"A critical survey of the views driving the current debate over U.K. legal alternatives to the U.S. 'Fair Use Doctrine', including a comparative analysis of the US and UK legal regimes."

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Signature: Date:

Dr. Mark L. Woods September 28, 2012

This dissertation is my own work. All sources used, quoted, summarised and otherwise referred to within are fully credited and cited in the foot/endnotes and the bibliography.

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A dissertation prepared in partial fulfillment for the Requirements of the L.L.M. in Intellectual & Industrial Property Law

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Word count: 20,000 words.

Abstract: This Master of Laws thesis (the "Thesis") surveys critical commentary driving the current debate over U.K. legal alternatives to the U.S. 'Fair Use Doctrine'. The survey first situates this commentary in an overview of the existing legal regimes in the United Kingdom and in the United States of America. The following analysis of related commentary makes comparisons to other so-called 'Common Law Jurisdictions', which have either adopted, ignored or rejected any changes to their laws, i.e., approving statutory codifications intended to move them *away* from the U.K.'s Fair Dealing model and *toward* the U.S.A.'s Fair Use Doctrine model. This study is informed by applying critical approaches, which are based on legislative and case law analysis, legal theory and legal history. Other informed or relevant commentary and writings are privileged for their relevance to the broader discourse. Therefore, observations and conclusions are achieved by methods including Comparative Law and Multi-disciplinary research. Consequently, the study provides both practical, historical and theoretical insight into specific areas of Intellectual and Industrial Property Law (IP), while also exploring the relationship of IP Law to European Union Law, Competition Law, the Law of Obligations, Commercial Law, and various other areas of international law, Common Law and Equity.

Key words: Copyright, Fair Dealing, Fair Use Doctrine, Intellectual Property Law, Common Law, European Union Law, British Law, American Law

Summary: From both historical and theoretical legal approaches, the general problem to be considered in this dissertation is outlined in key questions:

1. What are the defenses to alleged copyright infringement available to both practicing lawyers and to interested parties under the British system of 'Fair Dealing'?
2. What are the defenses to alleged copyright infringement available to both practicing lawyers and to interested parties under the United State's system of the 'Fair Use Doctrine?
3. What is the history of this debate between the two systems, and how do these two systems compare and contrast with each other, and what might the specific advantages or disadvantages of each system be?
4. What legal alternatives to the American-style 'Fair Use Doctrine' are being proposed in the U.K. and why?
5. Why did the recent U.K. government-commissioned Hargreaves Review reject a new 'Fair Use Law' for the UK, and what are the implications of this rejection, especially in the context of eventual harmonization or compliance with European Law?
6. What relevant conclusions can be drawn that would be useful to all 'stakeholders' in these debates i.e., producers and consumers of copyrighted products, distributors and broadcasters/service providers distributing these products, and to practicing lawyers as well as legislators, in the context of commercial and non-commercial uses, and under applicable European Intellectual Property and Competition Laws and especially with regard to specific 'Economies of Innovation' within the British 'Cultural & Creative Industries' (including but not limited to academic publishing, music, film, television and 'New Media' products)?

Focus of the research: This survey and analysis outlines the current debates surrounding the re-vamping / reforming of UK IP Law, and in particular, addresses how

newly proposed laws might cope with a perceived need by some for a U.S.–style Fair Use Doctrine while adapting to or compromising with opposition to these proposed changes.

The significance of the research: This research is both relevant and timely, as while there is a proliferation of conflicting and contracting voices in the debates over IP legal reforms in the UK and abroad, there is a dearth of theoretical IP Law analysis, as well as a lack of informed recommendations for resolving conflicts and applying this theory. There is also a dearth of recent scholarship, which considers the individual perspectives of actual small producers within the industries being debated, as well as a lack of balanced analysis about the practicalities of providing IP Legal support for these independent artists and producers.

Legal statutes and acts:

UK: Fair Dealing is defined primarily in the 1988 Copyright Designs and Patents Act (UK).

Digital Economy Act 2010, 2010 c. 24

Broadcasting Act 1990, 1990 c. 42

U.S.: 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law:*

> "One of the rights accorded to the owner of copyright is the right to reproduce or to authorize others to reproduce the work in copies or phonorecords. This right is subject to certain limitations found in sections 107 through 118 of the copyright law (title 17, U. S. Code). One of the more important limitations is the doctrine of "fair use." The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law." [1]

European Union Law and International Agreements, Accords, Treaties, etc.:

Article 9(2), Berne Convention for the Protection of Literary and Artistic Works (1979)

[1] U.S. Copyright Office, General Comments on Copyright and the Fair Use Doctrine; http://www.copyright.gov/fls/fl102.html

The (USA) Digital Millennium Copyright Act (DMCA) 17 U.S.C. §§ 512, 1201–1205, 1301–1332; 28 U.S.C. § 4001.

The EU Electronic Commerce Directive 2000/31/EC

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 (known as the Copyright Directive and/or The Information Society Directive).

The World Intellectual Property Organization Copyright Treaty (1996).

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950.

The body of relevant key case law and legal opinions, along with key legal and economic commentary, will be surveyed separately in this Thesis, and is listed in the Bibliography.

Part I. Introduction

Introduction: This Master of Laws thesis (the "Thesis") surveys critical commentary driving the current debate over U.K. legal alternatives to the U.S. 'Fair Use Doctrine'. A casual evaluation of this debate might frame it as a sharply-divided debate between two well-defined sides, but this study demonstrates that the lines of practical, legal and philosophical division are more complicated and nuanced than might be perceived from policy statements and from media reports, and also that there are important new arguments (based on studies and observations including statistical analysis of case outcomes, discourses innovative new business models, revenue streams, and IP protection/enforcement models) which clarify the advantages and disadvantages of each approach. By surveying the available, current literature on this topic and then analyzing the commentary in these writings, this Thesis will attempt to transcend the perceived, bipolar impasse of "either/or" reasoning, i.e., Fair Dealing v. Fair Use Doctrine, revealing the causes of the current legal disagreement to be as much the aspects of systemic industrial changes as they are about ownership protection and enforcement issues. It is hoped that this deeper analysis will show that all sides of the debate (including the 'transcendent' or radical approaches we briefly introduce) parallel established theoretical discussions within IP Law theory, and hence this Thesis will demonstrate that an application of IP Law critical approaches may be useful in solving the legal, commercial and industrial impasses.

Goals, Purpose and Methods of the Thesis: The purpose with the Thesis is to provide a survey of key commentary regarding the debates about British 'Fair Dealing' defences versus the U.S. Fair Use Doctrine, which is then supported by theoretical arguments backed up by case law with a critical analysis of qualified legal commentary. Our motives toward practising lawyers and other interested parties, is that they might gain insight into how Fair Dealing and Fair Use cases are solved in practice, and how pending legal changes could affect their practices and client case outcomes. Our survey does not seek to be exhaustive; indeed, the breadth and scope of writings about this current and continuing jurisprudential controversy are mind-bogglingly multitudinous — it is the chaotic confusion raised by the many voices around this topic, and the sheer volume of

these voices that motivates us to offer a more concise thesis, which clarifies the key issues and which organizes these issues into comprehendible and more readily digested understanding of these issues. The Thesis arrives at a time when the Hargreaves IP and Growth Review [2] has been delivered and the government has since responded, [3] although it has not yet made any substantive legislative changes related to recommendations made by Professor Hargreaves and his team. Indeed, almost six years have passed since the delivery of the Gower Review, [4] and little or nothing of that report's recommendations have found their way into Britain's laws. [5] This Thesis offers a historical and theoretical backdrop to the trajectory Britain has followed between Gower and Hargreaves, and further contextualizes this evolution with commentary informed by European Union Law and development in US case Law. The Thesis is informed by applying critical approaches, which are based on legislative and case law analysis, legal theory and legal history. The observations and conclusions are achieved by methods including Comparative Law and Multi-disciplinary research. Consequently the study provides both practical, historical and theoretical insight into specific areas of Copyright and Copyright Exceptions within the field of Intellectual and Industrial Property Law (IP), while also exploring the relationship of IP Law to European Union and

[2] The *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity - A review of Intellectual Property and Growth*. http://www.ipo.gov.uk/ipreview-finalreport.pdf

[3] Government response to the Hargreaves Review; http://www.ipo.gov.uk/ipresponse.htm

[4] *Gowers Review* of Intellectual Property. 6 December 2006. Full Text (PDF). Published by. The Stationery Office (TSO). ISBN 0118404830.

[5] To attest to the emotionally heated nature of this debate, the government is now alleging that stakeholder parties contributing to its full response have delayed the process, whilst defamatory statements are redacted from the record. "The Government had initially planned to publish the full set of responses alongside its summary (440Kb) published on 14 June 2012. However, in the course of reviewing the responses received, it became clear that a small number of respondents had advanced criticisms or inappropriately criticised the activities of others in the sector. The Government has now carefully reviewed the submissions to establish any potentially defamatory material and has redacted any inappropriate or defamatory comments. Signatures or personal telephone numbers and email addresses have also been redacted for information security purposes." To their credit, the government has launched public forums during the summers of 2012 for input from stakeholder parties, and launched a couple of studies for feasibility and research toward implementation of Hargreaves. Please see: http://www.ipo.gov.uk/types/hargreaves.htm

International Law, and briefly to Competition Law, the Law of Obligations, Commercial Law, and various other areas of international law, Common Law and Equity.

Background on the Core questions and most interesting aspects: We need to establish a general background about the debates we intend to discuss. There are two important points to make before giving background on our study. While we explain some of the background on the core questions, by definition we are also delimiting the range and scope of what this study will attempt and the measure of what it subsequently achieves. We also will touch on some of the most interesting aspects, in an early attempt to focus our study, given the enormous volume of comment the topic has and continues to generate worldwide. This Thesis confronts a 'post-Hargreaves Review reality' and seeks to introduce the reader to the complicated field of legal discourse surrounding the controversies driving the government's commission of Hargreaves. This Thesis gives a substantive but still skeletal outline of the total volume of commentary being generated around the related debates, and does not attain to include every aspect of the debates, i.e., we do not discuss the implications beyond copyright exceptions and reform, since including the parallel discussions on trademarks, patents and other parts of IP affected by these debates would be too unwieldy given our time and writing limits.

