give free rein to many uses that would qualify as transformative uses under U.S. fair use law.

That said, the fair use model still provides courts greater flexibility to devise a copyright exception for new technological uses, such as in the Google Book Search case, as well as to permit exact copying for a different expressive purpose, as in the illustrated history of the Grateful Dead case.[96] For that reason, several leading European scholars have advocated adoption of fair use, or an open-ended exception based on the three-step test, under European law.[97]

II. U.S. AND COPYRIGHT INDUSTRY OPPOSITION

Motion picture studios, book publishers, and record labels have all asserted the fair use defense in copyright infringement lawsuits brought against them.[98] Nonetheless, copyright industry trade associations and lobbyists have resolutely opposed the adoption of fair use outside the United States.

An early example involved the negotiations leading up to the landmark Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), adopted as part of the agreement establishing the World Trade Organization (WTO) in 1994. TRIPS requires WTO member countries to comply with prescribed standards for intellectual property protection and authorizes the imposition of trade sanctions against countries that fail to do so. In its initial submission to the TRIPS negotiations, the United States delegation, working closely with copyright industry associations, proposed that TRIPS allow countries to provide for exceptions to copyright holders' exclusive rights only in "clearly and carefully defined special cases which do not impair an actual or potential market for the value of a protected work."[99] If the U.S. proposal had

95. *See id.*

96. *See* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).

97. *See, e.g.*, Jonathan Griffiths, *Unsticking the Centre-Piece—The Liberation of European Copyright Law?*, 1 J. INTELL. PROP. INFO. TECH. & ELEC. COMM. L. 87, 90–91 (2010); Senftleben, *supra* note 26, at 243–47; *see also* Alexandra Sims, *The Case for Fair Use in New Zealand*, 24 INT'L J.L. & INFO. TECH. 176, 190–96 (2016).

98. *See, e.g.*, May v. Sony Music Ent., 399 F. Supp. 3d 169, 178, 187–92 (S.D.N.Y. 2019) (denying recording industry and other defendants' motion to dismiss based on fair use defense); Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499, 508–11 (S.D.N.Y. 2009) (holding that a song Fox broadcasted in an episode of *Family Guy* was fair use parody); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259, 1276 (11th Cir. 2001) (holding, in favor of publisher defendant, that the novel *Wind Done Gone* was fair use adaptation of *Gone with the Wind*).

99. Communication from the United States, *Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights*, pt. 2, art. 6, GATT Doc. MTN.GNG/GN11/W/70 (May 11, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92100144.pdf. On the "capture" of the United States Trade Representative by copyright industry interests to promote their domestic and international agenda, see Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977

been adopted, TRIPS would have imposed a significant barrier to the adoption of fair use in other countries. Under that proposal, indeed, § 107 of the U.S. Copyright Act might have itself run afoul of U.S. obligations under TRIPS.

The U.S. proposal was profoundly antagonistic to fair use in two respects. First, the proposal would have limited copyright exceptions to "clearly and carefully defined special cases." That language suggests that only specific, narrow statutory exceptions are permitted, or, at the very least, that judicial applications of an open-ended exception would be vulnerable to the claim that the court failed sufficiently to define and delimit the special case held to enjoy the fair use privilege.

Second, the U.S. proposal would have narrowed the permissible scope of copyright exceptions to those that satisfy the fourth fair use factor: "the effect of the use upon the potential market for or value of the copyrighted work."[100] The proposal would have made the absence of market harm a threshold requirement for uses to be permitted, not just one factor for courts to weigh in determining on a case-by-case basis whether a defendant's use qualifies as fair use. Granted, *Harper & Row v. Nation Enterprises*, the leading Supreme Court ruling on fair use when the United States submitted its TRIPS proposal, had characterized the fourth factor as the single most important factor for courts to consider.[101] But even *Harper & Row* had not held up the fourth factor as a threshold requirement. Moreover, in its 1994 ruling in *Campbell v. Acuff-Rose*, the Supreme Court reiterated that all four factors must be considered, and put considerable, if not primary, weight on the first factor, in particular on whether the defendant's use is transformative.[102]

Ultimately, the U.S. proposal was rejected. Instead, TRIPS incorporates the three-step test that has now become a standard provision in multilateral intellectual property law treaties as well as in national and regional legislation such as the E.U. Copyright in the Information Society Directive. TRIPS Article 13 provides that WTO member states "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."[103]

Some commentators have argued that the U.S. fair use privilege might exceed the permissible scope of copyright exceptions under the TRIPS Article 13 three-step test. They advance a number of arguments, principally that fair use's open-ended, flexible character—the fact that fair use enables courts to hold that new uses, involving new technologies, not specified in the statute do not

(2014); Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, *in* 6 NEW DIRECTIONS IN COPYRIGHT LAW 3 (Fiona Macmillan ed., 2007).

100. 17 U.S.C. § 107.

101. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

102. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–80 (1994).

103. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

infringe copyright—violates Article 13's requirement that copyright exceptions may be available only in "certain special cases."[104] In particular, they argue that the "certain special cases" restriction implies that a copyright exception must be legislatively confined to a narrow and specific purpose, much like the United States' rejected TRIPS proposal would have explicitly required.[105] Other commentators contest that proposition. They view Article 13 as more open-ended and flexible.[106] Or they contend that fair use as actually applied by U.S. courts meets the three-step test and that actual application is what matters.[107]

During a review of nations' copyright laws undertaken by the TRIPS Council in 1996, the European Communities asked the United States to "explain how the fair use doctrine, as it has been broadly applied and interpreted by US courts, particularly in connection with a 'parody' that diminishes the value of a work, is consistent with TRIPS Article 13."[108] The United States responded that "[t]he fair use doctrine of US copyright law embodies essentially the same goals as Article 13 of TRIPS, and is applied and interpreted in a way entirely congruent with the standards set forth in that Article."[109] In its response, the United States further emphasized that fair use is bound by case law.[110] The response cites the Supreme Court's statement in *Harper & Row* that the fourth factor is the most important. The U.S. response further declares that "[i]n applying the fair use doctrine, the courts have consistently refused to excuse uses

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104. *See* MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 162–65 (2004) (summarizing the views of European commentators Herman Cohen Jehoram and J. Bornkamm); *see also* MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO COPYRIGHT TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION § 5.55, at 284 (2002); Herman Cohen Jehoram, *Restrictions on Copyright and Their Abuse*, 27 E.I.P.R. 359, 362 (2005); Andre Lucas, *For a Reasonable Interpretation of the Three-Step Test*, 32 E.I.P.R. 277, 278–79 (2010); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 117 (2000); SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986, at 482 (1987). Okediji, Fiscor, and Ricketson have since changed their position, contending that fair use does comport with the three-step test. *See* Pamela Samuelson & Kathryn Hashimoto, *Is the US Fair Use Doctrine Compatible with Berne and TRIPS Obligations?*, *in* PLURALISM OR UNIVERSALISM IN INTERNATIONAL COPYRIGHT LAW 139, 140 n. 9 (Tatiana Eleni Synodinou ed., 2019) (describing the commentators' changing views); P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT: FINAL REPORT 3 (2008), https://www.opensocietyfoundations.org/sites/default/files/copyright_20080506.pdf ("The [three-step] test most likely permits both discrete European-style limitations and broader fair-use-style exemptions, or possibly a combination of both."); World Intellectual Property Organization [WIPO], *Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, at 67–69, Doc. SCCR/9/7 (Apr. 5, 2003), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf (discussing how some fair uses are consistent with the test).

105. *See, e.g.*, SENFTLEBEN, *supra* note 104, at 162–65 (summarizing the views of European commentators Herman Cohen Jehoram and J. Bornkamm).

106. *See, e.g.*, Geiger et al., *supra* note 71, at 612–16; Hugenholtz & Senftleben, *supra* note 91, at 17.

107. *See, e.g.*, Samuelson & Hashimoto, *supra* note 104, § 5.2.3.

108. Council for Trade-Related Aspects of Intellectual Property Rights, *United States—Review of Legislation on Copyright and Related Rights*, pt. IV(1), WTO Doc. IP/Q/USA/1 (Oct. 30, 1996). The European Communities' query and the U.S. response is quoted in full in WILLIAM F. PATRY, PATRY ON FAIR USE § 8:15 (2020 ed.).

109. PATRY, *supra* note 108, § 8:15.

110. *Id.*

that go too far and interfere with the copyright owner's normal markets for the work."[111]

In opposing adoption of fair use outside the United States, U.S. copyright industries similarly take the position that U.S. courts have, in fact, interpreted and applied § 107 in a manner that generally comports with the three-step test. In so doing, they downplay the breadth, flexibility, and importance of fair use in the United States. In their telling, U.S. fair use comports with the three-step test only because U.S. courts have narrowly interpreted the exception. And they argue that, unmoored from restrictive and precise U.S. precedent, courts in other countries might well interpret fair use in an overly capacious, liberal manner that would exceed the strictures of the three-step test.

We can see a prime example in the 2011 U.S. copyright industry submissions to the United Kingdom's state-commissioned Hargreaves Review of Intellectual Property and Growth, which had solicited views on whether the United Kingdom should adopt fair use and on whether fair use spurs technological innovation and growth.[112] In its submission, the Directors Guild of America (DGA) stated that "the fair use doctrine provides only a narrow affirmative defense to copyright infringement, and applies most frequently to small samples of creative work used for commentary, education, and parody."[113] The DGA further stated: "The fair use doctrine does not explicitly account for technological innovation, and the purpose of the fair use doctrine is not to promote any particular type of technological innovation."[114] Similarly, the Motion Picture Association of America (MPAA) informed the Hargreaves Review that because the U.S. Copyright Act contains fifteen specific and narrow exceptions to copyright in addition to fair use, "this ostensibly 'flexible' system is actually a fact-intensive, detailed code."[115] The MPAA further cited U.S. Copyright Office advice that because the fair use defense is uncertain, "[t]he safest course is always to get permission from the copyright owner before using copyrighted material."[116]

Of note, in these 2011 submissions, the copyright industries assiduously ignored U.S. court rulings that had already taken a considerably more expansive view of fair use. Most prominently, in its 1984 ruling in *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court held that consumer recording

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111. *Id.*

112. HARGREAVES REVIEW, *supra* note 3, at 3–5.

113. Dirs. Guild of Am., Comments of the Directors Guild of America, Submission to United Kingdom Independent Review of Intellectual Copyright and Growth 4–5 (Mar. 3, 2011), http://www.dga.org/Initiatives/~/media/Files/Internet%20Theft/Directors%20Guild%20of%20America%20Submissionto%20the%20UK%20Independent%20Review%20of%20IP%20and%20CopyrightMarch%2032011.pdf.

114. *Id.*

115. Motion Picture Ass'n, Comments of the Motion Picture Association, United Kingdom Independent Review Intellectual Property and Growth 11 (Mar. 4, 2011) (on file with authors). The MPAA has recently rebranded itself as the MPA, eliminating the "of America" phrase to emphasize the film industry's global character.

116. *Id.*

of television programs for later viewing is fair use and that, given that substantial non-infringing use, the supplier of consumer video-recording equipment faces no liability for facilitating copyright infringement.[117] In so holding, the Court reiterated that "[t]he sole interest of the United States and the primary object in conferring the [copyright] monopoly . . . lie in the general benefits derived by the public from the labors of authors."[118] Thus, the Court continued, "[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."[119]

Subsequently, in 2007, the Ninth Circuit held that Google's display of thumbnails of copyrighted images on its image search engine is fair use.[120] In so holding, the Court gave considerable weight to the fact that "search engines such as Google Image Search provide great value to the public."[121] It reasoned that fair use must be interpreted in line with the Supreme Court's statement in *Sony* that "[t]he purpose of copyright law is '[t]o promote the Progress of Science and useful Arts,' and to serve 'the welfare of the public.'"[122] And the Ninth Circuit further relied on *Sony* in noting "the importance of analyzing fair use flexibly in light of new circumstances."[123]

As a final notable example, in 2006 the Second Circuit held that the market for transformative uses does not count for purposes of determining market harm under the fourth fair use factor.[124] When the defendant's "use of the copyrighted images is transformatively different from their original expressive purpose," the court stated, "a copyright holder cannot prevent others from entering fair use markets merely 'by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.'"[125]

Since 2011, U.S. courts' extension of fair use to new technological uses and to uses held to be transformative has continued apace. The U.S. copyright industries, however, persist in holding up their imagined narrowly delimited portrait of fair use as the metric with which to measure whether fair use should be adopted in other countries. They declare that they, of course, celebrate U.S. fair use. But they insist that to adopt fair use elsewhere raises "serious questions regarding consistency with the three-step test" because courts in other countries lack the "many decades of [U.S.] case law and precedent" to ensure that the fair use provision "is compliant with the three-step test."[126] Indeed, in the case of

117. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984).

118. *Id.* at 432 (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

119. *Id.* (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

120. Perfect 10, Inc., v. Amazon, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007).

121. *Id.* at 1166 (quoting Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 848–49 (C.D. Cal. 2006)).

122. *Id.* at 1163 (second alteration in original) (citation omitted) (first quoting U.S. CONST. art. I, § 8, cl, 8; and then quoting *Sony Corp.*, 464 U.S. at 429 n.10).

123. *Id.* at 1166 (citing *Sony Corp.*, 464 U.S. at 431–32).

124. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614–15 (2d Cir. 2006).

125. *Id.* (quoting Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 146 n.11 (2d Cir. 1998)).

126. INT'L INTELL. PROP. ALL., 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 141–42 (2019), https://www.iipa.org/files/uploads/2019/02/2019SPEC301REPORT.pdf (opposing adoption of

civil law countries, they further argue courts do "not follow the legal principle of stare decisis" and are not "bound by judicial precedent in the same way as common law countries."[127]

As such, the IIPA has repeatedly cited countries' adoption of fair use in support of its petitions to the USTR for placing such countries on the watch list of countries that provide inadequate protection of U.S. intellectual property rights and thus should face the threat of trade sanctions.[128] For example, the IIPA opposed Ecuador's proposed addition of a fair use clause modeled on that of the United States. It argued that Ecuador's adoption of fair use would "undermine copyright protection" given that Ecuador is a civil law system and Ecuadorian judges "have no experience or training on the doctrine of fair use."[129] Similarly, the IIPA has recently petitioned the USTR to deny South Africa developing country trade preferences due to that country's alleged failure to provide "'adequate and effective protection' of American copyrighted works."[130] The IIPA petition points to South Africa's "ill-considered importation of the U.S. 'fair use' rubric," arguing that "South Africa lacks the decades of legal precedent that have served to define, refine, and qualify the fair use doctrine in the United

fair use in Ecuador). The International Intellectual Property Alliance (IIPA) is an umbrella trade association representing the Association of American Publishers; Entertainment Software Association; Independent Film & Television Alliance; Motion Picture Association of America; and Recording Industry Association of America. *About*, INT'L INTELL. PROP. ALL., https://www.iipa.org/about/ (last visited Apr. 19, 2021).

127. INT'L INTELL. PROP. ALL., *supra* note 126, at 141–42.

128. Section 301 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988, authorizes the President to take all appropriate action, including retaliation, against foreign government practices that burden U.S. commerce. 19 U.S.C. § 2411. Pursuant to provisions referred to as "Special Section 301," the U.S. Trade Representative (USTR) undertakes an annual review of foreign countries' intellectual property law and enforcement. In turn, the IIPA submits an annual report to the USTR for the Representative to consider as part of its annual review and determination of whether action is required to counter purportedly inadequate protection and enforcement of U.S. intellectual property in foreign countries. Every year, the USTR places some countries in one of three categories: "priority county," "priority watch list," or "watch list," in descending order of the extent to which that country has failed to provide adequate intellectual property protection and enforcement. *See* WILLIAM F. PATRY, 7 PATRY ON COPYRIGHT §§ 23.51–23.53 (2021 ed.) (discussing the Generalized System of Preferences and "Special Section 301"); Judith H. Bellow & Alan F. Holmer, *"Special 301": Its Requirements, Implementation, and Significance*, 13 FORDHAM INT'L L. J. 259, 261–63 (1989) (describing Special Section 301's objective and requirements); Kaminski, *supra* note 99, at 988–1005 (describing the copyright industry's extraordinary influence over USTR decision making in the Special Section 301 process and trade negotiations). The IIPA played an instrumental role in lobbying Congress to add the Special Section 301 procedure to the Trade Act. *See* PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 89–92 (2002).

129. INT'L INTELL. PROP. ALL., 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 125–26 (2018), https://www.iipa.org/files/uploads/2018/02/2018_SPECIAL_301.pdf. A last-minute amendment to Ecuador's copyright legislation scuttled the open-ended fair use provision, making it applicable only to specific exceptions enumerated in the statute. *Id.* at 125–27.

130. Letter from Kevin M. Rosenbaum, Couns., Int'l Intell. Prop. All., to Erland Herfindahl, Deputy Assitant U.S. Trade Rep., Off. of U.S. Trade Rep. (Apr. 18, 2019), https://www.regulations.gov/document?D=USTR-2019-0020-0002 (click "Download File") [hereinafter IIPA Petition]. The Trade Act of 1974 enables the President to accord favorable trade benefits to developing countries under the rubric of the "Generalized System of Preferences" (GSP) and provides that the President is to consider, inter alia, whether a country provides "adequate and effective protection of intellectual property rights" in determining that country's eligibility for such developing country benefits. *See* 19 U.S.C. § 2462(c)(5).

States."[131] The IIPA has also objected to the adoption, or proposed adoption, of fair use in Canada,[132] Japan,[133] South Korea,[134] Chile,[135] Taiwan,[136] Sri Lanka,[137] and, as we shall see, Israel on similar grounds. In a number of instances, the IIPA has insisted that countries that do adopt fair use must cabin the doctrine by providing explicitly in their copyright statute that fair use is subject to the three-step test.[138]

U.S. copyright industries have likewise opposed the proposed introduction of fair use in Australia and the European Union. In Australia, a common law country, a number of government studies, conducted between 2006 and 2018, favored adopting fair use. The MPAA and the American Association of Publishers (AAP) repeatedly filed submissions opposing those proposals. For example, in its 2012 submission to the Australian Law Reform Commission on Copyright and the Digital Economy, the MPAA stated:

> The enactment as part of Australian law of a new system based on the fair use doctrine would not bring with it this century and a half of judicial precedent [in the U.S.] that allows counsel, and the companies and individuals they

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131. IIPA Petition, *supra* note 130, at 7, 71; *see* INT'L INTELL. PROP. ALL., *supra* note 126, at 70–71. Similarly, in "talking points" prepared for State Department officials, the Motion Picture Association of America recommended that the officials tell South African legislators that the fair use model is ill-advised because it would "transfer power to make law in matters concerning copyright from Parliament to judges." MPAA Talking Points: Copyright Amendment and Performers' Protection Amendment Bills (Nov. 18, 2018); E-mail from Anjam Azziz, USTR Dir. for Info. & Intell. Prop., to Anissa Brennan, Senior Vice President of Int'l Affs. & Trade Pol'y, Motion Picture Ass'n of Am. (Dec. 4, 2018) (on file with authors). In the wake of U.S. (and E.U.) objections, South Africa's President returned the Copyright Act Amendment to that country's parliament for reconsideration. *See* Palmedo, *supra* note 17.

132. INT'L INTELL. PROP. ALL., 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 85–86 (2015), https://www.iipa.org/files/uploads/2018/01/2015_Special_301.pdf (objecting to Canadian Supreme Court's adoption and application of open-ended exception modeled on fair use).

133. INT'L INTELL. PROP. ALL., 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 383 (2009), https://www.iipa.org/files/uploads/2018/01/2009_Special_301.pdf (opposing proposal to adopt fair use in Japan given that "it would be extremely difficult to integrate this common-law doctrine into a civil law copyright system such as Japan's").

134. *See id.* at 295 n.14 (expressing grave concern about proposal to adopt fair use in South Korea given that "Korea is a civil law system which generally lacks the precedential background against which the U.S. fair use exception has developed").

135. INT'L INTELL. PROP. ALL., 2007 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 20 (2007), https://www.iipa.org/files/uploads/2018/01/2007_Special_301.pdf (opposing adoption of "'fair use'-like" exceptions in Chile).

136. INT'L INTELL. PROP. ALL., 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 95 n.20 (2020), https://www.iipa.org/files/uploads/2020/02/2020SPEC301REPORT.pdf (opposing a draft amendment to Taiwan's copyright statute that would create a "catch-all" fair exception and insisting that all exceptions "should be expressly confined to the three-step test").

137. INT'L INTELL. PROP. ALL., 2003 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 595 (2003), https://www.iipa.org/files/uploads/2018/01/2003_Special_301.pdf (calling on Sri Lanka to narrow its copyright exceptions and limitations, including fair use, to make clear that they comport with the three-step test).

138. In its 2019 submission to the USTR, the IIPA maintains that "[s]ome copyright 'reformers' call for broadly drawn exceptions to copyright protection that threaten to violate the cardinal global rule that such exceptions and limitations be confined to those that meet the familiar 'three-step test.'" It then cites the proposed adoption of fair use by Ecuador, South Africa, and Canada as examples. *See* INT'L INTELL. PROP. ALL., *supra* note 126, at vi–vii.

> advise, to rely upon the doctrine. Indeed, at its introduction, the new system would be unsupported by any binding precedent at all.[139]

Likewise, the AAP's 2016 response to the Australian Government Productivity Commission's draft report advocating adoption of fair use highlights fair use's case specific uncertainty:

> [T]he radical uncertainty of the scope or applicability of the fair use exception to any particular set of facts can be a debilitating cost . . . In the United States, these costs are mitigated, principally by the existence of a deep and rich body of case law and precedent . . . While this system works well in the United States, AAP is skeptical whether it can be successfully transplanted to Australia.[140]

For its part, in 2013, the European Commission solicited public comments on whether the European Union should provide for greater flexibility for copyright exceptions and limitations, including in the form of a fair use provision.[141] The MPAA, Sony ATV Music Publishing, and NBC Universal all responded by adamantly opposing adoption of fair use in the European Union.[142] They insisted that absent U.S. case law's many decades of judicial interpretation, transplanting fair use to the European Union "would be unwise and inevitably bring chaos to the system."[143]

Finally, at copyright industries' urging, the United States opposed any reference to fair use in the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.[144] The Marrakesh Treaty, which was adopted in June 2013 and came into force in September 2016, requires signatory countries to provide copyright limitations or exceptions to facilitate the availability of copyrighted works in accessible format to blind, visually impaired and print disabled persons (referred

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139. Letter from Greg Frazier, Exec. Vice President, Motion Picture Ass'n of Am., Inc., to the Exec. Dir., Australian L. Reform Comm'n 3–7 (Dec. 3, 2012), https://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc#org (Submission 197 from MPAA) (click "RTF" next to "197 Motion Picture Association of America" to download).

140. Letter by M. Luisa Simpson, Exec. Dir. of Int'l Enf't & Trade Pol'y, Ass'n of Am. Publishers, to Australian Gov't Productivity Comm'n 3–7 (June 2, 2016), https://www.pc.gov.au/__data/assets/pdf_file/0020/200918/subdr338-intellectual-property.pdf.

141. EUROPEAN COMM'N, PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT RULES (2013), https://ec.europa.eu/digital-single-market/en/news/modernisation-eu-copyright-rules-useful-documents (click "2013 Public Consultation on the review of EU copyright rules" to download).

142. Motion Picture Association, Public Consultation on the Review of the EU Copyright Rules; Submission to European Commission 5, 35–37 (March 5, 2014) (on file with authors); Sony/ATV Music Publishing, Response to the Public Consultation on the Review of EU Copyright Rules. Submission to European Commission 28 (Mar. 5, 2014) (on file with authors); NBC Universal, Public Consultation on the Review of EU Copyright Rules. Submission to European Commission 15–16 (Mar. 5, 2014) (on file with authors).

143. NBC Universal, Public Consultation on the Review of EU Copyright Rules. Submission to European Commission 16 (Mar. 5, 2014).

144. *See infra* notes 145–149 and accompanying text; *see also* Jonathan Band, *Ambivalence to Fair Use in U.S. Trade Policy*, DISRUPTIVE COMPETITION PROJECT (July 6, 2020), https://www.project-disco.org/intellectual-property/070620-ambivalence-to-fair-use-in-us-trade-policy.

to in the Treaty as "beneficiary persons").[145] The treaty further provides that signatory countries may fulfill their treaty obligations through copyright limitations or exceptions that "may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses."[146]

While the draft Marrakesh Treaty was being negotiated, the MPAA sent U.S. negotiators a memorandum objecting that the draft treaty "expressly encouraged [signatory countries] to implement the proposed instrument by way of fair use or fair dealing . . . without the need to pass by the three-step test in each and every case."[147] The MPAA memorandum urged, accordingly, that "the proposed instrument should omit a reference to specific ways of implementation, in particular fair use and fair dealing, and subject all exceptions and limitations as a general rule to the three-step test."[148]

A confidential U.S. Department of State communication, subsequently obtained through a Freedom of Information Request, reveals that government officials sought to assuage copyright industry objections to the draft Treaty's reference to fair use. The communication, dated April 3, 2013, states:

> I know [redacted name of person] is interested in the reference to fair practices, uses and dealing on page 18 of the draft document. Quite frankly, we think that this reference could lead to overly broad exceptions and, in the interests of pragmatism, we think it would be best if we could drop this reference. I believe [redacted name of person] has lobbied you on this, no? Basically we think that removing this fair practices reference will be a big help in getting consensus in the United States to negotiate the final parameters of a binding agreement in Marrakesh.[149]

Ultimately, the reference to fair use remained in the Marrakesh Treaty. At the United States' insistence, an article was added requiring that, in meeting their obligations under the treaty, signatory countries must ensure that their limitations or exceptions for beneficiary persons comply with the three-step test set forth in TRIPS and other international treaties.[150]

145. Marrakesh Treaty art. 4(1), June 27, 2013, 52 I.L.M. 1312 (2013).

146. *Id.* art. 10(3).

147. Memorandum from Motion Picture Ass'n on WIPO VIP Negotiations: Reference to Fair Use Incorporation of Three-Step test 2 (April 4, 2013) (on file with authors), attached to e-mail from Scott Martin, Exec. Vice President, Intell. Prop., Paramount Pictures, Inc., to Shira Perlmutter, Chief Pol'y Officer and Dir. for Int'l Affs., U.S. Patent and Trademark Off. (Apr. 15, 2013) (obtained from U.S. Patent and Trademark Office in response to Freedom of Information Request by James Love of Knowledge Ecology International). The reference to fair use was added to the draft treaty text in November 2012, more than three years after the treaty was formally proposed. Standing Comm. on Copyright and Related Rts., WIPO Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities, at 23, U.N. Doc. SCCR/25/2 (Nov. 23, 2012).

148. *See* Memorandum, *supra* note 147, at 2.

149. E-mail from Douglas P., Econ. Counselor, U.S. Embassy, to Carl Schonander, Dep't of State (Mar. 26, 2013, 10:25 AM) (redacted e-mail obtained from U.S. Patent and Trademark Office in response to Freedom of Information Request by James Love of Knowledge Ecology International).

150. *See* Marrakesh Treaty, *supra* note 145, art. 11.

In sum, U.S. copyright industries and, at certain junctures, U.S. government agencies have resolutely opposed the adoption of fair use in other countries.[151] In so doing, they have assumed that, at the hands of foreign courts, unhinged from the "deep and rich body of [U.S.] case law and precedent," fair use would likely be construed so broadly, arbitrarily, and inconsistently so as to bring massive legal uncertainty and significant harm to copyright holders.[152] The U.S. copyright industries' concern applies with special force to civil law countries, which the industries insist lack the tradition of adherence to precedent upon which common law fair use doctrine depends. But the industries voice their objection with respect to common law countries as well. The U.S. copyright industries insist, accordingly, that other countries should not replace narrowly defined, closed set limitations with fair use. And if other countries must adopt fair use, their copyright statute must explicitly provide that fair use is subject to the three-step test, which the U.S. copyright industries interpret to impose significant constraints on judicial discretion.

Commentators have presented convincing arguments challenging the U.S. copyright industries' position. They question, first, whether, in the face of dramatic changes in technology, closed list copyright exception systems really yield more certain results than fair use.[153] They also contest the notion that civil law judges are ill-suited to developing a relatively stable and certain fair use doctrine.[154] Finally, commentators contend that, as properly interpreted, the three-step test is not as constraining as the U.S. copyright industries imagine.[155]

We cannot further delve into those arguments in these pages. Rather, we present Israel's adoption and application of fair use as a case study that, at the very least, calls into question the copyright industries' blanket assertion that other countries' adoption of fair use doctrine will lead inexorably to chaotic

151. There are two notable exceptions. First, in July 2012, the U.S. Trade Representative, against the avid opposition of the U.S. copyright industry, abruptly proposed language in the draft Trans-Pacific Partnership Agreement (TPP) that would have encouraged countries to provide copyright exceptions loosely modeled on fair use. The USTR's abrupt embrace of fair use might have been motivated by its desire to curtail opposition to the TPP in the wake of the stunning defeat of copyright-industry supported legislation in the United States and of a copyright-industry supported trade agreement in the European Union earlier that year. Jonathan Band, Evolution of the Copyright Exceptions and Limitations Provision in the Trans-Pacific Partnership Agreement (unpublished manuscript) (Nov. 10, 2015), http://infojustice.org/wp-content/uploads/2015/11/band-tppfairuse-version11102015.pdf. The U.S. withdrew its signature to TPP in January 2017. As a result, the Agreement never came into force. In another instance, the USTR pressured Hong Kong to adopt a fair use exception instead of a broader blanket exception for reverse engineering of computer software. *See* Jonathan Band, *The Global API Copyright Conflict*, 31 HARV. J.L. & TECH. 615, 621 (2018).