Our intended scope is tested by broader legal concerns: This scope of this study's primary comparison is between "Fair Dealing" and "Fair Use", i.e., a British versus United States of America comparison, and both Britain and the USA can certainly be categorized as 'Common Law Jurisdictions'. But the literature review and the discussion of the debates in this study dependant upon that review reveals a scope which goes beyond just these two, traditionally Common Law legal systems, and there are 2 reasons for this: 1) The comparison of the U.K. and USA logically raises the question as to whether any other Common Law jurisdictions have considered the merits of switching from one to the other (and they have), and 2) the extent to which relations via conventions, treaties, international accords and trade agreements and via implications of EU harmonization (as it relates to UK law) and implications of NAFTA harmonization (as it relates to USA law) impact upon the ability to change or alter statutory instruments in either regime (as we will see that Hargreaves is recommending against on this very basis). It does seem

somewhat remarkable that the country which originated the Common Law tradition (the U.K.) now would be the country considering adapting a development originating from a former colony, the USA, rather than the opposite, and whilst (most) other colonies (and/or territories influenced by historic, British notions of jurisprudence) persist with the older status quo of Fair Dealing. It is even more remarkable, as we shall see, that while there is general consensus within the U.K. of both popular, political opinion (evidenced by the presiding PM's remarks) and by legal experts (as evidenced in the Gower Review and the IPO's response to Gower, but that an external Civil Law-based system (Continental Law and its contribution to prevailing EU law) is limiting any desired changes (as based on the Hargreaves report findings on Fair Dealing versus Fair Use).

Overlapping and Mutually-Informing Debates, divided between 'Two Worlds': First, the 'debates' as we describe them in this Thesis occur in two different 'worlds', as it were, 1) the 'world' of legal opinions, laws and commentary, and 2) in the 'world' of competing political and commercial interests, related intra-party lobbying, and in popular, public discourse. In general, (to make a broad comparison) the legal 'world' is mostly precise and particular about the facts, while the 'world' of popular discourse is fuzzy, blurry, emotional, often chaotic and often confusing.[6] The popular 'world' is also given to distortion and even deceptions driven by competing political and commercial interests, whereas the legal commentary and opinion is generally held to a higher standard, which is also created within the framework of ethical commitments and oaths – the popular 'world' discourse is not so ethical, to say the least. Nonetheless, this study will privilege both 'worlds' when needed, to the extent that these discourses inform each other, and to the extent that considering both of these disparate discourses allows this Thesis to succeed in its stated goals.

Hence, this Thesis moves between these two 'worlds' and seeks to unite the relevance of these disparate discourses, whenever they each separately or jointly relate to the core questions. While it would be easier to refer only to the precise, legal commentary

[6] I.e., it is easier for a newspaper to neglect ethical and responsible journalism than is might be for a court to neglect established case law, since while the newspaper risks damages the court's comment and opinion carries the weight of law and related enforcement).

and (mostly) precise legal opinions and judgments, it would not allow us to effectively situate our study in a context accessible to the widest possible audience, nor would it be accurate, since judges, lawyers are not the only parties contributing to the greater discourse – the broader popular discourse informs the courts, as well as the legislators – and consequently we can achieve a more comprehensive survey in this Thesis, by referencing both legal comment as well as historical, popular reporting and non-legal writing on the topic. Consequently, our methods should be understood to be multi-disciplinary, employing diverse critical approaches, and not only legal analysis. That said, our study is *built upon* analysis of legal commentary, while it is only *informed* by the popular debates.

Local in emphasis but international in scope: The second point is that while the title might suggest a 'U.K.-centric' perspective in this Thesis, that bias probably is not possible, and either way, it would not be responsible or scholarly in its approach -- and this is because the influences of legislature, laws, opinions, and other trends in Intellectual Property laws spread like wildfire around the globe into cases and legal considerations in unrelated jurisdictions, reflecting to some extent the newness and evolving nature of this branch of law.[7] Therefore, initially it may seem "U.K.-centric" to introduce the debates on a local basis, i.e., as they are currently occurring in the U.K., but as we just explained, focusing *solely* upon the local is not a reasonable scope for this Thesis, given that what occurs in the U.K. has implications with fellow EU member states, and is also widely referenced in courts around the world. We are introducing them on a local basis merely because they are currently occurring in the U.K. – as we shall show later in the Thesis, the debates are wide-ranging and international in scope and effect. But by focusing initially on the current, local debates, we most readily arrive at our core questions, and from a British perspective, at the most interesting aspects of this study. This raises another interesting question as to whether what occurs in British Law carries more weight around the world, due to Britain being popularly perceived as the originator of Common Law and many other legal precedents, institutions, etc. and

[7] Decisions made in the U.K. might not be binding upon courts in the USA or Australia or Canada, but they certainly will be considered, at least at the Appellate level and possibly in lower courts.

therefore possibly, a more important authority to be reckoned in decisions by courts, parliaments, congresses and legislative forums deriving their traditions from the British construct and framework of lawful governance and jurisprudence. As much as we might be tempted, we avoid this distracting tangent, except where we must mention the intersecting, historical trajectories of evolving IP Law. Hence, we can say that our methods of analysis are similarly limited to Comparative Law, even though for reasons of situating it in a relevant and accurate historical and actual/current context, we begin with both a title and background which seem to be U.K.-centric, but which in fact, are not.

Delimiting the scope or our survey while delimiting the scope of our analysis: In the previous two paragraphs of this Thesis we made two points, which allowed us to better frame our methods and approach, while delimiting the scope of our survey and subsequently the scope of our analysis. We stated that we would make exceptions to referencing the two 'worlds' as we described them (in which the relevant debates persist) to the extent that this allows us to achieve the goals of this Thesis. The goals of the Thesis are now becoming better defined, but perhaps we can perfect this definition even further. [8]

We stated that we would privilege both legal commentary as well as popular commentary (of course, adding all, needed citations and qualifications as to implied accuracy and relevance) because "it would not allow us to effectively situate our study in a context accessible to the widest possible audience." With this statement we have effectively broadened our scope and our Thesis's goals, beyond that of a theoretical or practicing legal audience. For example, one of the key articles that we reference (for the most recent analysis of US Fair Use Doctrine) states these issues as among its specific goals:

[8] One way to perfect it would be to compare our goal to the goals of key, pivotal studies considered in this survey and analysis, in that we do indeed "stand on the shoulders of giants" while we also as scholars, intend to distinguish ourselves (to whatever small or greater degree possible) from prior works of these learned and mostly peer-reviewed legal authorities, virtual mentors and assorted legal heroes (referenced and cited herein).

> "But we also need to know when and why courts are finding certain uses to be commercial or transformative and when and why courts are finding that certain uses are within the copyright holder's potential market, but that other uses are not."

UCLA School of Law Professor Neil W. Netanel's statement here about what we 'need to know' reveals his study's goals, which in context we will later expound upon. But the 'we' is implied, and by its very tone, content and complicated lawyerly context, we see that 'we' is a legal audience of judges and lawyers, and to a lesser extent, possibly including specialist legal experts and their assistants, who also are politicians, i.e., a minority in the British House of Lords, U.S. Senate and House Special Committees on Commerce and Legislature, etc. Contrast this with the goal of this Thesis, which is achieved by summarizing a lengthy survey of relevant literature, whereby we might also broaden access of the discourse beyond only a legal audience. This Thesis also situates the 'debates' in both legal and popular discourses, and then shows how these 'debates' inform and relate to each other. Professor Antony Dnes, in his paper prepared for the Hargreaves Review, pursues a similar blend of scholarly and popular discourses (which Dnes calls 'industry and public perceptions') as needed:

> "The relevant literature on fair use and fair dealing is mostly drawn into the paper as issues are addressed, as are some industry and public perceptions of copyright exceptions." [9]

By so doing we achieve the same goal, which is to accurately communicate, not only in legal circles but also to a wider academic and possibly to a commercial and even public level, the key elements of this study. By having this broader goal, we hope to expand upon the literature referenced in the survey, and through our analysis we hope to make it relevant and accessible not only to legal audiences, but also to the people effected by these laws, in their every day lives. This seems to be an important issue, and indeed is echoed in the conclusions of the Hargreaves Review, which is sincere when it instructs

[9] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 3, Available at SSRN: http://ssrn.com/abstract=1858704

the government to expand the breadth of efforts to communicate better with both the courts and by default (through decisions and opinions, with the public.) [10]

The scope of this endeavor: So, to summarize at this point the scope of this Thesis, we intend to limit the scope of our survey to a sampling of exemplary and key comments which have already anthologized, 'crunched' and analyzed the multiple parts of our blended topic (e.g., interpretations of Fair Dealing/Fair Use, the effect of case law/legislature, the effectiveness/relevance of enhanced remedies/enforcement v. new conceptions of ownership/relaxed enforcement/expanded exceptions to monopoly, etc.). Our sampling is targeted for a purpose; it does not attempt nor purport to be exhaustive, neither does it need to be in order to accomplish the goals of the Thesis. Our targeted purpose allows us to note the vast and multitudinous volumes of controversy and comment surrounding the debates we outline, within needing to completely list every known source -- that would be tedious and redundant, among other possible, research errors.

Limiting the scope of our survey / Limiting the scope of our analysis: Our survey therefore includes two parts: 1) An overview of Fair Dealing defenses / Fair Use Doctrine and 2) a targeted sampling of key and exemplary comment/literature. It must be remembered that the debates from a 'meta-perspective' demonstrate the historical differences between laws created by legislature (i.e., Civil Law, Justinian Law, Napoleonic Law, European Union Law) and law created or interpreted by judges (Common Law decisions and opinions). This is a historical tension that is noted and accepted in many historical accounts of the tension between the Code Civil and Common Law.[11] [12] We

[10] 5.8 "We address this issue in Chapter 10, where we recommend the IPO take on an additional role in providing interpretations of the law, which the courts would have to take into account, to increase certainty in the system." The *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity - A review of Intellectual Property and Growth*. http://www.ipo.gov.uk/ipreview-finalreport.pdf

[11] Watkin, T. G. (1997). *The Italian Legal Tradition*. Aldershot, Dartmouth Publishing Company Ltd.