152. Letter from M. Luisa Simpson to Australian Gov't Productivity Cmm'n, *supra* note 140, at 3–7.

153. *See* Hugenholtz, *supra* note 68, at 282–83 (explaining why "the advantage of legal certainty that is usually ascribed to the European system of precisely defined exceptions should not be overstated").

154. *See generally* Senftleben, *supra* note 26.

155. *See* Hugenholtz & Senftleben, *supra* note 91, at 20–23 (arguing that the three-step test should properly be understood to give courts flexibility to interpret copyright exceptions and limitations liberally, thus effecting a balance between authors' rights and the broader public interest in accommodating new technological uses of existing expression); Hughes, *supra* note 23, at 242–48 (suggesting that only specific judicial applications of § 107, not § 107 on its face, might violate the three-step test of TRIPS Article 13).

uncertainty and judicial license for piracy, thus significantly undermining copyright holder rights.

III. Israel's Adoption of Fair Use

In broad brush strokes, the United States and Israel followed similar paths to adopting fair use. In both countries, fair use was initially formulated and developed in case law, and subsequently codified as part of a general copyright statute revision. But in Israel, the Supreme Court adopted fair use within the framework of Israel's pre-copyright revision, statutory fair dealing exception. That landmark ruling has continued to influence fair use case law in Israel even after the Knesset replaced fair dealing with fair use.

This Part fleshes out key elements of Israel's adoption of fair use, focusing on two milestones: first, the judicial incorporation of fair use into fair dealing, and second, the codification of fair use in the Copyright Law 2007. With that backdrop, we also foreground U.S. opposition to the Knesset's replacement of fair dealing with fair use. The next Part presents our empirical findings regarding the first decade of case law following the effective date of the Knesset's codification of fair use in the Copyright Law 2007.

A. Courts: Melding Together Fair Dealing and Fair Use

Israel's Copyright Law 2007 replaced the U.K. Copyright Act of 1911, which applied to British Mandate Palestine, and remained in force after the establishment of the State of Israel in 1948.[156] As noted above, in the Copyright Act of 1911, the U.K. Parliament codified the fair dealing defense to copyright infringement. Section 2(1)(i) of the Act provided that "any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary" did not constitute copyright infringement.[157]

The Israeli Supreme Court's landmark 1993 ruling in *Geva v. Walt Disney Co.* concerned Disney's claim that Dudu Geva, a renowned Israeli caricaturist, had infringed Disney's copyright in its cartoon character Donald Duck.[158] Geva had authored a cartoon book that included a story centered on Geva's cartoon character Moby Duck.[159] Moby Duck looked nearly identical to Donald Duck, but Moby sported an iconic Israeli hat often worn by Kibbutz members in the fifties and sixties. Geva's story highlighted the subsequent decline of the Kibbutz movement.[160] Geva argued that his adaptation of Donald Duck in that

156. *See* Copyright Act 1911, 1 & 2 Geo. 5 c. 46, § 37(2)(a) (U.K.); *see also* Copyright Law, 5768–2007, SH 2119 38 (Isr.). The Copyright Ordinance was amended several times by the Israeli Parliament, the Knesset. *See id.* The transitional provisions of the 2007 Law provide that the Copyright Act of 1911, 3 Annotated Laws of Palestine 2475, and the Copyright Ordinance of 1924 continue to apply to certain matters. *See id.* § 78.

157. *See* Copyright Act 1911, 1 & 2 Geo. 5 c. 46, § 2(1)(i) (U.K.).

158. *See* CivA 2687/92 Geva v. Walt Disney Co., 48(1) PD 251 (1993) (Isr.).

159. *Id.* at 255.

160. *See* Birnhack, *supra* note 31, at 273 (describing factual background to *Geva*).

context was protected free speech and a parody, which was permitted as "criticism" under the Copyright Act of 1911's fair dealing exception.[161]

The Israeli Supreme Court, which issued its ruling just two months prior to the U.S. Supreme Court's seminal fair use ruling in *Campbell v. Acuff-Rose Music, Inc.*, discussed pre-*Campbell* case law and commentary in considerable detail.[162] In so doing, the Court drew a sharp contrast between U.S. fair use doctrine's flexible, open-ended character and the closed-list U.K. fair dealing exception then in force in Israel.[163] The Israeli Supreme Court expressed a clear normative preference for U.S. fair use. As the Court stated: "[T]he American arrangement is much more advanced and is, when compared to the 1911 law, a more desired arrangement. . . . It seems that the American legislator preferred to create a flexible arrangement, one that enables maximal consideration in the circumstances of each and every case."[164]

While the Israeli Supreme Court ultimately held that it was bound to apply the fair dealing exception in the Israeli statute, it ruled that each of the enumerated uses was to be broadly interpreted given that the fair dealing exception must reflect a balance between the rights of the copyright owner and other public and social interests.[165] In that regard, the Israeli Supreme Court broadly interpreted the fair dealing category of "criticism." It held that "criticism" may include not only parody (for example, targeting the copyright owner's work for ridicule) but also satire (for example, using a work to target some person, artistic genre, or social phenomenon other than the copyright owner's work).[166]

However, the Court further held that not every use for purposes of criticism constitutes fair dealing. To qualify as fair dealing, the Court held, it is not enough that the use falls within one of the enumerated types of uses in the statute—what the Court termed the "purpose of the use test."[167] The use, rather, must also satisfy a second requirement, that of "fairness of the use."[168] And the Court adopted the four-factor analysis of U.S. fair use law, as codified in Section 107 of the Copyright Act, to determine *fairness*.[169]

In applying the "purpose and character" of use under the first factor, the Israeli Supreme Court considered whether the use was commercial, and also

161. More precisely, Geva argued that Israel's free speech jurisprudence required that the fair dealing exception be broadly construed. *See Geva*, 49(1) PD at 256.

162. *Id.* at 272–82.

163. *Id.* at 270.

164. *Id.*

165. *Id.* at 273.

166. *Id.* ("It seems that the term 'criticism' for the purposes of article 2(1)(1) should be interpreted in a broad sense. The freedom of speech and creativity, while they cannot change the law per se, do influence . . . the shaping of the law through means of interpretation. Therefore, we recommend accepting a broad interpretation and including critiques in the form of parody and satire in the category of artistic criticism.").

167. *Id.* at 270.

168. *Id.*

169. *Id.* at 270, 275–76.

whether it had promoted a new purpose, different from that of the original work.[170] The Court emphasized that satires and other socially beneficial uses may sometimes qualify as fair use even if they are commercial. But the Court was not convinced that Geva's literal copying of Disney's entire work truly served any satirical effect.[171] After considering all four factors, the Court held that Geva's use failed to meet the test of fairness. It accordingly rejected Geva's fair dealing defense.[172]

In sum, in *Geva*, the Israeli Supreme Court applied U.S. *fair use* doctrine within the framework of the English *fair dealing* provisions, thereby creating a two-pronged test. Under *Geva*, Israeli courts considering fair dealing defenses had to determine, first, whether the purpose of the defendant's use fell under any of the purposes explicitly enumerated by the U.K. law, and second, whether the use met the test of *fairness* of use based on the four factors of U.S. fair use doctrine. A use could qualify as fair dealing only when both tests were met. Following *Geva*, the hybrid doctrine of fair dealing/fair use remained the dominant approach in Israel until *fair dealing* was finally replaced by *fair use* in the Copyright Law 2007.

B. Copyright Reform: From Fair Dealing to Fair Use

The Knesset enacted fair use in section 19 of the Copyright Law 2007 as part of a major copyright reform.[173] As in the U.S. Copyright Act, the fair use exception stands alongside, and independently from, specific exceptions and limitations for particular uses, including the making of certain copies by public libraries and archives,[174] public performances in educational institutions,[175] and making certain transient and incidental copies.[176]

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170. *Id.* at 276.

171. *Id.* at 283.

172. The Israel Supreme Court's rejection of Geva's fair use claim has been sharply criticized by later commentators. *See, e.g.*, Birnhack, *supra* note 31, at 275 ("The Court did not recognize the transformative nature of the use and over-emphasized the (minor) commercial aspect.").

173. The Act was passed by the Knesset on November 19, 2007 and came into force on May 25, 2008. *See* § 77, Copyright Law, 5768–2007, SH 2119 (Isr.). However, pursuant to the Law's transitional provisions, an unauthorized use of a copyrighted work that takes place prior to May 25, 2008 and that qualifies as fair use will not be deemed infringing. *See id.* § 78(c); *see also* Tamir Afori, The Copyright Act 540 (2012).

174. §§ 30–31, Copyright Law, 5768–2007, SH 2119 (Isr.). These sections exempt certain uses in libraries and archives of the type prescribed by the Minister of Justice and the Minister of Education, for the purpose of preservation.

175. *Id.* § 29.

176. *Id.* § 26 (permitting transient and incidental copies made as an integral part of communication conducted by an intermediary network and making transient copies when necessary to enable lawful use of the work, provided that the copy does not have significant economic value in itself); *id.* § 25 (permitting certain recording of works for purposes of authorized broadcast); *id.* § 24 (permitting certain copying or making derivative works of a computer program); *id.* § 23 (permitting certain broadcast or copying of works in public place); *id.* § 22 (permitting certain incidental uses of works); *id.* § 21 (permitting certain copying of works deposited for public inspection); *id.* § 20 (permitting certain uses of works in legal or administrative proceedings); *id.* § 28A (permitting certain copying and adaptation to facilitate access to works for persons with disabilities).

The fair use provision under the Israeli Copyright Law 2007 is very similar, but not identical, to the U.S. provision. Section 19 provides as follows:

> (a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.
>
> (b) In determining whether a use made of a work is fair within the meaning of this section, the factors to be considered shall include, inter alia, all of the following:
>
> 1) The purpose and character of the use;
> 2) The character of the work used;
> 3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
> 4) The impact of the use on the value of the work and its potential market.
>
> (c) The Minister [of Justice] may make regulations prescribing conditions under which a use shall be deemed a fair use.[177]

The Ministry of Justice's explanatory notes accompanying the proposed new copyright law stated that, despite *Geva*'s instruction that the purposes enumerated in Copyright Law of 1911's fair dealing provision must be liberally interpreted, the closed list provision presented significant practical difficulties given the wide variety of uses of creative expression that advance the fundamental purposes of copyright law.[178] Further, it would be extraordinarily difficult for the legislature to set out a comprehensive closed list enumerating such a wide variety of desirable uses, especially given the increasingly expansive reach of copyright holders' rights under case law and the proposed legislation. Accordingly, the Ministry of Justice explained, subsection (a) of the proposed provision would provide an open list of purposes that would enable courts to determine that worthy uses are non-infringing "fair use" and thus assist courts in achieving balanced results in light of the expansion of copyright holders' rights.[179]

With respect to the four factors set out in subsection (b), the Ministry of Justice noted, again citing *Geva*, that in interpreting "fairness" under the fair dealing provision, Israeli courts had largely adopted the arrangement set out in the U.S. statute.[180] In that vein, the Ministry explained—in language very much in line with U.S. doctrine—courts are to consider the four factors but may consider other factors as well.[181] Further, no single factor should be

177. *Id.* § 19.
178. Draft Bill Copyright Law, 5755–2005, HH (Knesset) 96 1116, 1125 (Isr.), https://fs.knesset.gov.il/16/law/16_ls1_584880.pdf [hereinafter Proposed Copyright Law].
179. *Id.*
180. *Id.* at 1126.
181. *Id.*

determinative. Rather, all the factors should be weighed against one another to determine whether a use qualifies a fair use.[182]

The Ministry of Justice also provided some explanation for each statutory factor. Of note, the Ministry states, along the lines of U.S. fair use doctrine, that the first factor is meant to distinguish between commercial uses and not-for-profit uses for study and research.[183] By contrast, the explanatory notes do not mention "transformative" uses.[184] However, in presenting the proposed copyright law revision to the Knesset committee considering the legislation, the Ministry's lead representative explained that the fair use provision was intended to permit copying that has a clear public value, "which the American literature has termed 'transformative use.'"[185] Finally, the explanatory notes state that the fourth factor expresses, among other things, Israel's obligation to comply with the three-step test set out in TRIPS Article 13.[186]

The Ministry of Justice's lead representative also explained that in proposing the fair use provision, the Ministry intended to adopt the American model, including not just the language of § 107, but also the case law regarding it.[187] As such, the Ministry opposed adding additional factors to section 19(b) because that might confuse Israeli courts into thinking that "we are different than the United States."[188] Following that view, the Ministry's lead representative later wrote, in a comprehensive treatise on Israel's Copyright Law 2007, that the Knesset's clear legislative intent in enacting the fair use provision was, inter alia, to "direct the public and the courts to the extensive fair use case law that had accumulated in the United States, and not to develop new rules in a vacuum."[189]

Yet, despite their overall similarity, there are some important differences between the Israeli and American fair use provisions. First, the Israeli statute preserves the two-step structure of fair dealing. To qualify as fair use, a use must satisfy both of two independent requirements: the *purpose test*, codified in section 19(a), and the *fairness test,* codified in section 19(b).[190] In its recent ruling in *Société des Produits Nestlé v. Espresso Club Ltd.*, the Supreme Court reiterated that the section 19(a) is a prerequisite to fair use.[191] If a use is neither for one of the enumerated purposes nor for any purpose that has at least some similarity to an enumerated purpose, it cannot be considered fair use and there

182. *Id.*

183. *Id.*

184. *Id.*

185. Knesset, Econ. Comm., Meeting Minutes No. 128, 17th Knesset, Statement of Tamir Afori, Israeli Ministry of Justice 14 (Dec. 12, 2006) (Isr.), https://main.knesset.gov.il/Activity/committees/Pages/AllCommitteeProtocols.aspx?ItemID=182266 (click "Copyright Law, 5768-2007" to download) [hereinafter Knesset Econ. Comm. Minutes].

186. Proposed Copyright Law, *supra* note 178, at 1126.

187. Knesset Econ. Comm. Minutes, *supra* note 185, at 21.

188. *Id.*

189. AFORI, *supra* note 173, at 208.

190. § 19, Copyright Law, 5768–2007, SH 2119 (Isr.).

191. CivA 3425/17 Société des Produits Nestlé v. Espresso Club Ltd. 31 (2019) (Isr.).

is no need to determine its fairness under section 19(b).[192] By contrast, under U.S. fair use doctrine, courts consider the purpose of use under the first factor. Accordingly, the purpose of use is weighed together with the other factors as part of the overall fair use analysis.[193]

Second, while section 19(a) provides for an open-ended list of purposes, in contrast with the closed list of fair dealing, it is not quite as open ended as the introductory clause to § 107. As initially drafted, section 19(a) provided that fair use is permitted, "inter alia," for the enumerated uses, meaning that, much like § 107, the enumerated uses were meant entirely as illustrative examples.[194] As enacted, however, section 19(a) provides that fair use is permitted for purposes "such as" the enumerated uses.[195] In other words, to qualify as fair use, a use must be for a purpose that has some characteristic in common with those enumerated in section 19(a).[196] Some commentators conclude that virtually any use could qualify has having such a purpose.[197] But, at least in principle, section 19(a) imposes some limit on the types of uses that can qualify as fair use.

Third, section 19(b) lacks an explicit reference to commercial use in the first factor. Section 107 of the U.S. Copyright Act provides that courts should consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[198] By contrast, section 19 of Israel's Copyright Law 2007, defines the first factor only as "the purpose and character of the use."[199] Nonetheless, as indicated above, the Ministry of Justice explanatory notes, like the Supreme Court's ruling in *Geva*, state that the use's commercial nature is to be considered in weighing the first factor, even if commercial nature is not definitive.[200] Hence, there would seem to be little or no practical difference in effect between Israeli and U.S. fair use with regard to commercial uses.

Finally, unlike § 107, section 19(c) of the Israeli fair use provision authorizes a regulatory body, specifically the Minister of Justice, to "issue regulations prescribing conditions under which a use shall be deemed a fair use."[201] This provision aimed to reduce the uncertainty resulting from the open-ended nature of the fair use doctrine.[202] However, Israel's Ministry of Justice has yet to issue any such regulations.

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192. *Id.*

193. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

194. AFORI, *supra* note 173, at 199.

195. § 19(a), Copyright Law, 5768–2007, SH 2119 (Isr.).

196. By contrast, the U.S. Copyright Act provides explicitly that the term "such as" is illustrative, not limitative. 17 U.S.C. § 101.

197. *See, e.g.*, AFORI, *supra* note 173, at 199 (stating that it is difficult to conceive of a purpose that would be so different than those enumerated such that it could not meet the "such as" requirement).

198. 17 U.S.C. § 107.

199. § 19(b)(1), Copyright Law, 5768–2007, SH 2119 (Isr.).

200. Proposed Copyright Law, *supra* note 178, at 1126.

201. § 19(c), Copyright Law, 5768–2007, SH 2119 (Isr.).

202. *See* AFORI, *supra* note 173, at 217–18.

C. U.S. Copyright Industry Opposition to Israel's Enactment of Fair Use

The IIPA actively opposed Israel's transition from fair dealing to fair use.[203] The IIPA acknowledged that Israel's proposed fair use provision, including the four factors set out in section 19(b), closely tracked that of the United States.[204] But as it has in other countries, the copyright industry trade association contrasted the newness of the proposed fair use provision in Israel with the United States, where "many years of jurisprudence have provided . . . considerable clarity on the boundaries of 'fair use.'"[205] Accordingly, the IIPA asserted:

> There is a significant risk that in Israel the adoption of these factors at this time might be viewed by the community as a free ticket to copy. This would have disastrous consequences, and thus we urge the Israeli government to re-examine the introduction of these factors, rather than relying on Section 19(a), which sets out the long-established "fair dealing" principle, followed by specific exceptions dealing with certain special cases.[206]

If Israel nevertheless replaced fair dealing with fair use, the IIPA insisted, section 19(b)(1) must be amended expressly to include the phrase "whether the use is of a commercial nature or is for non-profit educational purposes."[207] The copyright industry trade association was evidently not content to rely on the Ministry of Justice's explanatory notes and Israeli case law for ensuring that a use's commercial nature would weigh against a finding of fair use.

The IIPA also contended that:

> it is essential that the law implement expressly the well established Berne 'three-part test' (incorporated into TRIPS) . . . . In other words, it should be codified in Section 18 that no exception in Israel's law (whether fair dealing, 'fair use,' or a specific exception) may be applied [in any way that does not meet the three-step test].[208]

Finally, subsequently to Israel's enactment of fair use, the IIPA expressed concern over section 19(c)'s authorization of the Ministry of Justice to issue regulations clarifying fair use. As the IIPA stated: "Fair use is a case-by-case fact-based inquiry. This discretion seemingly without standard on the part of the Minister potentially opens the door for even broader exceptions to be introduced

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203. *See* Knesset Econ. Comm. Minutes, *supra* note 185, at 25 (Statement of Tamir Afori, Ministry of Justice Representative) (confirming that the IIPA had filed comments with Ministry opposing the transition from a closed list of permitted uses under fair dealing to an open list under fair use).

204. INT'L INTELL. PROP. ALL., *supra* note 135, at 70.

205. *Id.* at 71.

206. *Id.* (citation omitted).

207. *Id.* Ironically, the phrase distinguishing commercial from non-profit educational uses was added to § 107 to accord favorable fair use treatment to the latter, at the insistence of educators who had unsuccessfully lobbied for a blanket exception for all copying done for nonprofit educational purposes. *See* Samuelson, *supra* note 65, at 23–24.

208. INT'L INTELL. PROP. ALL., *supra* note 135, at 70.

in Israel. IIPA seeks clarification as to what the possible checks are to this seemingly unlimited discretion."[209]

The State of Israel responded to the copyright industry objections in a statement it submitted to the United States Trade Representative.[210] It stressed the close similarity between the Israeli and U.S. fair use provisions, proclaiming, indeed, that section 19 is "virtually identical" to § 107.[211] With respect to copyright industry concerns about the absence of judicial precedent on fair use in Israel, the State of Israel provided assurance that Israeli case law would draw upon that of the United States: "A body of case law interpretation of section 19 will develop and no doubt American case law will provide persuasive precedent on this point, as American case law often does in Israeli copyright law in general."[212]

The State of Israel also highlighted the inconsistency in the IIPA's insistence that Israel's copyright statute codify the three-step test. Its response asserts:

> Neither Berne, nor TRIPS, requires that the exact language of a treaty general principle be copied verbatim into national legislation. Indeed, if that were the case then the IIPA would also have to claim that Section 107 "Fair Use" of the U.S. Copyright Act is in violation of Berne Article 9(2).[213]

Finally, Israel deflected the IIPA's objection to possible fair use regulation by Israel's Ministry of Justice: "To the extent that regulations can be promulgated under the new section 19 with regard to specifying fair uses, such regulations are always subordinate to the primary legislation and can not contradict it."[214]

IV. EMPIRICAL STUDY OF ISRAELI AND U.S. FAIR USE CASE LAW

From the vantage point of over a decade since Israel's enactment of fair use took effect, we can now begin to assess empirically the U.S. copyright industry's principal objections to Israel's adoption of fair use. In this Part, we report the results of our comprehensive study of Israeli and U.S. fair use case law.

We reviewed all reported fair use rulings issued by Israeli courts during the first decade in which Israel's statutory fair use provision, section 19 of Israel's Copyright Law 2007, was in effect. That period extends from May 19, 2008 to May 18, 2018. During that decade, Israeli courts ruled on whether the defendant's use qualified as fair use in a total of fifty-five reported rulings. Of

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209. INT'L INTELL. PROP. ALL., *supra* note 133, at 208.

210. 2009 Submission of the Government of Israel to the United States Trade Representative with Respect to the 2009 "Special 301 Review" (Mar. 2009), https://www.justice.gov.il/Units/YeutzVehakika/NosimMishpatim/Global/2009special301submission.pdf.

211. *Id.* at 13.

212. *Id.*

213. *Id.*

214. *Id.*

these, thirty-four rulings were issued by Magistrate Courts, eighteen by District Courts, and three by the Supreme Court.[215] Of the lower court rulings, one was upheld on appeal and one was reversed.[216] For ease of reference, we label this study our "Israel Study."

Throughout, we compare the results of our Israel Study with empirical studies of U.S. fair use case law, including a parallel study we conducted of U.S. fair use case law during the same ten-year period as the Israel Study. That parallel study of U.S. fair use case law includes 185 reported rulings, of which 157 were by district courts, 28 were by appellate courts, and none were by the Supreme Court. For ease of reference, we label our parallel study of U.S. fair use case law, our "U.S. Study."

We present our results in comparison with U.S. fair use case law to provide a baseline for assessing whether the primary concern raised by the U.S. copyright industries in opposition to Israel's enactment of fair use has been realized in practice. Have Israeli courts lacking familiarity with the "carefully-honed jurisprudence" of U.S. fair use doctrine interpreted fair use in a loose manner that severely undermines copyright protection in comparison with the experience with fair use in the U.S.?[217] We also test Israel's response that U.S. copyright industry objections are fundamentally misguided because Israeli courts will, no doubt, look to U.S. precedent to guide their interpretation of section 19, which, after all, is closely modeled on § 107.

A. Methodology

Before we present the results of our studies, a caveat is in order. Our studies look to the outcomes and express rationales that courts present in reported judicial rulings. As such, they are subject to the same limitations as commentators have detailed with respect to similar empirical studies.[218]

Most importantly, while reported judicial rulings have great importance for understanding fair use, they capture only the cases that were of sufficient uncertainty of outcome and of sufficient monetary value that both parties saw fit

215. Magistrate Courts are trial courts that have jurisdiction over civil claims for less than 2.5 million shekels (the equivalent of roughly $715,000). District Courts are both trial courts that have jurisdiction over larger claims and courts of appeal for cases that originate in Magistrate Court. Appeals from District Courts are directly to the Supreme Court. *See The Judiciary: The Court System*, Israel Ministry of Foreign Affs., https://mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx (last visited Apr. 19, 2021).

216. To better assess Israeli courts' understandings of fair use, we count all rulings, including the ruling that was reversed on appeal.

217. In its 2009 Special 301 Report recommending that Israel remain on the USTR Watch List for possible trade sanctions, the IIPA stated:

> While IIPA would by no means object to the adoption of fair use as understood in the U.S., and as interpreted through decades of jurisprudence, Israel does not have that carefully-honed jurisprudence, and the adoption of the "fair use" standards without it risks creating gaps in protection that would not be justified in countries having a "fair use" tradition.

Int'l Intell. Prop. All., *supra* note 133, at 208.

218. *See* Netanel, *supra* note 43, at 731–34 (surveying the literature); *see also* Sag, *supra* note 47, at 83.

to litigate through at least one judicial ruling.[219] Nor does a study of reported cases directly reflect the myriad decisions related to copyright that are not related to litigation, including those that inform licensing and unilateral decisions about when to copy or refrain from copying existing works.[220]

In addition, our empirical studies do not attempt to dive under the hood to explore what unexpressed considerations, biases, factors, and result-oriented jurisprudence might actually be driving judicial rulings on fair use. To attempt to do so would have introduced undue speculation, distortions, inconsistencies, and unreliability into scoring the rulings. As such, one might say that our studies report what courts say they are doing, not necessarily what courts are actually doing.

Nonetheless, our statistical analysis in the Israel Study does show that various factors external to those that Israeli courts expressly identify in their fair use jurisprudence have no statistically significant correlation with the finding of fair use. These include the types of litigants (individuals, corporations, non-profits, or government agencies), the types of works alleged to have been infringed (such as photographs, audiovisual works, or literary works), and the types of works created by the alleged infringers. We are thus reasonably confident that our results do not reflect idiosyncrasies in the mix of litigants or categories of works at issue during the period of our study. Rather, the doctrinal factors that Israeli courts have cited as part of their fair use analysis and that do have a statistically significant correlation with fair use outcomes appear to drive the courts' fair use rulings and to form the foundations of Israel's fair use doctrine during the period of our study.

B. Results

1. Case Outcomes on Fair Use

During the ten-year period of our study, Israeli courts were significantly less likely than their U.S. counterparts to rule that a use qualifies as fair use. Of the fifty-five rulings in our Israel Study, the court determined that the allegedly infringing use failed to qualify as a fair use in a substantial majority of the cases. The court rejected the alleged infringer's fair use defense in thirty-nine cases, just over 70% of the total. The court ruled that the use was a fair use in just sixteen cases, slightly less than 30% of the total. Be that as it may, during the first decade in which Israel's statutory fair use provision was in effect, fair use claimants had a somewhat better rate of success than had fair dealing claimants

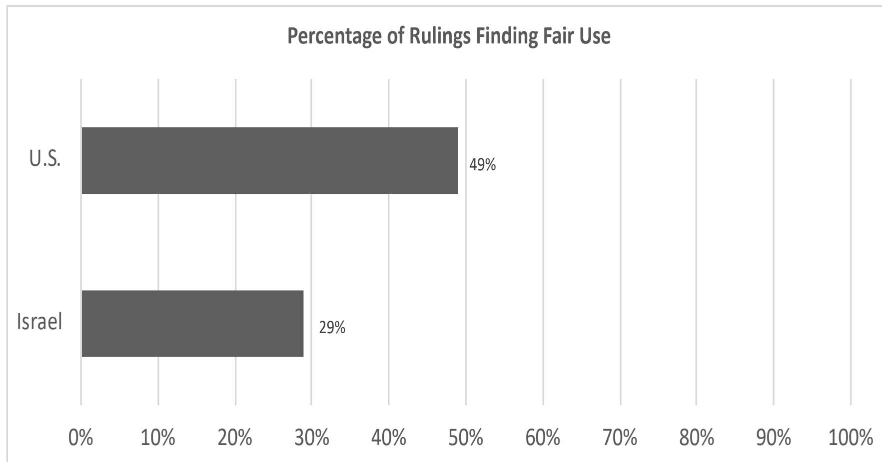
219. The pioneer study of reported case selection biases is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL. STUD. 1 (1984); *see also* Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265 (2002).

220. *See* Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 1985 (2014).

prior to effective date of the Copyright Law 2007, although the difference is not statistically significant.[221]

By contrast, a plurality of the 185 rulings in our U.S. Study favored the alleged infringer on the issue of fair use. In the United States, the court rejected fair use in seventy-five cases, or 40.5% of the total, and ruled that the use was a fair use in ninety cases, or 48.6% of the total. Of the remaining cases, the court ruled that further proceedings were needed to determine outstanding questions of fact in eighteen cases (less than 10% of the total), and issued a mixed result, partly favoring the plaintiff and partly the defendant, in two cases.