[12] Because of the disinformation and erroneous background 'noise' that permeate even the otherwise legal debates (often as a result of misunderstandings as a result of the 'tension' just mentioned, among other causes) and not only in the popular version of

hope this will be useful to practicing lawyers and to legal students, as well as making accessible technical points in our analysis to multidisciplinary researchers (venturing from their diverse academic fields into law) and to the general public, including 'Creative Industry' stakeholders, etc. In the case of Fair Dealing, it suffices for our purposes that we list the primary defenses and note key cases, with the occasional helpful comment for clarification and distinction between similar or overlapping defenses. We show the connection between Fair Dealing defenses and the legal doctrine behind these defenses, and within the resulting Common Law case decisions, which have interpreted these defenses. This emphasis upon the legal doctrine within Fair Dealing defenses will later be helpful in our comparisons to Fair Use Doctrine. In the case of Fair Use Doctrine, we note the codes' established factors, the privileging of these factors in the US Supreme Court, major relevant Circuit Courts, and district courts, as well as in lower courts. This leads to our literature survey, where we contrast the points of our overviews with consideration of the debates in other so-called 'Common Law Jurisdictions', and we show how (the evolution of) Fair Use Doctrine and case law in the US is considered, ignored, rejected or overlooked in the debates in these other jurisdictions. Finally we attempt to bring in some alternative perspectives to the polarized debates, and we conclude by recapping our discussions and offering some suggestions for further research and possible legal development.

So, first we begin with some historical background: For the purpose of historical simplification, we might describe (in the style of an 'elevator pitch' [13]) the historical trajectory of a Fair Dealing/ Fair Use copyright exception like this:

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these debates, we find it necessary to include a brief listing of key points to grasp about Fair Dealing/Fair Use.

[13] An 'elevator pitch' is common 'show biz' slang for the nervously executed, but hopefully convincing, rapid and abbreviated, persuasive-sales-statement that a hopeful media producer might make, when encountering (by cleverness, sheer luck or chance) an enormously wealthy and powerful investor or studio head alone in an elevator, and who must in the duration of however many flights the lift is ascending, make their case to successfully gain the interest of the investor/studio head, without boring them or putting them to sleep. This is mentioned in various Hollywood and Independent Film narratives and biographies, see, Goldman, W. (1996). *Adventures in the Screen Trade*. Grand Rapids, Michigan, Abacus.

[Begin the punctuated 'elevator pitch' version of the evolution of Fair Use/Fair Dealing exceptions/defenses up to today]:

- Over three centuries, various groundbreaking English judges piece together from various parts of Common Law, mostly using 'fair abridgement' decisions, to support their as yet unnamed leanings toward a legal necessity for exceptions to copyright, occurring initially in the mid to late 1700s.
- This legal concept and case law precedence then makes its way into both the letter and spirit of the groundbreaking US Constitution, and eventually is then defined by US case law as "Fair Use" in *Folsom v. Marsh.* Meanwhile, the 1700s is both the 'Age of Reason' as well as the beginning of US imperial projects and almost at the height of early British colonial/imperial expansion, and so, by fast-forwarding in history we end up with numerous countries with varied but inter-related legal systems . . .
- Some of which broke away and achieved independence, while developing legal systems based upon their former British rulers
- While some others which are still dependent on the U.K. and/or still form a quasi-governmental collective known as the British 'Commonwealth' of Nations, but all of whom also derive their system of law from England
- And a few countries that don't have such direct, historical links with England, but which for other reasons chose a Common and Equity Law framework (i.e., the Philippines).
- Throw in a few hundred years, numerous trade disputes, wars, international accords and new political entities (including the European Union) and for good measure add several key treaties, like the Berne Convention, TRIPS, etc., several US Supreme Court decisions, etc. and this brings us to the beginning of our current British debate, where somewhat ironically, the British PM is suggesting the U.K. now needs to be more like its former colony, the USA.
- The review of UK IP has been done and dusted, and in the end, what has changed? Are we in Britain moving toward a Singapore-style compromise that overlays a Fair Use factors test over existing Common Law Fair Dealing, or are we 'kicking the can' for reforms further down the road?

[End of said 'elevator pitch'].

The Irony is poignant but telling: Why is this ironic? Well, to begin, there is a popular idea that the current US Fair Dealing Doctrine originated in American case law, but scholars, who find its origin in English Common Law's "fair abridgement cases", more accurately dispute this idea:

> "It is widely said to have its American origins in Justice Story's test for "a fair and bona fide abridgement," as set out in his 1841 decision in *Folsom v. Marsh*, [14] although, as Matthew Sag has recently described, fair use has earlier roots in fair abridgement cases litigated in English courts of law and equity extending back to 1710." [15]

Some irony rests in the fact that this is the same Britain that once 'ruled the world' but which has had to accustom itself to having former colonies overshadow its post-Imperial incarnation in world trade, and also occasionally overshadow it in cultural, political and legal influence, but our Conservative PM seems anything but 'conservative' in his assertion, that we not 'conserve' (i.e., *preserve*) our British 'Fair Dealing' legal tradition, and instead adapt progressive, new laws according to a [gasp] US Fair Use Model. Whether this is possible or desirable remains to be seen, as we shall explore later. The elevated rhetoric of political and public discourse, which we describe in this Thesis as the 'popular debates' are countered by the sobriety and reasoned approach of scholars including Professor Hargreaves and his team located in the UKIPO. Hargreaves notes early in his study that his review occurs in the context of a structure of laws and protections that exist in the US, but which might not be readily transferable to the U.K. [16]

Then there are the many so-called 'Common Law Jurisdictions', which have considered altering their laws away from the British model of 'Fair Dealing' as a result of various commercial, technological, political, social and legal influences, and some have even

[14] 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4,901).

[15] Netanel, Neil Weinstock. Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715. (2011) Pg. 719.

[16] A good example of this is the The Digital Millennium Copyright Act (DMCA) which has 'safe harbour' provisions which protect innovators from liability as the conduit of information, and although this is paralleled by similar provisions in the

done so (Israel, the Philippines and Singapore, most famously). The irony here rests in the commentary and sometimes exaggerated rhetoric that occurs while these countries are debating changes, some demonizing the change in anti-American terms, while praising the fact that Britain has not yet embraced Fair Use, while others demonize British Fair Dealing as antiquated, inflexible and not fit-for-purpose in a modern, industrial, post-digital reality – while often ignoring the reasons why Britain has come later to the debate, i.e., its responsibilities and limitations under treaties with the EU, rather than on the merit of anti-American/pro-American legal model arguments.

But to recap, this irony is poignant but telling, in that it supports the decision in the design of this Thesis to broaden the scope of its survey, to include not only the precise legal opinions and commentary around the topic, but also the popular discourse and social history which contextualizes these two trajectories of intertwining and mutually-informing debates – including the mutually informing part which 'generously' includes for our consideration the disinformation that is typical of the popular debates, i.e., information which mistakenly confuses the historical origins of this law and doctrine, or which contorts and the conflates the discussion to include wholly different aspects of IP Law, *as if* copyright, patents and trademarks, etc. formed one monolithic, national-commercial/economic problem needing a single, sound-byte ready solution. But thankfully, this digression that explained why irony reinforces our reasoning now leads us to our U.K.-centric background, which historically situates the summary in this introduction to the Thesis, while also permitting us to weave into our introduction, a bit of partially-misleading but necessary, 'popular discourse and social history'.

On the ground in Britain, with the 'Fair Dealing v. Fair Use' debates: In November of 2010, UK Prime Minister David Cameron (with an anecdote about the founding of the Internet search engine giant Google) called for a re-vamping of UK IP law, and proposed the introduction of a British 'Fair Use Law' modeled after the American legal doctrine of the same name. Some sectors within the so-called 'Creative Industries' in Britain lobbied hard to influence and discourage the subsequently Coalition government-commissioned Hargreaves Review from complying with the requests of Cameron (and presumably of Google and her allies), and subsequently alternatives to creating a British

version of the U.S. 'Fair Use Doctrine' have been suggested and proposed by Hargreaves, instead. To the dismay of 'Free Expression' advocates, 'Creative Commons' advocates, and consumer groups, these same sectors within the British Creative Industries lobby had prevailed in expanding the scope of IP enforcement, rather than resolving legal exception questions raised in the Digital Economy Act, brought in by an exiting Labour government, which preceded Mr. Cameron's current Conservative-led/Liberal Democrat Coalition government. [17]

Bear in mind that this tug-of-war (over the final review of the 'Fair Use' alternative recommendations by Hargreaves) between the 'Creative Industries' establishment representatives, unions, corporations guilds, etc. and advocates of alternative approaches of IP regulation and enforcement is not only isolated to the UK, but is playing out in current U.S. struggles between Hollywood and her allies and the Internet giants, consumers and their allies, as seen in the recent defeat of the SOPA bill and currently in the struggle against enactment of the international ACTA treaties. We will refer to these larger struggles later. But here we are giving a current, popular, local account, reported with a basic, historical background to the current debate. Later we will anchor the historical background in a more specific and more accurate legal history.

The legal tug-of-war in the U.K. seems to be a division of two sides, one pitted against the other, but in fact interviews with British artists and producers, an in-depth analysis of events leading up to the Hargreaves reviews and responses to it, as well as an analysis of new business models recommended by alternative legal theorists, suggests that the entire debate is more nuanced and less sharply polarized, as might be reported in the

[17] Consequently, within the Creative Industries themselves, we see a rare division of forces, with traditional broadcasters, distributors and producers of copyrighted-entertainment products and related IP lining up on one side (against a legal easing of enforcement/expansion of consumer rights, i.e., 'Fair Uses' and on the other side we see consumers, independent artists, legal and economic 'Internet specialist' theorists, civil liberty advocates and an alliance of 'New Media' providers and network carriers. Within the U.K. the same tension is being echoed in specific arenas within these industries, as echoed in the recent British Film Institute report 2012 [17], wherein the same divisions (with traditional producers and their allies on one side and with consumers, providers and 'New Media' carriers/providers and other stakeholders/allies on the other side).

news media or as gleaned from official press statements made by the most prominent voices of the 'two sides'. [18] Consequently, what becomes the most interesting aspect of this study, is that an analysis (of the commentary in qualified legal journals) suggests that the overall solutions might require a legislative and enforcement 'paradigm shift' beyond the highly polarized 'two-sided' debate to not only privilege the owners of copyright, but to also privilege views which include perspectives from consumers and from the 'grassroots' of British independent artists and producers, i.e., in the 'public interest', and which considers also radical or alternative framings of the larger legal argument, within the context of established IP Law theoretical approaches.