FIGURE 1. PERCENTAGE OF RULINGS FINDING FAIR USE IN U.S. AND ISRAEL



What could explain this dramatic difference in fair use outcomes between the two countries? It might stem in part from variations in statutory language. In particular, the Israeli provision retains something of fair dealing's two-part structure, providing that to qualify as fair use, a use must satisfy both the purpose requirement and the fairness requirement. We return to that possible explanation below.[222]

Another possible explanation is that Israeli courts have taken substantive positions that have contributed to less friendly outcomes for the fair use defense than under U.S. fair use doctrine, at least during the ten-year period of our study. To shed light on that explanation, we reviewed each of the fifty-five Israeli rulings on fair use. Somewhat speculatively, we assessed whether, in our

221. Israeli courts rejected the fair dealing defense in 84% of the 32 rulings that addressed the defense prior to May 2008. *See* Niva Elkin-Koren, *Users' Rights*, *in* AUTHORING RIGHTS: READING THE ISRAELI COPYRIGHT ACT, 2007, at 327, 354–57 (Michael Birnhack & Guy Pessach eds., 2009) (Hebrew) (noting that during that period Israel courts fully accepted the fair dealing defense in just four cases and partly accepted the defense in one other case).

222. *See infra* notes 308–309 and accompanying text.

considered judgment, a U.S. court would have ruled the same as the Israeli court if the same facts were before the U.S. court.

In our view, U.S. courts would have come to the same conclusion as the Israeli courts in the vast majority of cases. Among the outliers, an Israeli lower court ruled that the defendant's internet streaming of television broadcasts of soccer games qualified as fair use, noting that the defendant served the public interest in viewing sports matches that would otherwise not be generally available in Israel and did so without charging viewers or selling advertising.[223] It is highly unlikely that a U.S. court would have accepted such a fair use defense and, indeed, the Israeli Supreme Court subsequently reversed the lower court ruling on appeal.[224]

On the other side of the coin, a number of Israeli rulings rejected fair use when defendants used iconic, decades-old news photographs to present historical documentation of significant events in Israel's history or to background news coverage of breaking developments, largely because the defendants had failed to give authorship credit to the photographer.[225] By contrast, the use of photographs and graphic images as historical artifacts and documentation has generally (although not universally) been held to be fair use in the United States.[226] Moreover, as discussed below, the failure to give authorship credit is a non-issue in U.S. fair use cases.[227]

223. The Football Association Premier League v. Ploni, Case No. 1636/08, Motion 11646/08, (District Ct., Tel Aviv, 2009) (Isr.).

224. CivA 8485/08, FA Premier League v. Israel Sports Betting Council (2010) (Isr.).

225. *See, e.g.*, Ephraim Sharir v. Teetell Arutzei Tikshoret, Case No. 4384-12-13 (Magistrate Ct., Beit She'an, 2014) (Isr.) (use of news photo as it appeared in Lebanese press in story about Lebanese ridicule of Israeli leaders); Shmuel Rakhmani v. Israeli Basketball Super League Administration Ltd., Case No. 44159-08 (Magistrate Ct., Tel Aviv, 2010) (Isr.) (use of news photo in League's exhibition commemorating sixty years of Israeli basketball history); Shmuel Rakhmani v. Israel News Corporation Ltd., Case No. 7036-09 (Magistrate Ct., Jerusalem, 2011) (Isr.) (use of news photo in documentary about significant events in Israel's history). *But see* Danon Image Communication v. Shelly Yachimovich, Case No. 57588-05-12 (1), (Magistrate Ct., Tel Aviv, 2014) (Isr.) (posting a photograph of a politician, in an article featuring an interview with her, constitutes fair use); Joseph Tauber v. Israel 10 - News Channel Broadcasting Ltd., Case No. 18924-07-13 (District Ct., Haifa, 2013) (Isr.) (displaying a copyrighted photograph of a legendary Israeli singer, in a news report regarding an exhibition in her honor, is fair use).

226. The classic case is Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968), holding that copying the iconic Zapruder photographs of the John F. Kennedy assassination to provide the public with information on that major historical event was fair use. *See* Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932, 944–45 (4th Cir. 2013) (holding that NFL's copying of graphic image of football team's former logo in documentary video and football team's public display of former logo in exhibition featuring memorabilia from the team's history are fair use); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609–10 (2d Cir. 2006) (holding that use of concert poster art to illustrate a historical biography of rock band is fair use); Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 22–23 (1st Cir. 2000) (holding that republication of photographs taken for a modeling portfolio in a newspaper was transformative because the photos served to inform, as well as entertain); Philpot v. Media Rsch. Ctr. Inc., 279 F. Supp. 3d 708, 722 (E.D. Va. 2018) (holding that defendant's use of plaintiff's photographs of famous musicians to accompany online articles about those musicians' political views constitutes fair use). *But see* Monge v. Maya Mags., Inc., 688 F.3d 1164, 1176 (9th Cir. 2012) (holding that a celebrity gossip magazine's publication of previously unpublished photographs of plaintiff's clandestine wedding is not fair use).

227. *See infra* text accompanying notes 308–309.

It is also possible that the sharp disparity in fair use outcomes reflects some difference in litigation rules and practice between the two countries. Factors such as litigation costs, the availability and size of statutory damage awards, awards of attorney's fees and costs to prevailing parties, judicial power and propensity to dispose of cases and discrete issues in cases prior to trial, judicial encouragement of pretrial settlement, the ready availability of copyright licensing (including through collective rights management organizations), and the presence of repeat players in the field can impact the mix of copyright cases and case outcomes.[228] In that regard, during the ten-year period of our study, Israeli courts issued a proportionately large number of fair use rulings compared to U.S. courts, considering that Israel is a far smaller country than the United States. We suspect that the high cost of litigation, coupled with the taxing nature of discovery practice, in the United States operates to diminish the number of potential copyright cases that are litigated to a reported judicial ruling.[229] Over 60% of the cases in our Israel Study were brought in Magistrate Court, where civil claims may not exceed the rough equivalent of $715,000. It would often not be worth litigating claims of that size in the United States.[230] In any event, the possible extent, if any, of litigant selection effects arising from such factors and their possible impact on fair use case outcomes are beyond the scope of our study.[231]

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228. For example, the scholarly literature has shown that under certain conditions, the English Rule, under which the losing party pays the winning party's attorney's fees, engenders a mix of litigated cases having a higher possibility that plaintiffs will prevail than under the American Rule, under which no attorney fee shifting occurs. *See, e.g.*, Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 140–42 (1984). However, we doubt that result obtains in our study. Israel follows the English Rule, but, for all intents and purposes, so does the United States in copyright cases, even if U.S. courts have stopped short of formally adopting the English Rule. *See* Steven J. Horowitz, *Copyright's Asymmetric Uncertainty*, 79 U. CHI. L. REV. 331, 341 (2012) (noting that attorney's fees are awarded to prevailing copyright owners "as a matter of course despite being nominally discretionary"); Jeffrey Edward Barnes, Comment, *Attorney's Fee Awards in Federal Copyright Litigation After* Fogerty v. Fantasy*: Defendants are Winning Fees More Often, But the New Standard Still Favors Prevailing Plaintiffs*, 47 UCLA L. REV. 1381, 1390 (2000) (presenting empirical study finding that U.S. courts granted motions for attorney's fees to prevailing copyright infringement plaintiffs in 89% of the cases and to prevailing copyright infringement defendants in 61% of the cases).

229. According to one empirical study of a representative sample of U.S. copyright litigation, more than 85% of copyright infringement lawsuits are terminated voluntarily by one or both parties, or by default judgment without a substantive ruling by the court. Cotropia & Gibson, *supra* note 220, at 2001–02.

230. As of 2011, the average cost of litigating a copyright infringement case through trial, for either plaintiff or defendant—and excluding judgment and awards—was estimated to range from $384,000 to $2 million. *See* Shyamkrishna Balganesh, Essay, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013) (citing American Intellectual Property Law Association survey).

231. We are also aware of the Priest-Klein hypothesis that outcomes in civil litigation should generally approximate 50% since parties will settle all but the most uncertain cases. *See* Priest & Klein, *supra* note 219, at 5–6. As Priest and Klein recognize, however, there are various exceptions to that hypothesis. *See* Netanel, *supra* note 43, at 753–54 (discussing Priest-Klein hypothesis and its exceptions); *see also* Liu, *supra* note 52, at 167 n.19; John R. Allison & Lisa Larrimore Ouellette, *How Courts Adjudicate Patent Definiteness and Disclosure*, 65 DUKE L.J. 609, 670–71 (2016). In particular, potential fair use outcomes were probably subject to considerable uncertainty during the period of our study, during the first decade in which Israel's statutory fair use provision was in effect and during a longer period, extending back to the mid-1990s, in which U.S. fair use doctrine was in flux.

Finally, in comparing U.S. and Israeli courts' acceptance of the fair use defense, it is important to reiterate that fair use outcomes in the United States have shifted over time. U.S. courts became far more receptive to fair use defenses after the transformative use approach came to dominate fair use case law, roughly following the Second Circuit's embrace of the approach in the Grateful Dead concert posters case in 2006.[232] In his study of fair use case law from 1978 through 2005, Barton Beebe found that defendants' fair use win rate for district court rulings that were not reversed on appeal was only 32.1%.[233] But as a later study showed, that fair use win rate rose dramatically between 2006 and 2010 to 58.3%.[234] Moreover, recent years have seen a possible retreat from U.S. courts' defendant-friendly approach to fair use. Our U.S. Study showed a statistically significant turn away from accepting the fair use defense during the last two years of our study, as U.S. courts became less willing to find that the defendant's use is transformative.[235] From May 25, 2014 through May 24, 2016, U.S. courts ruled that the use was fair use in 64.1% of the cases. But from May 25, 2016 through May 24, 2018, U.S. courts ruled that the use was fair use in only 35.5% of the cases.[236] Hence, while fair use win rates in Israel were substantially lower than in the United States during the full ten-year period of our study, win rates in Israel are much closer to those in the United States during the last two years of our study and during the period prior to U.S. courts' decided embrace of the transformative use approach in 2006.

At bottom, while Israeli courts ruled against fair use at a markedly higher rate than did U.S. courts during the period of our study, we do not want to overstate the significance of that data point. On one hand, it is, indeed, quite clear that Israel's enactment of fair use has not resulted in a "free ticket to copy" with "disastrous consequences" for copyright owners, the U.S. copyright industries' dire predictions notwithstanding.[237] But the extent, if any, to which Israel's markedly less fair-use friendly outcomes truly reflects a significantly *more restrictive* substantive understanding of fair use among Israeli courts than under U.S. fair use doctrine requires further study. Moreover, to compare the two is, necessarily, to aim at a moving target as U.S. and Israeli fair use doctrine evolve over time.

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232. *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).

233. Beebe's data was limited to unreversed district court rulings on motions for preliminary injunctions, bench trials, and crossed motions for summary judgment. He considered just crossed motions for summary judgment because courts are generally more likely to publish an opinion granting summary judgment than denying it. As a result, if cases where only one party moves for summary judgment are included, the results will be skewed by whether plaintiffs or defendants file more such motions. Beebe, *supra* note 44, at 576–78.

234. Netanel, *supra* note 43, at 755 (showing win rates for unreversed district court rulings on motions for preliminary injunctions, bench trials, and crossed motions for summary judgment).

235. Our U.S. Study showed that courts found the defendant's use to be transformative in 63% of the cases during the two-year period, May 25, 2015 through May 24, 2016, but in only 43% of the cases during the final two-year period of our study.

236. The Pearson chi-square measure of statistical significance for the shift in fair use outcome from the first of those two-year periods to the second is 0.041.

237. *See supra* note 158 and accompanying text (quoting the IIPA's dire prediction).

2. *Influence of U.S. Precedent*

Judicial citations to rulings of other courts are a commonly used metric for the influence of those other courts. For example, Barton Beebe concluded, based on case citations, that fair use rulings from courts of the Second and Ninth Circuit Courts of Appeal exerted an overwhelming influence on fair use rulings outside those circuits during the period of his empirical fair use case law study.[238]

Applying the metric of case citations to our study leads to what, at first glance, is a startling result. Contrary to Israel's assertion that Israeli courts would look to U.S. fair use precedent for guidance regarding how to interpret and apply Israel's new fair use provision, rulings of U.S. courts seem to have had virtually no direct influence on Israeli fair use case law during the first ten years in which Israel's fair use statute was in effect. Only two Israeli fair use rulings cited any U.S. fair use precedent at all. Both cases cited the U.S. Supreme Court ruling in *Campbell v. Acuff-Rose Music, Inc*.[239] Israeli courts made no mention of either of two other seminal U.S Supreme Court rulings on fair use, *Sony Corp. v. Universal City Studios*[240] and *Harper & Row v. Nation Enterprises*.[241] No less dramatically, only two Israeli cases made any reference to § 107 of the U.S. Copyright Act. Evidently, in the vast majority of cases, Israeli courts saw no reason to cite the U.S. fair use provision from which section 19 of the Copyright Law 2007 is derived.

Yet, despite the general dearth of case citations to U.S. fair use precedent in our study, U.S. fair use doctrine clearly has influenced the crafting of fair use doctrine by Israeli courts. First, as discussed above, the Israeli Supreme Court first introduced fair use doctrine into Israeli copyright law in *Geva v. Walt Disney Co.*, some fourteen years before the Knesset replaced Israel's prior fair dealing exception with fair use in the Copyright Law 2007. *Geva* did cite and rely on U.S. precedent, including *Sony Corp. v. Universal City Studios, Inc.* and several leading lower court rulings.[242] *Geva*'s interpretation and application of U.S. fair use doctrine remains seminal precedent in Israeli fair use case law. Thus, through *Geva*, U.S. fair use precedent has indirectly impacted Israeli fair use case law even if Israeli courts do not generally cite the U.S. cases.

Second, the two rulings in our Israel Study that do reference U.S. precedents were Supreme Court cases. During the period of our Israel Study, Israel's Supreme Court addressed fair use in four rulings. In two out of the four, the Court made explicit reference to U.S. fair use precedents. *Football Association Premier League Ltd. v. Anonymous* involved a petition to unmask

238. Beebe, *supra* note 44, at 567–68.

239. *See, e.g.*, CivA 9183/09 The Football Association Premier League Limited v. Anonymous 10 (2012) (Isr.) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)).