Philosophies that are driving the debates: The current debate in legal journals and in alternating affirming/dissenting case opinions, has now extended to the wider press, and within the U.K. more recently has been agitated by news releases made by the current Coalition government. PM David Cameron's government specifically asked for a study to be made, which could determine to what extent Britain could adopt the American version of the Fair Use Doctrine. The argument behind this request is that 'Britain is falling behind', which is as much an argument of national pride as it is economical. From the offset we see that the controversy in many places, including in the U.K., causing the debates, relates back to reports from business sources and studies, which state that the American model is more 'business friendly', as referenced above in the BBC articles about Mr. Cameron's recent comments:

[18] The 'two sides' are defined by misinformation by no less the British PM David Cameron, who (probably with well-intended by legally misunderstood concepts about the main issues) builds a 'straw man' argument, pitting commercial expediency 'in the national interest' against IP property rights, as if IP did not have at its heart a similar 'public interest' concern, which is does. It is likely that the PM does know more about arguments about Fair Use Doctrine before the US Supreme Court, but as a politician ideology and political gain often trump accurate arguments, so the popular debate get more polarized and less comprehendible. Indeed, the further blurring of 'two sides' polarizations worsens, as there are key, celebrated and much-publicized cases where major players in these debates have alternated between claims of infringement one day, to claims of 'Fair Use' defenses on another day, in only slightly different cases, with the global search engine-driven giant Google being one of the most famous (for this switching between defendant and plaintiff) when it suits their purposes (and so, it is no wonder that even the British PM is confused).

> "Mr. Cameron said the founders of Google had told the government they could not have started their company in Britain. He said: "The service they provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States." [19]

Counter arguments have been and will be made in popular forums that adoption of the US model will lead to 'chaos' and 'confusion'. These fear-mongering exaggerations (mostly within the 'popular debates') on both sides distort the legal reality, as we will demonstrate in our survey. Similarly confusing at a popular level, Google is claiming a Fair Use defense in several cases related to the comments relayed to Cameron. [20] Cameron (probably unintentionally) has simplified to point of distorting the legal arguments that would compare Fair Dealing with Fair Use. [21] Another bias in the BBC report is that it utilizes statements from what the journalists perceived to be the 'two sides' of the bilateral debate, and unfortunately the comments do not clarify these two sides, nor are they representative of either a local version or international version of the facts of the debate. Various arguments are put forward as to how rapid, technical advances and/or rapid social and consumer behavior changes precipitate faster responses and alterations than are possible under the U.K. regime of Fair Dealing copyright exceptions. These issues are important aspects of popular reasoning, but are part of a broader meta-legal discourse, and are not necessarily at the heart of the legal debate, as Cameron and others imply.

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[19] BBC News - UK copyright laws to be reviewed, announces Cameron, 4 November 2010; http://www.bbc.co.uk/news/uk-politics-11695416.

[20] E.g., THE AUTHORS GUILD, INC. *et al.*, Plaintiffs, v. GOOGLE INC., Defendant. UNITED STATES DISTRICT COURT; SOUTHERN DISTRICT OF NEW YORK, 05 Civ. 8136 (DC) ECF CASE.

[21] Further confusion immediately ensues in this article, wherein Cameron and other politicians / industry stakeholders are quoted, as they (not necessarily being IP legal experts) conflate copyright exceptions with trademark and patent exceptions, and with other aspects of IP and commercial or competition or contract law. This is understandable, as the debates do encompass the broader range of the IP Law spectrum, but it is also confusing, since most of the changes requested have only to do with proposed expansions to copyright law, and not to patent or trademark law (Although Designs Patents has been given its own, allocated study within the government's response to the review).

Whether technological advances are at the heart of the debate as to whether Britain should shift from Fair Dealing to Fair Use, this isolated aspect of the broader spectrum of debates surrounding copyright exception has done much to drive the nature of the debate in the U.K., as the PM specifically asked for an investigation based on what he has stated were primarily responses to market demands/commercial production needs:

> "The analysis in this paper reflects a Prime Ministerial request to the Intellectual Property Office to examine the possibility that fair dealing may have acted to inhibit technological innovation in the UK, particularly in relation to the major characteristics of the emerging digital age, where copying is easier, digitization occurs and markets are enlarged." [22]

It is obvious from the more nuanced nature of the 'Prime Ministerial request' that the government is interested in arguments that go beyond merely a single driving rationale, i.e., lagging behind in technology (although that would be a reasonable motive in itself) and that the press releases and subsequent BBC and other media stories tend to focus on this motivating issue, which tends to give the popular debate a bias that sounds solely economical. This is probably a calculated PR spin that is clouding the original thinking of the PM from being clearly articulated in the news articles, wherein the government obviously has a vested interest in making every action seem directly related to creating jobs, hence the techno-economic bias in the popular forum. In fact, the experts acting on behalf of the PM to bring this debate into the national spotlight make less sound byte ready statements, but statements which are nuanced enough to demonstrate that they realize that the debates over the two models, Fair Dealing/Fair Use are vast, international concerns, which have countless other scholars and researchers beyond the Cliffs of Dover thinking about a wide range of equally important issues and factors, as Professor Dnes demonstrates in his next statement related to the PM's request:

[22] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 2, Available at SSRN: http://ssrn.com/abstract=1858704

> "Fair use, possibly among other factors, appears to have allowed innovations to emerge rapidly in the US and also allows innovative practices, such as format shifting, that currently conflict with UK law, but which may be of high value to consumers without generating significant damage to the interests of copyright holders." [23]

With this statement Dnes demonstrates the contrast between the popular debate, held in press conferences and framed by speech writers plagued by the distraction of other political concerns, and the statement of a qualified, legal commentator. Indeed, we use the outline created by Dnes as a guiding outline for creating our comparative overview, although focusing on the legalities only of copyright exception, and not combining our study with law and economics, as Professor Dnes has done, except where it relates to the purpose of this Thesis. [24] So, the goal of this Thesis is to build our analysis not only upon the content but also upon the tone of qualified commentary, while we inform our analysis with the popular debate. For example, versions the word 'caution' used in legal commentary clearly contrasts with the exaggerated warnings used by every side in the popular debate:

> "Moving to fair use from fair dealing would reduce the legal rights of copyright holders, suggesting a need to be cautious of the possible deterrence of the underlying innovation associated with registration." [25]

Final reiterations about the scope of this Thesis: This Thesis is limited to Copyright and related exceptions. As such, this Thesis utilizes within its chosen scope of surveyed and analyzed legal discourses, literature which mostly focuses solely on the debates surrounding exceptions to copyright (CR), although at times it is useful and relevant to refer to cases or comments which includes arguments about patents, trademarks, and so on, but only to the extent that these sources relate to the underlying debate themes

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[23] Ibid, Pg. 2.

[24] Alas, the popular debate, given as it is to over-simplifying, mistaking, conflating, and otherwise getting the issues confused and even wrong, is still important and must be considered in our survey, since it serves as a barometer of what the public is asking for, where the cultural trends are heading, and how the law must respond, or risk becoming imbalanced in favor of only one aspect or another of the original and enduring motives behind granting limited intellectual property monopolies.

[25] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 5, Available at SSRN: http://ssrn.com/abstract=1858704

being analyzed in this study, and not in an attempt to broaden the scope of the Thesis beyond copyright exceptions. [26]

In this first section called the 'Introduction', we have introduced the topics, which are the focus of this Thesis, and we have carefully described the scope and range of this study. We have discussed the parameters, which will guide our selection of commentary and argument, and we have discussed our method and critical approaches. We have written about the topics in a general way, but we have outlined the sequence of sections in this Thesis where we will further define and give specific order and meaning to the topics, only mentioned in the Introduction. In order to allude to the logic of this specific order, we have suggested an outline of key questions to hold in mind while continuing this Thesis, and to also use as measure of whether we have achieved our stated goals and purpose. We now turn to the second section of the Thesis, which provides an overview of the two regimes followed by a survey of relevant literature.

[26] This focus of the Thesis is limited to mostly 'Common Law Jurisdictions': The literature survey and analysis that follows our overview of laws and doctrines in this Thesis makes comparisons to other so-called 'Common Law Jurisdictions', which have either adopted, ignored or rejected any changes to their laws, i.e., approving statutory codifications intended to move them *away* from the U.K.'s Fair Dealing model and *toward* the U.S.A.'s Fair Use Doctrine model. The discussion references that fact that non 'Common Law Jurisdictions like the Netherlands are also debating these topics, and our discussion necessarily references the impact of European Union Law on the debate in the U.K. We also contrast the ways in which, for example, an almost identical rationale in Australia (not a member of the EU) *against* adoption of Fair Use Doctrine is used as an argument *for* the adoption in the U.K. (which is an EU member).

Part II: An Overview of the Two Regimes:
UK Fair Dealing Defenses v. US Fair Use Doctrine

Introducing the Survey, with notes about our research methods: This section of the Thesis gives a general overview of Fair Dealing and Fair Use, without going into great depth to discuss or analyze these aspects and defences. Analysis and comparisons of the two regimes will be achieved later in the Thesis, by applying a critical approach to qualified legal commentary and case opinions relating to the two regimes. The primary source for a UK 'Fair Dealing' defenses overview in law texts is entitled Intellectual Property Law by Lionel Bently and Brad Sherman.[27] This legal text has the only exhaustive and detailed chapter dedicated to U.K. 'Fair Dealing' defenses and offers a wealth of footnotes and an extensive bibliography. We started our research by outlining this chapter and cross-referencing all listed cases and journal citations. We then conducted a search in three search engines to see how each journal article cited in Bently and Sherman ranked, as far as the number of times each article was cited in legal opinions and in other qualified legal commentary. Our survey includes a sampling of the cited articles in Bently and Sherman, which also ranked highest in citations, in qualified journal articles. The search engines used were the WestLaw UK database, the HeinOnline Law Library database, and Google Scholar. Then we looked again at the search engine findings to see what more recent articles ranked above the Bently and Sherman articles (Bently and Sherman was last published in 2009, the Third Edition, and numerous important cases have been decided since 2009). This second sorting of the legal commentary articles and opinions still relied upon the list derived from Bently and Sherman, but looked to see which new articles most often referenced these older, highly ranked articles. We did this assuming that previously highly ranked articles there were cited in 2009 would still have currency in 2012, if they were still being cited by newer, highly ranked articles, and so, by association, we added a second tier of newer (2009-2012) legal journal articles to our survey, and we again chose a sampling which met our criteria of being highly ranked in citations and cross-references, and/or frequently linked in online legal references. The third test we applied was to include recent articles, which,

[27] L. BENTLY & B. SHERMAN, INTELLECTUAL PROPERTY LAW Pg. 199-240, Oxford University Press, (3d ed. 2009).

although not yet cited as highly as others, due to the quality of their content promised to become highly cited. During this literary research 'threshing' procedure that allowed us to separate the 'wheat from the chaff', we weighted our choices with article citations which frequently occurred in legal arguments put forward by parties contributing to the debates in countries which currently are or recently have considered shifting from Fair Dealing model toward a Fair Use Doctrine model. This provided a wealth of anecdotal material and historical background to the far-flung controversy, and helped to contextualize our overviews and analyses. This is also when we noticed how distorted and exaggerated the popular arguments could be, in contrast to the usually precise and considered legal debate on the same topic, and we made a note of the nature and frequency of these distortions, to gain an insight into how the legal debate might be better communicated to a popular forum. For example, we noticed (during the same debate held in Canada over shifting from a Fair Dealing model to a Fair Use model) that statements made by one legal group in Canada in peer-reviewed journals and in official submissions to the investigating committee were balanced, substantive and precise. This same legal group published articles in the same period, but more for popular, public consumption, and this is where persuasive distortions and misleading statements to the point of political and social fear-mongering leapt into their otherwise tempered and reasoned rhetoric – clearly the nature of the perceived audience alters the tone, content and direction of claims and opinions. We will give more details about this incident, later in our survey.

Here is the overview of Fair Dealing/Fair Use that precedes our survey. Although the Fair Dealing overview is abbreviated and mostly an annotated list of defenses, we believe it broadens our readership to include this overview in this form at the beginning of the Thesis, because while is attains to be succinct, it is also precise in targeting the most important cases supporting or testing these defenses. Thus it simultaneously serves as a defining reference point for the casual reader and as a source of secondary references for the legal student or theorist.

Overview of Fair Dealing: In this section we seek to answer the question, "What are the defences to copyright infringement that are available to both practicing lawyers and to interested parties under the British system of 'Fair Dealing'?" Bently and Sherman, Professor Dnes, and almost every other scholar tackling this topic begin by establishing the 'Legal basis for Fair Dealing', usually after they have made some statement to 'Define Fair Dealing'. Bently and Sherman ground their discussion by listing the accompanying key cases that are supporting the specific, legal copyright exception. They find the 'Legal basis for Fair Dealing' in British IP Law [28] and in the European Convention of Human Rights [ECHR] and related British Human Rights Law, (specifically citing ECHR, Article 10):

> "As mentioned in Chapter 2, Article 10 of that Convention confers a freedom of expression, limitations to which must be 'necessary in a democratic society'. [29]

According to Bently and Sherman, the British Court of Appeals decision in *Ashdown v. Telegraph* [30] agrees that

> "Article 10 considerations were to be taken into account, first, in the process of interpreting the existing exceptions; second, in the formulation of remedies; and third, if necessary, in the formulation of a judicial 'public interest' exception to copyright." [31]

Dnes goes beyond Bently and Sherman's explanation of the defences, to 'fill in the gaps' while considering 'possible reform':

> "The focus in this paper is on filling some gaps in knowledge by examining the ability of fair use and fair dealing to deal with change, and by examining some key issues concerning possible reform." [32]

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[28] The defenses to copyright infringement which are known as 'Fair Dealing Defenses are codified in *CHAPTER III, entitled "ACTS PERMITTED IN RELATION TO COPYRIGHT WORKS" of* The *Copyright, Designs and Patents Act 1988* (c. 48) [commonly abbreviated as CDPA] http://www.jenkins.eu/statutes/copyright.asp

[29] L. BENTLY & B. SHERMAN, INTELLECTUAL PROPERTY LAW Pg. 202, Oxford University Press, (3d ed. 2009).

[30] Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142 (18 July, 2001) URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2001/1142.html*

[31] Ibid, pg. 202.

[32] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth,

Bently and Sherman exhaust the possible exceptions and give supporting cases and statutory support, where indicated, to Fair Dealing. Dnes is setting up a discussion of copyright exception legal models, which has already concluded that Fair Use Doctrine is superior to Fair Dealing in its inherent flexibility and ability to rapidly deal with change:

> "At the heart of the fair-use doctrine are the perceived benefits from establishing a flexible approach that can be used by judges in the courts to adjust copyright exceptions to changing, and often unforeseen, developments without a need for further legislation. It seems there is no alternative to fair use if the desire really is to produce a high degree of flexibility in the face of change." [33]

Bently and Sherman devote only three-quarters of a page to discussing the debates around reform of copyright exceptions, while Dnes focuses upon the debates. We will discuss this more in our literature survey. But first we give an overview of the cases that support the defences, known under the umbrella of 'Fair Dealing':

An Overview of Case Law which supports, established, clarified or reinforced aspects of the notion of 'Fair Dealing': Copyright Exceptions are established in: Pro Sieben Media A.G. v Carlton Television Ltd & Anor, Court of Appeal - Civil Division, December 17, 1998, [1998] EWCA Civ 2001. That these exceptions must be 'for a specific purpose' is confirmed in The *Newspaper Licensing Agency* Ltd *v Marks* & *Spencer* Plc [2001] UKHL 38, [2003] 1 AC. 551. One of the primary question to ask would be, "Is it fair?" which is supported in *Hubbard v. Vosper* [*1972*]*1* All ER 1023, 1029. Further, we must ask "Is it published?" This condition is expanded upon in *Hyde Park Residence v Yelland* [*2000*] *E.M.L.R.* Then, the question of citation or due credit to the author is raised, and we ask, "Was there 'Sufficient Acknowledgement'?" This comes directly out of the CDPA s. 29(1)(1B); s. 30(1). By the way, this citation or credit goes to Acknowledge Author, not Owner as noted in *Express Newspapers v Liverpool Daily Post* [*1985*] 3 All ER 680.

HMSO: Intellectual Property Office, London, 2011. Pg. 2-3, Available at SSRN: http://ssrn.com/abstract=1858704

[33] Ibid, pg. 3.

The list of specific defences and supporting case law for Fair Dealing includes: Fair Dealing for the purpose of research or private study, Fair Dealing for criticism or review, Fair Dealing for the reporting of current events, Fair Dealing when there are 'Incidental uses', Fair Dealing when there is Disclosure in the public interest, Library Uses as Fair Dealing, Educational Uses as Fair Dealing, Uses of works for the handicapped as Fair Dealing, Fair Dealing when there is Public Administration, Fair Dealing for purposes of Cultural Preservation, Exceptions for artistic works under Fair Dealing, Exceptions for computer programmes under Fair Dealing, Exceptions for Databases, Exceptions for Works in electronic form, Temporary Technology-dictated copies as Fair Dealing, Defences for films and sound recordings, Broadcasts and Fair Dealing, and also, Uncategorized defences under Fair Dealing. [34]

With 'Purpose of research or private study' [35] we must always first ask of ourselves and of our clients, "Is there a commercial intent?" For Private research or study, the use must be Fair, i.e., "What amount has been copied?" and which was supported in UNIVERSITIES UK LTD v. COPYRIGHT LICENSING AGENCY LTD, DESIGN AND ARTISTS COPYRIGHT SOCIETY LTD, R.P.C. (2002) 119 (18): 693-727.[36] This exception does not extend to third parties, i.e., You can't do Fair Dealing copying for someone else's research (3rd Party copies) as established in Sillitoe v McGraw-Hill Book Co [1983] FSR 545. So, in other words, University professors and lecturers can't claim Fair Dealing when making multiple copies of someone's work for their students – this does not constitute research of private study. We find this in the opinion in *Longman Group Ltd v*

[34] L. BENTLY & B. SHERMAN, INTELLECTUAL PROPERTY LAW Pg. 199-240, Oxford University Press, (3d ed. 2009).

[35] Please note (Recital 42): "When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect." ["The EU Copyright Directive"] 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 Official Journal L 167 , 22/06/2001 P. 0010 – 0019; http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

[36] UNIVERSITIES UK LTD v. COPYRIGHT LICENSING AGENCY LTD, DESIGN AND ARTISTS COPYRIGHT SOCIETY LTD, R.P.C. (2002) 119 (18): 693-727. doi: 10.1093/rpc/2002rpc36.

Carrington Technical Institute Board of Governors, [1991] 2 NZLR 574 (H.C.) With this exception there must also be 'Sufficient acknowledgement', i.e., duly cited, or it is not fair dealing for the research exception – here there is an underlying assumption that research gets distributed, versus private study which doesn't by definition, although this is not clear via the law or case law, to date.