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

241. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

242. CivA 2687/92 Geva v. Walt Disney Co. 48(1) PD 251, 277–81 (1993) (Isr.).

the identity of an anonymous user who streamed unauthorized broadcasts of football matches owned by the English Premier League.[243] Although the petition was dismissed on procedural grounds, the Israeli Supreme Court stated that streaming constituted copyright infringement and that fair use did not apply.[244] The Court cited *Campbell* for the transformative use approach, and also made extensive references to U.S. law review articles.[245]

In another decision, *Safecom, Ltd. v. Raviv*, the Israeli Supreme Court addressed the copied drawings of a functional electric device in a patent application submitted to the U.S. Patent and Trademark Office.[246] The Court explicitly stated that "the four subordinate criteria [that is, the fair use factors] listed in section 19(b) of the New Law are based on the subordinate criteria that have been laid down in the American Copyright Act [see: 17 USC § 107]."[247] The Court further cited empirical research on U.S. fair use doctrine demonstrating that

> although the fourth subordinate criterion—the effect on the potential market—is most often mentioned as the decisive factor regarding the fairness of use, the first subordinate criterion—the purpose and nature of the use—does in fact have the most marked effect on the decision, the most influential factors being the commerciality and transformativeness of the use.[248]

Citing the decision in *Football Association Premier League Ltd. v. Anonymous*, the Court held that these two factors were also the most influential under Israeli law.[249]

Finally, in *Société des Produits Nestlé v. Espresso Club Ltd.*, decided just after the ten-year period of our study, the Israeli Supreme Court relied heavily on *Campbell* to hold that the defendant's parodic use was a transformative use and fair use.[250] The Court repeatedly cited other U.S. fair use precedent as well. At bottom, therefore, U.S. fair use precedent has probably influenced Israeli fair use jurisprudence to a considerably greater extent than what might appear from overall case citations. Indeed, the dearth of lower court citations to U.S. precedent might reflect the economics of litigation more than a decided lack of interest in U.S. precedent. Israeli courts will typically not look to foreign law unless the parties cite it, and lawyers are unlikely to devote resources to uncovering foreign law unless the case is of sufficiently high value to warrant that investment.

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243. CivA 9183/09 Football Ass'n Premier League Ltd. v. Anonymous (2012) (Isr.). For a translation of the district court decision, see CivC (TA) 1636/08 Football Ass'n Premier League Ltd. v. Anonymous, Nevo Legal Database (Sept. 2, 2009) (Isr.), http://www.nevo.co.il/psika_word/mechozi/me-08-1636-11.doc.

244. *Id.* at 2.

245. *Id.* at 12.

246. CivA 7996/11 Safecom, Ltd. v. Raviv (Oct. 10, 2013) (Isr.), http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Safecom%2C%20Ltd.%20v.%20Raviv.pdf.

247. *Id.* at 19–20.

248. *Id*. at 20 (first citing Beebe, *supra* note 44; and then citing Netanel, *supra* note 43).

249. *Id.* at 20.

250. CivA 3425/17 Société des Produits Nestlé v. Espresso Club Ltd. 38 (2019) (Isr.).

3. *Role of the Four Fair Use Factors in Fair Use Analysis*

U.S. courts almost invariably apply each of the four statutory fair use factors as part of their fair use analysis. Indeed, in *Campbell*, the Supreme Court mandated consideration of all four factors. As the Court stated: "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."[251]

Israel's fair use provision likewise states that courts must consider all four of the factors. Section 19 provides: "In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following: [the four factors]."[252] Nonetheless, in its 2012 ruling in *Football Association Premier League*, the Israeli Supreme Court held that "[t]hese are not essential or cumulative factors but a non-exhaustive list of parameters that might indicate the fairness of a particular use that is made of a protected work."[253]

In line with the Israeli Supreme Court's statement, and despite the statutory requirement that "all" factors be weighed, Israeli courts seem to view the four factors as suggested guidelines rather than a checklist of items that must be expressly addressed in fair use analysis. Indeed, in almost 40% of the rulings in our Israel Study, the court did not expressly apply *any* of the four fair use factors to the facts of the case before it in determining whether the defendant's copying qualified as fair use.

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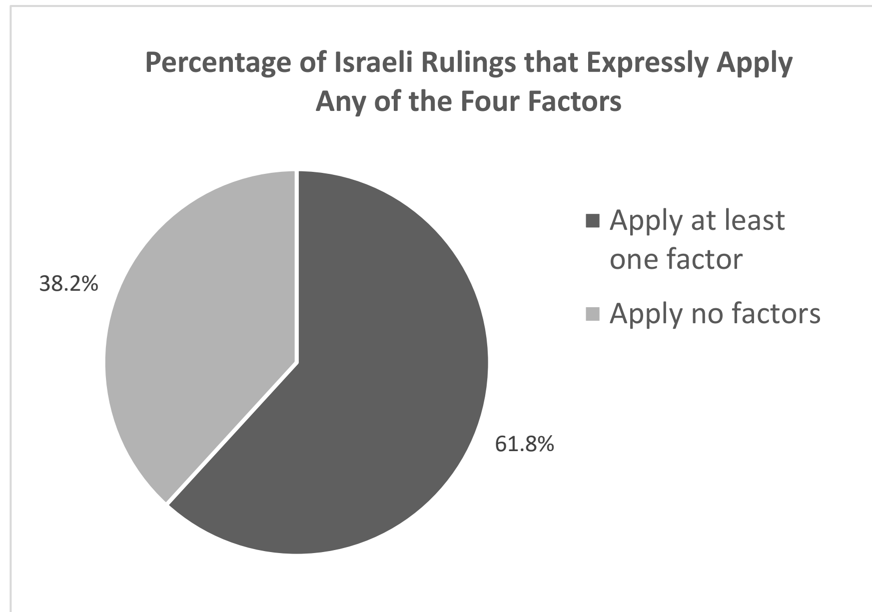
251. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

252. § 19, Copyright Law, 5768–2007, SH 2119 (Isr.).

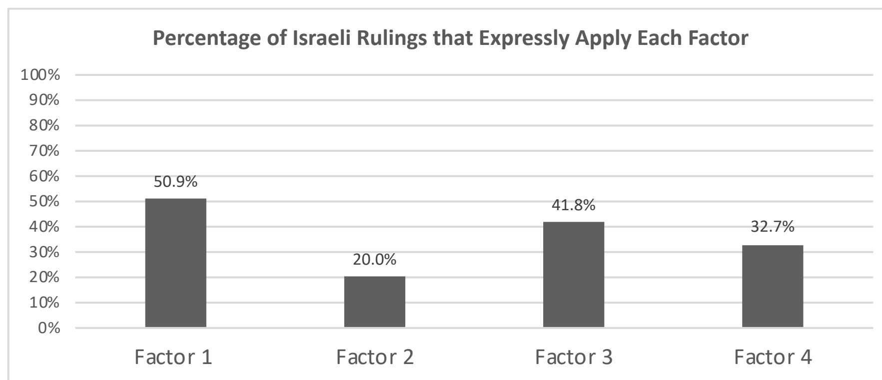
253. CivA 7996/11 Safecom, Ltd. v. Raviv (Oct. 10, 2013) (Isr.), http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Safecom%2C%20Ltd.%20v.%20Raviv.pdf (quoting CivA 9183/09 Football Ass'n Premier League Ltd. v. Anonymous (2012) (Isr.)).

FIGURE 2. PERCENTAGE OF ISRAELI RULINGS APPLYING ANY OF FACTORS



Further, while 51% of the Israeli rulings expressly apply the first factor—the purpose and character of the use—significantly less than half apply any of the other three factors. Only 20% apply factor two—the character of the work used. Only 41.8% apply factor three—the scope of the use—quantitatively and qualitatively, in relation to the work as a whole. And only 32.7% of Israeli fair use rulings apply factor four—harm to the copyright holder's market.

FIGURE 3. PERCENTAGE OF ISRAELI RULINGS APPLYING EACH FACTOR



4. *Weighing the Four Factors*

In the cases in which Israeli courts do apply one or more of the four statutory fair use factors, they, like their U.S. counterparts, typically determine whether that factor weighs in favor of or against fair use. In the instances in which Israeli courts determine that a statutory factor weighs for or against fair use, that determination lines up almost universally with the fair use outcome in the case. For example, during the ten-year period of our Israel Study, Israeli courts expressly found that the first factor weighed against fair use in 27.2% of the cases. They rejected the fair use defense in every one of those cases. Israeli courts expressly found that the first factor weighed in favor of fair use in 26.3% of the cases. They ruled that the alleged infringer had made fair use of the plaintiff's work in every one of those cases. When Israeli courts expressly found that factors two, three, or four either favored or disfavored fair use, that finding also substantially lined up with the court's ruling on fair use overall, albeit by slightly less than a 100% correlation.

Notwithstanding the strong correlation between Israeli courts' findings on the statutory factors and fair use outcomes, only factor one appears to have much valence in explaining fair use outcomes in Israel. Our Israel Study shows a statistically significant correlation between an Israeli court's determination on factor one and the court's ruling on the overall issue of fair use.[254] And, as noted above, Israeli courts expressly applied the first factor in slightly more than half the cases during the ten-year period of our study. Of the other factors, only factor two has a statistically significant correlation with overall fair use outcomes. But since only 20% of the cases even mention factor two, it is unlikely that judicial determinations of factor two have much effect on fair use outcomes overall.[255]

In the United States, factor one also has the strongest correlation with fair use outcome. However, unlike in Israel, the correlation between factor four and fair use outcome is statistically significant as well.[256] U.S. fair use jurisprudence also differs from Israeli case law in which sub-factors of factor one are most strongly correlated with fair use outcome and thus that seem to drive judicial rulings on fair use. In the United States, courts have identified three sub-factors pertaining to the purpose and the character of the defendant's use.[257] These are whether (1) the use is transformative, (2) the use is commercial, and (3) the defendant used the copyrighted work in good faith. In the United States, transformative use appears to play a significantly larger role in determining fair

254. The Fisher's exact test measure of statistical significance for the correlation of a judicial finding that factor one weighs against fair use with a fair use outcome that rejects fair use is two-sided $p<=0.0025$. The Fisher's exact test measure of statistical significance for the correlation of a judicial finding that factor one favors fair use with a fair use outcome that finds fair use is two-sided $p<=0.0001$. The Fisher exact test is used to measure statistical significance where the size of the data sample is sufficiently small so that Chi-Square might not be a valid test.

255. We rely only on bivariate correlations because logistic regression analysis is not suited to our study. *See* discussion *infra* Part IV.B.6.

256. Liu, *supra* note 52, at 184–85, 198.

257. *Id.* at 185.

use outcomes than do the other two sub-factors. Indeed, Jairui Liu's study finds that when courts found factor one to favor fair use, only transformative use was statistically significant among the sub-factors.[258]

In Israel, as further elucidated below, although the Israeli Supreme Court twice referred to transformative use as part of the fair use analysis, the lower courts almost entirely ignored the concept of transformative use during the period of our study.[259] Rather the factors of (1) the commercial character of the allegedly infringing use and (2) whether the defendant gave authorship credit to the creator of the copied work, a factor that has hardly any role at all in U.S. fair use jurisprudence, have the strongest correlation with fair use outcome.[260] In our Israel Study, the defendant's good or bad faith also has a statistically significant correlation with fair use outcome when measured in a bivariate analysis.

Of further note, although factor one now has the strongest correlation with fair use outcomes in the United States, factor four had the strongest correlation during the period before the transformative use approach came to dominate U.S. fair use case law. Indeed, in his empirical study of fair use case law from 1978 to 2005, Barton Beebe reported a near perfect correlation between judicial findings on factor four and fair use outcomes.[261] That result comported with the U.S. Supreme Court dictum in *Harper & Row, Publishers Inc. v. Nation Enterprises*, stating that the fourth factor "is undoubtedly the single most important element of fair use."[262] However, in *Campbell v. Acuff-Rose Music, Inc.*, decided in 1994, some nine years after *Harper & Row*, the Supreme Court flatly contradicted the *Harper & Row* dictum.[263] The *Campbell* Court underscored that courts are to consider all four statutory factors, without any single factor being the most important.[264] Further, the first factor, in particular the question of whether the defendant's use is transformative, has now eclipsed the fourth factor in importance and degree of correlation with fair use outcomes.[265] Nonetheless, lower courts in the United States continue to cite the *Harper & Row* dictum that the fourth factor is the single most important. One-fourth of the rulings in our U.S. Study cited the dictum.

Whatever the continuing force of the *Harper & Row* dictum in the United States, it has had negligible influence in Israel. That is not surprising. After all, less than one-third of the rulings in our Israel Study apply factor four and no

258. *Id.*

259. *See infra* text accompanying notes 281–290.

260. We refer to the commercial character of the use and whether the defendant gave authorship credit as "factors" rather than "sub-factors" because Israeli courts treat authorship credit and, sometimes, commercial character, as independent factors rather than subsuming them within the first statutory factor or any other statutory factor.

261. Beebe, *supra* note 44, at 617.

262. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

263. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) ("[A]ll [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.").

264. *Id.*

265. *See* Asay et al., *supra* note 50, at 944–46 (reporting regression analysis that shows that the question of transformative use is paramount in fair use cases and has even come to exert a strong influence on factor four analysis).

Israeli ruling has cited *Harper & Row*. Only one Israeli ruling in our data set stated that factor four is the most important. Four rulings stated expressly that factor four is not the most important and that all the factors should be considered equally. Forty-nine rulings, amounting to 89.1% of the rulings in our Israel Study, made no reference at all to the relative importance of factor four.

Finally, in what may mark a departure from American fair use jurisprudence, the Israeli Supreme Court in *Société des Produits Nestlé v. Espresso Club Ltd.* has recently put forth an original conceptual framework for the four factors analysis. Copyright law, the court held, aims to encourage the creation of works for the purpose of enriching the public domain.[266] To that end, the Court stated, fair use serves to limit copyright, to ensure that copyright is appropriately balanced to achieve its goals, and to ensure it does not unduly constrain public access to works without justification.[267]

Within that framework, the Israeli Supreme Court classified the four factors within three broad considerations based on copyright law's normative foundation.[268] In so doing, the Court characterized the four factors as tests to assist the court in applying these considerations in particular circumstances. The first consideration explores the extent to which the allegedly infringing work promotes socially valuable objectives, including that of encouraging creation.[269] This consideration is reflected in factor one (the purpose and character of use) and factor two (the nature of the protected work).[270] The second consideration is the extent by which the allegedly infringing use impairs the copyright holder's incentives, by compromising his control over the use of his work and its economic exploitation.[271] This consideration is reflected in factor four (effect on the value of work and its potential market) and factor three (the scope of use).[272] The third consideration is proportionality.[273] It explores the extent to which the actual use of the original work in the allegedly infringing copy serves the general purpose of the allegedly infringing work. Factor three (the scope of use) and factor one (the purpose and character of use) reflect this consideration.

Notwithstanding its characterization of the four factors as merely sub-tests to assist the court in applying those three considerations as needed, the Israeli Supreme Court in *Nestlé* nevertheless proceeded to carefully analyze each of the factors. It remains to be seen whether this new conceptual framework for the four factors will affect their relative weight in determining fair use outcomes, and how this framework will affect the overall analysis of fair use cases.

266. CivA 3425/17 Société des Produits Nestlé v. Espresso Club Ltd. 31 (2019) (Isr.).

267. *Id.* at 32.

268. *Id.* at 34.

269. *Id.*

270. *Id.*

271. *Id.*

272. The Israeli Supreme Court noted that there might be a tension between these two considerations, for instance, when a work promotes an important social goal but may cause economic harm to the rights holder. *Id.*

273. *Id.* at 34–35.

5. Transformative Use

Within the last two decades, the transformative use approach has come to completely dominate U.S. fair use jurisprudence. As we have noted, in his recent exhaustive empirical study of transformative use in U.S. copyright law from the Copyright Act of 1976 through 2016, Liu reports that during the final decade of his study nearly 90% of U.S. fair use rulings addressed whether the allegedly infringing use is transformative.[274] Liu's study also shows significant correlations between fair use outcomes and judicial findings regarding whether a use is transformative.[275] Finally, as Liu demonstrates, a finding that a use is transformative profoundly impacts judicial analysis of fair use factors one, three, and four.[276]

Not surprisingly, our U.S. Study comports with Liu's findings. During the period of our study, courts explicitly addressed whether the defendant's use was transformative in 82.7% of the cases. Further, in an additional 14.2% of the cases, courts applied the transformative use approach by expressly addressing the key definition of what constitutes a "transformative use," whether the defendant's expressive purpose differs from that of the plaintiff, even if the court did not expressly use the word "transformative." Together, these amount to almost 97% of the cases in our U.S. Study. And, notably, although courts during the final two years of our U.S. Study were less likely to find the defendant's use to qualify as transformative than previously, they continued to consider whether the use is transformative in almost every case.

By comparison, the transformative use approach had relatively marginal influence in Israeli fair use case law during the first ten years in which Israel's Copyright Law 2007 took effect. Nonetheless, as we presently explain, the issue of whether the defendant's use is transformative may have had greater impact than appears at first glance. It also seems likely to loom larger in Israeli fair use doctrine in the years ahead.

During the period of our empirical study, only eight Israeli rulings, 14.5% of the total, mentioned the word "transformative." And, of those, only six rulings, 10.9% of the total, expressly found whether or not the allegedly infringing use in question was transformative. Likewise, very few rulings considered or gave any weight to whether the alleged infringer's expressive purpose differed from that of the author of the copied work. Only two cases found that the alleged infringer had a different expressive purpose and that this fact weighed in favor of fair use.

However, in those few instances in which Israeli courts did determine whether the use in question was transformative, the findings correlated 100% with fair use outcomes.[277] In all three of the cases in which the court held that

274. Liu, *supra* note 52, at 177.

275. *Id.* at 180 (finding that outcome on issue of transformative use correlates without fair use outcome over 94% of the time).

276. *Id.* at 185 (factor two), 194–95 (factor three), and 198–99 (factor four).

277. In line with that 100% correlation in those few cases in which Israeli courts did rule on whether the use is transformative, there was a statistically significant correlation overall between the Israeli courts' finding on

the use was transformative, it ruled that the use was fair use. In all three in which the court held that the use was not transformative, it ruled against fair use. Thus, at least within the very small set of cases in which Israeli courts did determine whether the allegedly infringing use was transformative, Israeli jurisprudence aligned with the transformative use approach that dominates U.S. fair use doctrine. In both countries, a finding of whether the defendant's use is transformative heavily correlates with fair use outcome.

In addition, Israel's Supreme Court has been considerably more receptive to U.S. transformative use doctrine than its lower courts. Out of the handful of cases in our Israel Study that expressly addressed transformative use, two are Supreme Court rulings. Citing *Campbell*, the Israeli Supreme Court in *Football Association Premier League Ltd.* opined that transformative uses are more likely to qualify as fair use than are non-transformative uses.[278] Transformative uses, the Court stated, fulfill the purpose of the fair use exception, which is to promote creativity and enrich the accumulated store of knowledge.[279] Moreover, the Court noted, in many cases, a transformative use neither substitutes for the protected work nor otherwise competes with it.[280] As a result, transformative uses generally cause no economic harm to authors' incentives to create. Ultimately, however, the Court rejected the defendant's fair use claim in the case before it. In so ruling, it held that streaming an original broadcast "as is," in a manner that serves exactly the same purpose and aims to reach precisely the same audience as the original does not constitute a transformative use.[281]

In *Safecom, Ltd. v. Raviv*,[282] the Israeli Supreme Court alluded to the importance of transformative use, citing American empirical studies.[283] Yet, finding against fair use, the court held that defendant's near exact copy of the plaintiff's patent application drawings did not qualify as transformative use.[284] As the court stated, "it does not appear that the Respondent's use of the Safecom drawings led to the creation of a new expression, different from the original expression embodied in them."[285]

Finally, in its recent seminal decision in *Société des Produits Nestlé v. Espresso Club Ltd.*, the Israeli Supreme Court fully embraced the transformative use approach that currently dominates U.S. fair use case law.[286] Nestlé, the owner of the successful global brand Nespresso, sued a local Israeli coffee

transformative use and fair use outcomes (Fisher's exact test two-sided p<=0.0284) even though almost 90% of the rulings did not even mention transformative use.

278. CivA 9183/09 Football Ass'n Premier League Ltd. v. Anonymous 15 (2012) (Isr.).

279. *Id.*

280. *Id.*

281. *Id.* The Israeli Supreme Court's holding is consistent with prevailing U.S. fair use doctrine. *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 819 (9th Cir. 2003) ("Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.").

282. CivA 7996/11 Safecom, Ltd. v. Raviv (Oct. 10, 2013) (Isr.), http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Safecom%2C%20Ltd.%20v.%20Raviv.pdf.

283. *Id*. at 20 (first citing Beebe, *supra* note 44; and then citing Netanel, *supra* note 43).

284. *Id.*

285. *Id.*

286. CivA 3425/17 Société des Produits Nestlé v. Espresso Club Ltd. (2019) (Isr.).

company, Espresso Club, over Espresso Club's TV commercial campaign mocking Nespresso's original commercials featuring the American star, George Clooney.[287]

In a ruling that draws heavily on U.S. precedent and law review articles, the Court found for the defendant, concluding that the mocking commercial amounted to fair use.[288] In so doing, the Court highlighted the significance of transformative use as a central test of fair use considered by the courts in the United States and in Israel.[289] The importance of the transformative use test, the Court stated, arises from its link to the purpose of copyright law: to enrich the public domain with creative works.[290] The public domain does not gain from mere copying a work without any additional creativity, and it is therefore difficult to justify the harm such copying may cause to the incentives of the original author. However, when the defendant has used the original work to create something different and new, the justification for allowing the original author to prevent the distribution of the second work is called into question. Citing *Campbell*, the Court stated that transformativeness involves an inquiry into the extent to which the defendant's work has a different or innovative character compared to the original work, and whether it has some additional layer or dimension.[291]

The use at issue in *Nestlé* was a parody, a paradigmatic transformative use. It was clearly a work of different character, which had a different essence and communicated a different message. *Nestlé* thus raises the question of whether uses, like Google Book Search's mass digitization of books, that involve exact copying of the entire original work for a fundamentally different, socially beneficial purpose might qualify as a transformative use and a fair use.[292] While Israeli courts have yet to rule on technological uses like mass digitization, lower courts have accepted fair use claims involving exact copying for different purposes without making any express reference to transformative use. Those uses have included copying a chorography for the purpose of learning,[293] replication of portions of a copyrighted newspaper interview on a politician's website,[294] the posting of a copyrighted photograph on a Facebook page of an NGO advocating animals' rights,[295] and the pulling of blog posts entries and

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287. *Id.* at 1–2.

288. *Id.* at 55.

289. *Id.* at 43–46. With regard to the Israeli cases, the Israeli Supreme Court cited the two prior Supreme Court rulings that had discussed transformative use: CivA 7996/11 Safecom, Ltd. v. Raviv (2013) (Isr.) and CivA 9183/09 Football Ass'n Premier League Ltd. v. Anonymous (2012) (Isr.).

290. *Id.*

291. *Id.* at 43.

292. CivA 230/12 Jonathan Brauner v. Google Inc. (2013) (Isr.) (noting that an Israeli copyright infringement action against Google regarding Google Book Search met defeat when an Israeli district court ruled that the lawsuit was ineligible for a class action, without reaching the issue of fair use, and the plaintiff withdrew his appeal at the recommendation of the Supreme Court).

293. CivC 8303/06 Mejula v. Hanan Cohen (2008) (Isr.).

294. CivC (DC TA) 57588-05-12 Danon PR Telecommunications v. Shelly Yachimovich (2012) (Isr.).

295. CivC 48263-11-13 Ronen v. Let the Animals Live (2016) (Isr.).

headlines by an online news website using RSS.[296] In any event, it remains to be seen whether subsequent Israeli cases will broadly apply the transformative use approach and, if so, whether that will translate into more favorable fair use outcomes for defendants as it has in the United States.

6. *The Factors that Drive Israeli Fair Use*

Our Israel Study identified four factors that had a statistically significant correlation with fair use outcomes and that were applied by courts in enough cases to provide a possible explanation for what has driven Israeli fair use outcomes and doctrine. We note that given the relatively small size of our data set and given that each of those factors had a strong, independent statistically significant correlation with fair use outcome, logistic regression analysis is not suited to our study. We, accordingly, look to bivariate correlations and an assessment of the number of cases in which courts rule on the relevant factor to determine the extent to which that factor might explain fair use outcomes.

We also compare Israeli court treatment of these factors with that of U.S. courts. In so doing, we identify a sharp distinction between Israeli and U.S. fair use doctrine during the ten-year period of our study. With one exception, none of the factors that correlate significantly with fair use outcomes in Israel correlate significantly with fair use outcomes in the United States. Indeed, what appear to be the highly influential factors in Israel generally have a decidedly marginal impact on fair use outcomes and doctrine in the United States.

a. *Commercial Use*

As discussed in Part III, the U.S. copyright industries who lobbied against Israel's adoption of fair use raised particular concern that, as drafted, Israel's fair use provision omits any express mention of the commercial nature of the use and would thus encourage Israeli courts to liberally award fair use to commercial uses of copyright-protected works.

Ironically, however, our Israel Study reveals that, in fact, Israeli courts appear to have weighed the commercial nature of the use far more heavily against fair use than do their U.S. counterparts. In our Israel Study, over 90% of the twenty-three rulings that found that the allegedly infringing use was commercial proceeded to reject the fair use defense.[297] Conversely, in six out seven cases (85.7%) in which the court explicitly found that the use was not commercial, the court ruled in favor of fair use, also a statistically significant correlation.[298]

By contrast, our U.S. Study found that the court ruled against the defendant on fair use in only half the cases in which the court characterized the use as

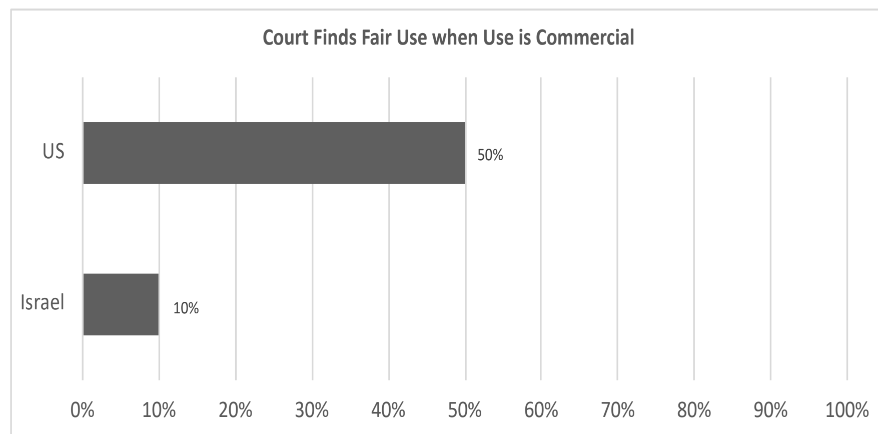
296. CivC 45536-07-11 Tomer Apfeldorf v. Yoav Itzhak (2013) (Isr.).

297. A two-sided measure of statistical correlation between finding that use is commercial and fair use outcome is Chi-Square $p=0.0048$.

298. Per the Fisher's exact test, the two-sided measure of statistical correlation between finding that use is not commercial and fair use outcome is two-sided $p<= 0.0016$.

commercial. In the United States, a judicial finding that the defendant's use was commercial thus correlated with the court's rejection of the defendant's fair use defense with no higher odds than would be predicted from flipping a coin. On the other hand, when courts characterized the use as non-commercial, they ruled, similarly to Israeli courts, that the use was fair use in an overwhelming 83.9% of the cases.[299] Finally, when U.S. courts characterized the use as both commercial and transformative, they ruled that the use was fair use in 80% of the cases and that the use was not fair use in only 8.9% of the cases (with the remainder either questions of fact or mixed).

FIGURE 4. PERCENTAGE OF COURTS IN U.S. AND ISRAEL FINDING FAIR USE WHEN USE IS COMMERCIAL



The striking difference between Israel and the United States in fair use outcomes when the court finds the use to be commercial is also reflected in the respective courts' express statements about the weight to be accorded to the commercial nature of the use in fair use analysis. In our Israel Study, 47% of the rulings expressly stated that the commercial nature of the use is to be weighed against fair use.[300] Of these, seven rulings stated expressly that no commercial use may qualify as fair use and thirteen rulings stated that the commercial nature of the use is an important, but not disqualifying, factor weighing against fair use. Further, another six rulings expressly weighed the commercial nature of the use heavily against fair use without specifying whether commercial nature disqualifies a use from being fair use or merely weighs significantly against it.

299. All in all, the correlation between commercial character and fair use outcome was statistically significant, at Pearson Chi Square $p = 0.005$.

300. Of those rulings, 48% defined commercial use as a use that is designed to reap a profit and 36%, more broadly, a use designed to reap any benefit for the defendant, including enhancement to reputation. An additional 16% did not define commercial use. No Israeli court used the phraseology that appears in some U.S. fair use cases to the effect that a commercial use is one in which the defendant fails to pay the customary price for the use.

Only one ruling stated that the commercial nature of the use is of marginal weight in determining fair use.

By contrast, our U.S. Study found that no court stated that a commercial use may never be a fair use and only 11.3% of the rulings stated that commercial uses are generally presumed to be unfair and/or to cause market harm. Further, in 37.8% of the rulings, U.S. courts expressly minimized the importance of the commercial nature of the use, such as by stating that if the use is transformative, the commercial character weighs little against fair use.