In Fair Dealing for Criticism or Review, the spirit of the law is that CR can't be used to control or influence critics, as confirmed in Time Warner Entertainment Co Ltd v Channel 4 Television Corp PLC (1993). We must ask for this defence, "Was the criticized work or reviewed work publically available?" as determined concerning private, royal letters in *HRH the Prince of Wales v Associated Newspapers* Ltd. [2006] EWHC 522 (Ch). Additionally with criticism or review, 4 step test suggested by Bentley and Sherman [37] asks:

1) Was the fair dealing as criticism or review fair? This is to be tempered with, "How much of original was used?" which leads to the concept of 'Quotation with proportionality' which is codified in the Info. Soc. Directive, Art. 5(3)(d). So, again, the amount is qualitative instead of quantitative, i.e., was it "blatant" or "substantial" copying", e.g.,"Lord Reid held that there was copyright in the coupons and that Ladbroke had reproduced a substantial part of the coupons." **[38]** This was described as "a case of blatant copying - Ladbroke took the whole of the expression - the way the form was laid out and the headings; not just the 'facts' or 'ideas'". **[39]**

With criticism or review, condition number 2) Commercial copying is unfair, which is upheld in IPC Media Ltd v News Group Newspapers Ltd, Court of Appeal - Chancery Division, February 24, 2005, [2005] EMLR 532,[2005] EMLR 23,[2005] EWHC 317 (Ch),[2005] FSR 35. With criticism or review, we now ask, 3) "What was the nature of the

[37] L. BENTLY & B. SHERMAN, INTELLECTUAL PROPERTY LAW Pg. 211-212, Oxford University Press, (3d ed. 2009).
[38] Ladbroke Football Ltd v William Hill Football Ltd [1964] 1 WLR 273; http://wikijuris.net/cases/ladbroke_football_v_william_hill_football_1964 - fn_1
[39] Ibid.

use?" This is confirmed by Fraser-Woodward Ltd v BBC & Brighter Pictures Ltd, [2005] EWHC 472 (Ch); [2005] EMLR 487; [2005] FSR 36; [2005] 28(6) IPD 11; *The Times*, 15 April 2005, Court Chancery Division. Specifically:

> "The Court held, dismissing the claim, that in respect of all but one of the photographs the use was for the purposes of criticism and review of other works, namely the tabloid press and magazines, applying *Pro Sieben AG v Carlton UK TV Ltd* [1999] and that the use was fair. Whilst *Ashdown v Telegraph Group Ltd* was authority for the proposition that the criticism must be of a work or another work and it was not sufficient to criticise anything to invoke the section, there was no requirement that the criticism and review contain specific reference to the work in question. The use of the remaining photograph amounted to incidental inclusion. Sufficient acknowledgment did not need to be express and it did not need to be a contemporaneous act of identification." [40]

Within Fraser-Woodward, the court also confirmed *Hubbard v Vosper* [1972] 1 All ER, which gave one of the first, case law 'definitions' of Fair Dealing criteria:

> "It is impossible to define what is *fair dealing*. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a *fair dealing*. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with *fair dealing* in the law of copyright. The tribunal of fact must decide." [41]

Finally, condition number 4) with criticism or review asks us, "Was "sufficient acknowledgement" given?" This is supported in CPDA s.30(1). The criticism itself doesn't have to be fair in order for the dealing to be "fair". A remedy of defamation might be in order, but it doesn't negate fairness of the dealing necessarily, again supported by *Pro Sieben Media v. Carlton Television* [*1999] FSR 610, 619.*

[40] Fraser-Woodward Ltd v BBC & Brighter Pictures Ltd, [2005] EWHC 472 (Ch); [2005] EMLR 487; [2005] FSR 36; [2005] 28(6) IPD 11; *The Times*, 15 April 2005, Court Chancery Division. http://www.5rb.com/case/Fraser-Woodward-Ltd-v--BBC--Brighter-Pictures-Ltd

[41] *Hubbard v Vosper* [1972] 1 All ER 1023.

Parody: The key case in this exception is *Williamson Music* Ltd *v* The *Pearson* Partnership Ltd (1987) F.S.R. 87. But further case law hasn't clarified that parody would always constitute fair dealing as criticism, rejected by Teiltelbaum J. in Cie *General des Etablissements Michelin-Michelin* & Cie *v*. *C.A.W. Canada* 85 and upheld by an Israeli Court in CA 2687/92 *Geva v*. *Disney*, Inc. 48(1) PD 251 (1994). Other 'Common Law' jurisdictions have found satire to be a form of criticism and therefore a legal exception to CR in *TCN Channel Nine* Pty Ltd *v Network Ten* Pty Ltd [*2001*] *FCA 108.* EC Copyright Directive for Info. Soc. asked for changes*, and so* Gower recommended changing British CR law to add a specific exception for parody and Hargreaves made suggestions, awaiting legislative response.

Reporting of current events*:* This is the 'journalistic' exception and it requires 'sufficient acknowledgement', unless because the work is a broadcast, a sound recording or a film, the acknowledgement would be impractical (CPDA s 30(3).) This exception seeks a negotiation between property rights and free speech rights, which echoes the philosophical tensions inherent in every IP debate, i.e., between the desire to compensate society's labourers (John Locke) while stimulating the economy via voluntary, individual expression (Hegel) against the goals of Utilitarianism which emphasizes public interest (John Stuart Mill, Jeremy Bentham, etc.) and within the context of a pragmatic approach found in the writings of Landes and Posner concerning the need to create laws which consider the efficient function of the economy. Here is the legal test:

1) Demonstrate dealing "for purpose of reporting current events"
2) That the dealing was "fair"
3) And that such dealing included "sufficient acknowledgement".

Generous interpretation driven by underlying values of "freedom of speech" and "freedom of information" is supported in *Newspaper Licensing Agency v Marks &*

Spencer [*2000*] *4 All ER 239, 382. And regarding Ashdown v Telegraph Group Limited* [*2002*] *Ch 149, 172* -- Key principles and necessary factors were specified in this ruling, namely, as related to Article 10 [Freedom of Expression] of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950. [42] As far as related case law, *Cream Holdings and Imutran v Uncaged Campaigns Limited* [2001] EMLR 563 applies Section 12 of the U.K. Human Rights Act 1998 [43] in the context of rights beyond fair dealing [for the purpose of reporting current events] in that is states:

> "The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material) . . ." [44]

Accordingly, *Ashdown* limited the application of s.30 of the CPDA within the limitation proscribed by Article 10 of the ECHR (and within the scope of proportionality of the same law in Article 12:

> " . . . Article 10 cannot be relied on to create defences to the alleged infringement over and above those for which the 1988 Act provides. The balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic state itself in the legislation it has enacted." [45]

In *Ashdown* the Vice-Chancellor held that rights of expression in ECHR Articles 10 and 12 must be balanced by other necessary rights and responsibilities, including the right to protection of property,[and in this case, including IP]:

> "In a democratic society there are many circumstances in which freedom of expression must, of necessity, be restricted. In particular untrammelled exercise of freedom of expression will often infringe the 'rights of others', both under the

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[42] "The Vice-Chancelor accepted that Article 10 could be engaged (and is engaged in this case) in a claim for copyright infringement. But he went on to hold ([2001] 2 WLR at p.972G): 'It does not follow that because Article 10 is engaged the facts of each case have to be considered to determine whether the restriction imposed by the law of copyright goes further than what is necessary in a democratic society. Article 10.2 recognises that the exercise of the right to freedom of expression carries with it duties and responsibilities.'" *Ashdown v Telegraph Group Limited* [*2002*] *Ch 16.*

[43] The *Human Rights Act 1998* (c 42)

[44] The *Human Rights Act 1998* (c 42) 12(4).

[45] *Ashdown v Telegraph Group Limited* [*2002*] *Ch 18.*

> Convention and outside it. The right to respect for one's private life recognised by Article 8 is an example. More pertinent in the present context is the right recognised by Article 1 of the First Protocol:
>
> "*Protection of property* -- Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." [46]

Some prior Public Interest defences connected to Fair Dealing relied upon Beloff v Pressdram Ltd. [1973] 1 All ER 241, 250.

For the Purpose of Reporting a Current Event: We must first ask ourselves, "Was it an event?" This is confirmed by *Newspaper Licensing Agency Ltd v Marks* and *Spencer plc* [*2000*] *4 All ER*. 239, 382. We specifically see this in *Newspaper Licensing Agency Ltd v Marks* and *Spencer plc* [*2000*] *4 All ER*. 239, 249 (quoting Gibson LJ) (CA):

> "The judge said (at 546) that the publication of a report or article in the press may itself constitute a current event and a publication may constitute fair dealing for the purpose of reporting current events though it contains no analysis or comment or any matter other than use of the copyright material, but that did not mean that whatever was reported in the press was a current event. He added that the term 'current events' was narrower than the term 'news', and that reporting of current events does not extend to publishing matters of current interest, whether generally or to particular persons like M&S, but which were not current events." [47]

And again at pararaph 42 Gibson LJ states that the event must have 'significance' as an actual event (and not just a copying that 'reports' that the original was published) and that the copying must be beyond narrow commercial interests of the defendant, i.e.,

[46] *Ashdown v Telegraph Group Limited* [*2002*] *Ch 25.*

[47] *Newspaper Licensing Agency Ltd v Marks* and *Spencer plc* [*2000*] *4 All ER*. 239, para. 41.

demonstrating a public interest. [48] Accordingly, a comparison of products is not a 'current event' as shown in *Newspaper Licensing Agency* v. Marks & Spencer [*1999*] *EMLR 369*, *383* and further, an item being published in a newspaper does not automatically constitute a 'current event'. [49] However, sufficient media coverage could make an otherwise trivial non-current event become a current event, because the media is extensively reporting it. [50] [51] If the defence if reporting of current events is established, was it fair? This is generally determined by asking whether the dealing impinged upon the potential profits of values of the IP, whether the original has yet been published (if ever), how much was used and to what extent would be its impact proportionally, what was the motivation of the copier, and if the dealing showed a relevant need to copy so that the public could relate to the event(s) under discussion. In this context, courts have asked whether a commercial motive for copying can ever attract a 'Fair Dealing' defence against impingement. [52] Finally, there must be 'sufficient acknowledgement' to use this defence, except as stated in the CPDA s. 62, excluding the need to cite when making a sound recording, film, broadcast or whenever it is otherwise impossible and impractical. [53]

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[48] *Newspaper Licensing Agency Ltd v Marks* and *Spencer plc* [*2000*] *4 All ER*. 239, para. 42.
[49] *Newspaper Licensing Agency Ltd v Marks* and *Spencer plc* [*2000*] *4 All ER*. 239, 249 (quoting Gibson LJ) paragraph 41, 42.
[50] *Pro Sieben AG v Carlton UK TV Ltd* [1999] FSR 64.
[51] When claiming 'reporting or current events' as the defence, the material copied must directly relate to the event in question, or the courts could reject this defence as seen in *Associated Newspapers v News Group Newspapers* (*1986*) R.P.C. 515. and also held in *Hyde Park Residence v Yelland* [*2000*] *E.M.L.R., 363, 374, 379-80.* It is possible, for historically dated material to relate to the 'current event', as seen in *Associated Newspapers v News Group Newspapers* (*1986*) R.P.C. 515 and in *Ashdown v Telegraph Group Ltd*.[*2002*] Ch 149.
[52] *Newspaper Licensing Agency v Marks* and *Spencer* [*2000*] 4 All ER 239, 267 quoting Mance LJ.
[53] Copyright, Designs and Patents Act 1988, C 48, s. 62 echoes this list.

Incidental Use of IP as a Fair Dealing defence: The key case is *FA Premier League* & Others *v Panini UK* Ltd [2003] 4 All ER. To summarize key holdings, the use of incidental was further defined by asking whether the use is "essential" or indeed, "incidental" to the creation of the allegedly infringing work – the court mentioned that profit motives, aesthetics, and art were all areas to consider when determining whether inclusion was in fact, "incidental" and a maintainable defence. IPC Magazines v. MGN [1998] FSR 431, 441 echoes this with criteria to decide if inclusion in the work is incidental by asking if including it was 'casual, inessential, subordinate, or merely background' and then the court held that it was not, therefore

> "On the ordinary interpretation of the word 'incidental', the inclusion of the magazine in the advertisement was not merely incidental to the broadcast, since the impact of the advertisement would be entirely lost if the front cover of the magazine was not used." [54]

Incidental should not be confused with accidental, this is not the meaning of the exception, since one can *intend* (in a ay not accidental or unplanned) to include or accidentally include, and still the inclusion could be incidental if it is not 'essential' to the design and impact of the allegedly infringing work, again in IPC Magazines v. MGN [1998] FSR 431, 441. We must note that 'deliberately' including music or lyrics is not Fair Dealing as it is excluded in CPDA 1988 31(3) which states that

> "A musical work, words spoken or sung with music, or so much of a sound recording [F1or broadcast] as includes a musical work or such words, shall not be regarded as incidentally included in another work if it is deliberately included." [55]

[54] IPC Magazines Ltd v MGN Ltd, (1998) IP & T Digest 46, CHANCERY DIVISION, RICHARD MCCOMBE QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION), This judgment has been summarised by Butterworths editorial staff. Paragraph (3), and accessed via IP & T Digests/1998/IPC Magazines Ltd v MGN Ltd - (1998) IP & T Digest 46.
[55] Copyright, Designs and Patents Act 1988, C 48, s.31(3)

The key difference here is that intentionally included music or lyrics in a sound recording is not incidental, but an accidentally included music or lyrics would be.

Disclosure in the public interest: This is a Common Law defence which pre-dates The Copyright Act 1956 and the CPDA 1988 c. 48. The key case to establish *stare decisis* for this defence is considered Beloff v Pressdram Ltd. [1973] 1 All ER. UnGoed-Thomas J stated that,

> "Public interest is a defense outside and independent of statutes, is not limited to copyright cases and is based on a general principle of common law." [56]

Other key cases for this defence include *Lion Laboratories v Evans* [*1985*] QB 526 which confirms the defence, along with Hyde Park Residence Ltd v Yelland & Ors, Court of Appeal - Civil Division, February 10, 2000, [2000] EWCA Civ 37 – Aldous LJ denied the existence of this defence and stated that none existed outside the statutory limits, adding that the defence violated the Berne Convention. He did hold that the courts retained a prerogative to refuse to enforce CP if they believed a work to be scandalous, blasphemous, immoral, contrary to family life, etc., which does seem to indicate an exception, but Aldous LJ did not see this right in the law, but rather a discretion of the court in some cases. His argument rested upon section 171(3). Ashdown v Telegraph reconsidered the decision in Hyde Park Residence Ltd v Yelland & Ors and rejected the argument of Aldous LJ, instead re-confirming with a majority the opinion of Mance LJ in Lion Laboratories v Evans, supporting the public interest defence. This confirmation was made within the context of The Human Rights Act 1998, which the court viewed as codifying these rights, having developed through Common Law, with acknowledgment from Parliament in CPDA 171(3).

Overview of Fair Use Doctrine:

[56] Beloff v Pressdram Ltd [1973] All ER 241-273, paragraph H, page 259.

Overview of Fair Use: What are the defences to alleged copyright infringement available to both practicing lawyers and to interested parties under the United State's system of the 'Fair Use Doctrine'?

Legal basis for Fair Use: U.S. 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law:*

> "One of the rights accorded to the owner of copyright is the right to reproduce or to authorize others to reproduce the work in copies or phonorecords. This right is subject to certain limitations found in sections 107 through 118 of the copyright law (title 17, U. S. Code). One of the more important limitations is the doctrine of "fair use." The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law." [57]

Is there a definition for 'Fair Use'? Here's how the courts have framed it:

> "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities." [58]

Perhaps it is appropriate to include a succinct 'Definition of Fair Use' found in the Hargreaves Review, which for the benefit of British lawyers, contrasts Fair Use against Fair Dealing:

> "By contrast the US approach enables judges to take a view as to whether emerging activities in relation to copyright works should legitimately fall within the scope of copyright protection or not. Fair Use provides a legal mechanism that can rule a new technology or application of technology (like shifting music from a CD to a personal computer) as legitimate and not needing to be regulated, so opening the way to a market for products and services which use it. It has been suggested that this is one of the factors creating a positive environment in the US for innovation and investment in innovation. Fair Use offers a zone for trial and error, for bolder risk taking, with the courts providing a backstop to

[57] U.S. Copyright Office, General Comments on Copyright and the Fair Use Doctrine; http://www.copyright.gov/fls/fl102.html

[58] Historical and Revision Notes, house report no. 94–1476, immediately following US Code Title 17 Chapter 1 § 107 (referred to as 17 USC § 107) - "Limitations on exclusive rights: Fair use".

> adjudicate objections from rights holders if innovators have trespassed too far upon their rights." [59]

Study of fair use/dealing/practice (as it is variously known, that is, the collection of defences and/or the underlying or stated doctrine and legal principles supporting limitations to the monopolies granted in IP, and in our case, to copyrights, is a study about the 'boundaries' of copyright protection, in that the borders of an IP monopoly are encroached upon by rights of free speech, competition, and the public interest, among other rights and needs beyond that of the property owner. Several of the articles cited in our literature survey have in their title or content the phrase 'challenging or testing legal barriers or boundaries' - and from a comparison of recent legal database citations, this phrase occurs most often with commentary which considers the effects of technology upon IP law, i.e., "Is a trademark in a virtual world and absolute property or not, and why?" [60] The second most frequent occurrence is in studies looking at how Fair Use is challenging legal barriers or boundaries, especially when it butts up against other fields of law or practice. [61] And finally, there is the long list of articles, which are driven to consider Fair Use and its implications because of technological advances. Either way, they all echo the same starting point:

> " . . . fair use in copyright law allows others to use the copyright work in a way that does not compete with or prejudice the original work." [62]

At the heart of Fair Use is the Four-fold test which courts have established and upheld

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[59] The *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity - A review of Intellectual Property and Growth*. Section 5.2;
http://www.ipo.gov.uk/ipreview-finalreport.pdf

[60] Cheng, Tania Su Li --- "A Brave New World for Intellectual Property Rights " [2006] JlLawInfoSci 2; (2006) 17 Journal of Law, Information and Science 10

[61] Nimmer, Raymond T., '*Breaking Barriers: The Relation Between Contract and Intellectual Property Law*'. (1998) 13 Berkeley Technology Law Journal 827 at 831.

[62] Cheng, Tania Su Li --- "A Brave New World for Intellectual Property Rights " [2006] JlLawInfoSci 2; (2006) 17 Journal of Law, Information and Science 10
[footnote number 35].

and commented upon, which serve as an interpretative and flexible backstop to neglect and abuses of IP rights, as Professor Hargreaves says:

> "Fair Use offers a zone for trial and error, for bolder risk taking, with the courts providing a backstop to adjudicate objections from rights holders if innovators have trespassed too far upon their rights." [63]

About this Four-fold test of Fair Use it has been said that:[64]

> "These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107: "(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."" [65]

Fait Use Doctrine can be simplified to this rationale: The public gains a benefit by allowing this exception to copyright enforcement, and by effectively limiting the property rights of the author, so there is a calculation of insufficient harm being done to the rights holder, and/or the presence of a public interest/benefit (with the correct, accompanying conditions) that then supersedes the private property right.

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[63] The *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity - A review of Intellectual Property and Growth*. Section 5.12;
http://www.ipo.gov.uk/ipreview-finalreport.pdf

[64] US Code Title 17 Chapter 1 § 107 (referred to as 17 USC § 107) - "Limitations on exclusive rights: Fair use" states that: Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[65] Historical and Revision Notes, house report no. 94–1476, immediately following US Code Title 17 Chapter 1 § 107 (referred to as 17 USC § 107) - "Limitations on exclusive rights: Fair use".

Fair Use as 'general' defence versus a 'specific' defence: Key ideas within recent Fair Use cases have considered 'Scène à faire' and "Limited and 'transformative' purpose" [66] By 'Transformative', it is emphasized that the excepted work does not limited the income of the author, i.e., to include commentary, criticism and parody. Fair Use Doctrine designed to be inherently flexible and expansive with acknowledgment of the need of the provision to rapidly adapt to technological advances:

> "General Intention Behind the Provision. The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. 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. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." [67]

Hargreaves echoes this elevation of 'flexibility' as a supreme quality or advantage of Fair Use Doctrine:

> "So the question is how to build in sufficient flexibility to realise the benefits of new technologies, without losing the core benefits to creators and to the economy that copyright provides." [68]

Seeking a balance of property rights versus individual needs, i.e., 'public interest':

> "The criteria of fair use are necessarily set forth in general terms. In the application of the criteria of fair use to specific photocopying practices of libraries, it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users." [69]

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[66] Campbell v. Acuff-Rose Music (92-1292), 510 U.S. 569 (1994).