Notably, however, the Israeli Supreme Court's recent ruling in *Nestlé* appears to signal a closer alignment of Israeli and U.S. fair use on the issue of commercial use. In *Nestlé*, the Court stated that the Knesset's omission of explicit reference to the commercial nature of the use in section 19(b)(1) was meant to clarify that fair use is not to be categorically denied to commercial uses.[301] Rather, in line with U.S. fair use doctrine, courts are to consider both the use's commercial nature and whether the use is transformative, but must give less weight to the former than the latter.[302] As with other aspects of the Court's ruling in *Nestlé*, it remains to be seen how lower courts will interpret and apply that clarification regarding commercial use.

b. Authorship Attribution

The defendant's failure to give authorship attribution appeared to weigh heavily against fair use in our Israel Study. Courts' ruling on fair use defenses found that the defendant had failed to give the author adequate credit in twenty-two cases, or 40% of the cases in our data set. The court rejected the defendant's fair use defense in all but one of those cases.[303]

Some further explanation is in order. Israel's Copyright Law 2007 recognizes authors' moral right of attribution.[304] The author's moral right of attribution, namely to have his name identified with his work, is limited to "the extent and in the manner suitable in the circumstances."[305] As in other countries, under Israeli law, the author's moral right is a personal right that is distinct from the author's copyright.[306] By the same token, fair use applies only to any unauthorized use of the copyright owner's economic rights, not the moral right of attribution. Unlike some statutory fair dealing and fair use provisions in other countries, section 19 does not explicitly require authorship attribution as a

301. CivA 3425/17 Société des Produits Nestlé v. Espresso Club Ltd. 47–48 (2019) (Isr.).

302. *Id.* at 46–47.

303. The correlation between failure to give authorship credit and fair use outcome is statistically significant, at Pearson Chi Square $p = 0.0011$.

304. Moral rights under the 2007 Act consist of the right of attribution Section 46(1) and the right to protect the integrity of the work against distortion that may be prejudicial to the author's honor or reputation (Section 46(2)). § 46(1)–(2), Copyright Law, 5768–2007, SH 2119 38 (Isr.).

305. *Id.*

306. *See generally* MIRA T. SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY (2011).

condition to the fair use defense.[307] Nonetheless, our Israel Study demonstrated that courts have repeatedly considered the lack of attribution in determining fair use.

Authors brought a claim for infringement of their moral right of attribution in addition to a claim of copyright infringement in 56.4% of the fair use cases in our Israel Study. The court ruled that the defendant had infringed the author's moral right of attribution by failing to give the author adequate credit in twenty-two of those cases. As just noted, the court rejected the fair use defense to the author's copyright infringement claim in all but one of those twenty-two cases.

By contrast, the defendant's failure to give authorship attribution is virtually a non-issue in the United States, where the Copyright Act contains no general recognition of authors' moral right. In our U.S. Study, only two rulings (1.1% of the total) stated that failure to give authorship attribution can weigh against fair use and two rulings state the opposite, that failure to give credit to the author is irrelevant. Nor does the fact that the defendant gave authorship attribution generally weigh in favor of fair use. Only three rulings (1.6%) in our U.S. Study stated that giving authorship attribution can weigh in favor of fair use, and one expressly stated that the fact that the defendant credited the author was irrelevant to fair use analysis.

A handful of U.S. fair use rulings prior to the ten-year period of our study gave some weight to authorship attribution.[308] But our empirical study and careful reading of fair use doctrine reinforce our conclusion that authorship attribution generally weighs little, if at all, in U.S. fair use case law. As an earlier study concludes, despite courts' occasional reference to authorship attribution as an equitable consideration for fair use, it is "most certainly not the case" that "attribution is regularly considered by courts as a factor in the fair use analysis."[309] Again, that stands in sharp contrast to the considerable weight given to authorship attribution by Israeli courts.

Having said that, however, the Israeli Supreme Court's recent ruling in *Nestlé* might move Israeli fair use doctrine closer to that of the United States along this vector as well. *Nestlé* did not hold explicitly that failure to give authorship attribution is irrelevant to fair use. But it repeatedly highlighted the distinction between an author's moral rights and the economic rights of the copyright owner, and stated that an author's recourse for violation of his or her

307. Fair dealing provisions in several countries require reasonable authorship attribution as a condition to qualifying for the defense. *See* Jane C. Ginsburg, *The Most Moral of Rights: The Right to Be Recognized as the Author of One's Work*, 8 GEO. MASON J. INT'L COM. L. 44, 53 n.30 (2016) (citing fair dealing provisions of several countries, including the United Kingdom). Some newly enacted fair use provisions explicitly require authorship attribution as well. *See, e.g.*, Copyright Amendment Bill B 13B—2017 § 12A(c) (S. Af.) (enacted, but not yet signed into law); INTELLECTUAL PROPERTY CODE, § 184.1(e), Rep. Act No. 8293 (Phil.) (requiring authorship attribution for certain uses).

308. *See, e.g.*, Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 23 (1st Cir. 2000) (finding newspaper's attribution of authorship weighed in favor of fair use); Weissmann v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989) (finding plagiarism weighed against fair use); *see also* Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983).

309. Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 88 (2007).

moral rights lies only in the moral rights provisions of the Copyright Law 2007, not in the copyright provisions.[310] Further, the fact that the Nespresso had failed to credit the author of the creative expression that it copied was conspicuously absent from the Court's fair use analysis. The Court did not even mention the defendant's failure to give authorship attribution, let alone give it any weight.

c. *The Defendant's Purpose of Use*

As discussed above, section 19 of the Israel Copyright Law 2007 sets out a two-part test for fair use.[311] Section 19(a) provides: "Fair use of a work is permitted for purposes such as private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution."[312] In contrast to Israel's previous fair dealing exception, section 19(a) is meant to set out an open list of permissible purposes. Uses other than the enumerated uses may qualify as fair use. However, to qualify as fair use, the defendant's use must be "such as" one or more of the enumerated uses in some way. As the Supreme Court emphasized in *Nestlé*, section 19 sets out two requirements for a finding of fair use: purpose and fairness. The Court explicitly held that "the language of section 19(a) does not allow renouncing the purpose test as an independent preliminary test."[313] At the same time, as discussed above, Israeli courts have broadly interpreted the purpose test.[314]

In our Israel Study, nineteen rulings (35.5% of the total) expressly found that the defendant's use was not one of the uses enumerated in section 19(a). In all but two of those nineteen rulings, the court rejected the defendant's fair use defense, yielding a statistically significant correlation between fair use outcome and a finding that the defendant's use is not one of the enumerated uses.[315] Notably, moreover, none of those rulings analyzed whether the use in question was "such as" one or more of the enumerated uses. This suggests that Israeli courts might be continuing to apply the approach from the previous fair dealing regime, in which only enumerated uses could qualify for the fair dealing defense, rather than the more open (although not entirely open) regime set out in section 19. In that vein, only 18% of rulings explicitly acknowledged that the list of enumerated purposes is an open-ended list.

On the other hand, in 65% of the cases in our Israel Study the court did not explicitly find that the use failed to satisfy the purpose test. In these cases, the court found the use to be for one of the purposes enumerated by the clause, or simply ignored the purpose test all together. In sum, it is not clear whether the

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310. CivA 3425/17 Société des Produits Nestlé v. Espresso Club Ltd. 54–55 (2019) (Isr.).

311. *See supra* notes 191–199 and accompanying text.

312. § 19(a), Copyright Law, 5768–2007, SH 2119 38 (Isr.).

313. CivA 3425/17 Société des Produits Nestlé v. Espresso Club Ltd. 31 (2019) (Isr.); *see also* Elkin-Koren, *supra* note 221, at 359–60 (arguing that the language of the statute suggest that the legislator sustained the two necessary conditions to exempted use drafted by courts prior to the enactment of the Copyright Law 2007, namely, the purpose of use, and the fairness of use as measured by the four factors).

314. *See, e.g.*, CivA 2687/92 Geva v. Walt Disney Co. 48(1) PD 251, 273 (1993) (Isr.).

315. Pearson Chi-Square Pr. 0.0276.

seventeen rulings that denied fair use after finding that the defendant's use was not one of the enumerated purposes were path-dependently applying the previous closed-list fair dealing regime or simply concluding without discussion that the defendant's use was neither an enumerated use nor "such as" the enumerated uses.

Regardless of the explanation for why Israeli courts seem to apply the section 19(a) purpose test restrictively, Israeli doctrine differs from that of the United States on this issue by imposing an additional obstacle before defendants who claim fair use. Section 107 of the U.S. Copyright Act also prefaces the list of enumerated uses in the preambular clause with the phrase "such as."[316] But in its definitions section, the U.S. Copyright Act provides explicitly that the "terms 'including' and 'such as' are illustrative and not limitative."[317]

Accordingly, U.S. courts interpret § 107 to set out a fully open list of examples of the types of uses that can qualify as fair use.[318] U.S. courts occasionally state that the fact that the defendant's use does not fall within one of the illustrative categories of fair use weighs against fair use.[319] However, Beebe concluded, based on the regression model in his empirical study of U.S. fair use case law, that "when controlling for the effects of other findings, a finding that the defendant's use fell within one of the preambular categories did not significantly affect the outcome of the fair use test."[320]

d. Defendant's Bad Faith

Our Israel Study found a statistically significant correlation between fair use outcome and courts' ruling on whether the defendant had used the plaintiff's work in good faith. Israeli courts ruled in favor of fair use in every one of the four cases in which the court found that the defendant had acted in good faith and against fair use in every one of the twelve cases in which the court found that the defendant had not acted in good faith. But the fact that Israeli courts addressed the issue of the defendant's good faith in just sixteen cases, slightly less than a third of our data set, suggests that this factor has somewhat weaker explanatory power for fair use outcomes than do the commercial character of the use, authorship credit, and a judicial finding that the defendant's use did not meet the purpose test.

Our U.S. Study found that the issue of whether the defendant acted in good faith is quite marginal in the U.S. fair use doctrine. In our U.S. Study, only eighteen rulings (just under 10% of the total) addressed the issue of whether the defendant acted in good faith, and of those, three rulings stated that the

316. 17 U.S.C. § 107.

317. *Id.* § 101.

318. *See, e.g.*, Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) ("[A] secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute." (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994))).

319. *See, e.g.*, Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 107 (2d Cir. 1998).

320. Beebe, *supra* note 44, at 609–10.

defendant's good or bad faith is irrelevant to whether the defendant's use qualifies as fair use.[321] Likewise, Beebe's empirical study of fair use cases found that, while a judicial finding of bad faith on the part of the copyright infringement defendant correlated significantly with the court's rejection of the fair use defense, only 16% of the cases made reference to the propriety of the defendant's conduct. Further, Beebe's regression analysis suggested that a finding of bad faith served little role in fair use outcomes keeping other factors and subfactors constant.[322]

CONCLUSION

In campaigning against the adoption of fair use outside the United States, U.S. copyright industries warn policy makers around the world that introducing fair use would undermine copyright protection. They contend that courts in other countries lack the capacity to carefully craft the scope of a privileged use, and insist that the adoption of fair use would thus lead to unrestrained copying.

Our empirical study of fair use case law in one country to have adopted fair use outside the United States finds no evidence to substantiate these claims. We find, indeed, that during the first decade in which Israel's statutory fair use provision was in effect, Israeli courts were quite restrained in accepting fair use defense compared to their U.S. counterparts, rejecting fair use defenses in 70.9% of the cases, compared with a mere 40.5% rejection rate by U.S. courts. While the courts of other countries that adopt fair use might be more receptive to fair use defenses than have Israeli courts, our case study makes clear, at the very least, that the USTR should give no weight to the mere fact that a country has adopted fair use in determining whether that country should face the threat of trade sanctions for inadequate intellectual property protection.

Our study further reveals that, notwithstanding Israel's enactment of statutory language that was almost identical to § 107, Israeli courts developed an independent jurisprudence of fair use, putting weight on factors that have generally played an insignificant role in determining fair use outcomes in the United States. These factors include the commercial nature of the defendant's use, the defendant's failure to give authorship credit, the purpose of use, and the extent to which the defendant acted in bad faith. At the same time, however, the Israeli Supreme Court has repeatedly looked to U.S. fair use case law for guidance. As we have discussed, indeed, the Court's recent ruling in *Nestlé* might move Israeli fair use jurisprudence closer to that of the United States even if *Nestlé* pronounced a uniquely Israeli framework for the four statutory fair use factors.

Our findings may offer some important lessons to countries considering the adoption of the fair use exception in their copyright law. Most importantly,

321. *See* Liu, *supra* note 52, at 186 (finding that only 17.7% of the U.S. cases in his study addressed the defendant's good faith or bad faith).

322. *See* Beebe, *supra* note 44, at 595, 609. A more recent study similarly found that although the good faith/bad faith inquiry has a statistically significant coefficient, the inquiry is so rarely applied as to render that statistic somewhat meaningless. *See* Asay et al., *supra* note 50, at 994 n.226.

introducing a fair use provision need not, in itself, lead to unrestrained copying. Far from being a license to unauthorized copying, fair use offers a conceptual framework for a sophisticated legal analysis weighing the conflicting values and considerations promoted by copyright law.

Our study has further demonstrated that courts may play a moderating role, even when empowered with broad discretion. Although fair use is an open-ended norm which seemingly accords courts wide discretion, judicial decisions in our study reflected a considerable degree of path dependency. Israeli courts followed a relatively conservative approach that heavily relied on the legal tradition which preceded the Knesset's enactment of fair use. Our findings suggest that, to a large extent, Israeli courts' interpretation of the fair use provision looked to the fair dealing framework which preceded the fair use reform. In particular, in part because of how the Knesset drafted section 19, Israeli courts have continued the fair dealing distinction between the *purpose test* and the *fairness test*, interpreting section 19 to require the *purpose of use* as a precondition to fair use. U.S. courts have taken a different path in their interpretation of the statutory language of § 107.

This path dependency of courts should not come as a surprise. Judicial decisions are shaped by precedent and by briefs submitted by the litigants. The conceptual framework applied by judges and litigators is further shaped by their training and experience under the previous law. Courts may play an important role in legal reform, but they are generally bounded by their legal tradition and their local legal culture. Consequently, even broad discretion accorded to judges by an open-ended fair use norm is unlikely to result in dramatic change overnight.

Finally, our findings underscore the role of courts in copyright reform, and their contribution to the integration of a legal transplant in local copyright law. While fair use opponents express concern about delegating to courts a semi-legislative power to craft copyright exemptions for new uses, our study suggests that courts are not only capable of carefully developing legal norms but also of doing so in a manner that is bound by local legal culture. This could be an important feature in localizing global copyright norms.

We hope that our study inspires additional, companion studies of how fair use has been applied in other countries that have adopted the privilege. Such studies would shed greater light on how fair use is actually transplanted outside the United States. They would provide the necessary empirical data to compare transplanting countries' approaches to fair use with one another and with evolving fair use doctrine in the United States.

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