[67] Historical and Revision Notes, house report no. 94–1476, immediately following US Code Title 17 Chapter 1 § 107 (referred to as 17 USC § 107) - "Limitations on exclusive rights: Fair use".

[68] The *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity - A review of Intellectual Property and Growth*. Section 5.22;
http://www.ipo.gov.uk/ipreview-finalreport.pdf

[69] Historical and Revision Notes, house report no. 94–1476, immediately following US Code Title 17 Chapter 1 § 107 (referred to as 17 USC § 107) - "Limitations on exclusive rights: Fair use".

Again, Hargreaves is aware of the role of 'balance':

> "Copyright involves a necessary balancing of divergent interests. When new opportunities arise, the law sometimes needs to adapt so that the right balance is maintained. In education and research in particular, but also in other fields including everyday consumer behaviour, there is a clear need to make that adaptation happen." [70]

So, to assist the reader, we have here summarized in questions the Fair Use "Four Standards" Test:

1) Is it 'transformative'? Examines the 'purpose and character' of the work, to see if 'something new' has been created. Has value been added by the changes? [71]
2) What is the nature of the work? Dissemination of factual information taken form a biographical source would have clear benefits to the public and therefore is more likely to enjoy Fair Use status, while information taken form fictional works is a more difficult case to make, regarding how this would benefit the public, and therefore they are less likely to be ruled Fair Use. Also, has it already been published? If not, then Fair Use becomes more difficult to assert given that authors hold stronger rights over the first presentation of their own work, and could consequently convince a judge to reject arguments of Fair Use for works not even published, yet.
3) The Amount and Substantiality of the Portion Taken – must be small, but cannot be the 'heart' of the work, i.e., you can't copy the 'signature' quote or melody line and call it Fair Use, etc. Parody permits more to be used, since, as the US Supreme Court ruled, in parody ""the heart is also what most readily conjures up the [original] for parody, and it is the heart at which parody takes aim." [72]

[70] The *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity - A review of Intellectual Property and Growth*. Section 5.2;
http://www.ipo.gov.uk/ipreview-finalreport.pdf

[71] Harry Potter Encyclopedia case - (*Warner Bros. Entertainment, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D. N.Y. 2008).)

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

4) The effect of the use upon the potential market – Is the IP owner deprived of income as a result of your use? [73] There is a broader interpretation regarding parody, wherein parody might change the public perception or the original and hence effect its marketability, but this is a natural consequence of parody, the important thing is whether the parody displaces the demand for the original. [74] But parody can be subjectively determined as some courts have shown. [75]

It should be noted that another possible defence when the sample of the original used is so small, is the *de minimis* defence, which could be useful for instance in situations where trademarked images accidentally slip into visual media without prior legal clearance, but not intentionally used in a way that is large enough to justify a court's consideration of the 4-standard rule. [76]

Regarding recent surprise rulings with parodies, a judge used the incorporation-by-reference doctrine to justify dismissed an infringement case, prior to discovery and summary judgement, on the grounds the case was so obviously unreasonable that the discretion of the judge was sufficient to dismiss, and chiding the Plaintiff for effectively attempting to conduct a 'fishing expedition' against the makers of South Park. [77] The opinion implied that Brownmark's suit risked painting the plaintiffs as 'copyright trolls', a term that has been widely used to refer to the Righthaven 'without standing' Fair Use ruling. [78]

[73] *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992)
[74] *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986)
[75] *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (N.D. Ga. 1986)
[76] *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998), but contrast this with denial of *de minimis* defence in *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).
[77] Brownmark Films LLC v. Comedy Partners, 2011 WL 6002961 (E.D. Wis. Nov. 30, 2011)
[78] Righthaven LLC. v. Democratic Underground LLC, District Court, D. Nevada, 791 F.Supp.2d 968 (2011)

Part III: Survey of Relevant Literature

Our 'Survey of relevant literature' indirectly considers all of the Laws, Directives, Conventions, Treaties, Doctrines, Case Law and Texts listed in the bibliography and cited throughout the Thesis. Rather than create a separate section to analysis the contents of our overviews and of our literature survey, we felt that is was a natural process to consider within loose categories all of the literature selected, and to allow our discussion to tease out the salient points found in these qualified, journal articles. Most of the articles are peer-reviewed from prestigious law schools, and most are written by scholars know to be experts in their respective fields. We don't include a survey of the listed laws and treaties, since this already is covered in the articles cited, and we prefer to quote the key points and conclusive rendering from this commentary, rather than rehash the relevance of these laws, some of which have held monumental legal status – the same holds true for the landmark cases cited, especially with the Fair Use Doctrine. Since this Thesis is being written first for a British readership and secondly for a broader, international readership, it seemed appropriate to include in the overviews a simplified list of Fair Dealing defenses with their most important points and key cases, while in the case of Fair Use Doctrine we include the substance of decisions which has formed the evolving doctrine, to date. We begin our survey with the articles which focus most directly on our main topic, but as the chapter unfolds we begin to reflect the nature of debates themselves, which tend to be informed not by any single issue, but by a blend or synthesis of various principles, whether they commentator notes these principles, or not. In the next section we mention 'Economic Arguments' and we want to clarify in advance that this is not a naïve conflation of unlike things, even though the relations we are making might not be immediately evident. To explain this in advance, so as not to distract from our discussion, we point to the comments of Professor Antony Dnes, who comes from an economics disciplinary background, but who is also an expert in legal theory and practice.

Fair Dealing/ Fair Use – Comparative studies and Alternatives to Economic Arguments: To briefly summarize where the next section is heading, we looked at secondary sources among legal commentary, and found that using our cross-referencing methods with

online search engine 'citation' counting mechanisms we were most frequently guided to two studies that met our criteria, using Boolean phrasing. When these results were prioritized with 'most recent' added as a search term, we landed again at the same two studies. Consequently, our study was most profoundly guided these two recent studies, one of which had as their remit a comparative study of Fair Dealing versus Fair Use Doctrine, namely the study of both regimes by Professor Antony Dnes, and the other which surveyed the statistical impact of jurisdictional fragmentation between US District courts, as well as the statistically-measurable cumulative 'rights accretion' of Fair Use Doctrine in the USA, by Professor Neil W. Netanel. What was useful about these two 'purpose-built' comparative studies of the two regimes was the extent to which they showed the doctrinal foundations of each regime, and how these doctrines were alike, similar or different. Dnes unites the two regimes by telling that under both regimes

> "Copyright is counter-balanced by exceptions that allow defined uses of copyrighted material without requiring permission from the rights holder, and amounting to a permitted private *taking* of property that is sometimes associated with a liability to pay for the taking. The broad principles of copyright law obey the economic logic of creating temporary monopoly incentivizing creativity, but allowing exceptions in cases where the uses do not harm the market interests of the copyright holder and where transaction costs threaten to undermine a beneficial use." [79]

Dnes then uses the difference of 40 pages of commentary and analysis to lay out the differences between the two regimes, to the extent that they actually exist, and Dnes does not seem convinced that, while the approaches of the two regimes famously differ, the outcomes are trending toward similar endings, and it might not actually be possible to bring the debates to any definitive closure, since this might, in fact not be possible – or at least, "no one really knows":

> "No-one quite knows whether the US fair-use and UK fair-dealing approaches are truly distinct, or what the full economic significance is of any distinctions;" [80]

The best that Dnes can offer is 'evidence' based decision making enhancement for his study's commissioning legislators as a result of his and others 'analysis of laws and cases'.

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[79] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 8, Available at SSRN: http://ssrn.com/abstract=1858704

[80] Ibid, pg. 7.

Dnes is comprehensive and precise in his analysis and doesn't seem to have missed a detail. He begins by succinctly describing the general advantages/disadvantages quotient for each regime, first with Fair Use Doctrine:

> "The US approach is often regarded nonetheless as wide ranging and flexible with possible advantages for innovation (*Gowers Review,* 2008, p.62; Brenncke 2007; Attorney General of Australia 2005), but flexibility can also be seen as creating uncertainty, although in the US doctrinal differences owe in part to jurisdictional fragmentation, particularly comparing the Ninth and Second Federal Circuits, that could not affect the UK."

Dnes in one sentence has isolated for us the elements of debate that will mostly comprise all other commentary on the topics, whether scholarly or popular. The two advantages to Fair Use, 'wide ranging' and 'flexible' permeate most other discussions, and Dnes has already in his study told us that 'flexible' is superior to all others in this consideration, and that it is likely the crowning and 'unique selling point' for those wishing to adopt a Fair Use regime:

> "It seems there is no alternative to fair use if the desire really is to produce a high degree of flexibility in the face of change." [81]

And if there is any dramatic trajectory to academic writing, one could say that Dnes has masterfully 'foreshadowed' the denouement of this plot, by pointing us toward the issue that will bear most weight, and that is, "Is it all worth it, just to achieve 'flexibility'?" i.e., are the costs of uncertainty and the harm a legislative change might do to property owners, worth the shift to a doctrine versus enumerated but limited Fair Dealing rights? Dnes wants to know, from an economic perspective, if in spite of the known or reputed advantages of Fair Use to stimulate innovation (and presumably to so stimulate the economy) whether the 'damage' is limited enough to permit this massive change to British law:

> "Fair use, possibly among other factors, appears to have allowed innovations to emerge rapidly in the US and also allows innovative practices, such as format shifting, that currently conflict with UK law, but which may be of high value to

[81] Ibid, pg. 2.

> consumers without generating significant damage to the interests of copyright holders." [82]

And then with Fair Dealing:

> "The fair-dealing doctrine *is* more narrowly defined, in terms of enumerated purposes, in the UK Copyright, Designs and Patents Act 1988 (CDPA) Ch. III, §§ 29-30, but there has still been divided opinion over whether the CDPA lacks principles, contains too many barriers to claiming exceptions, or whether courts adopt a liberal interpretive approach in practice as urged by Lord Denning in *Hubbard v. Vospar*. More recently, increased narrowness of interpretation has been shown by UK courts as they have been increasingly affected by EU directives and jurisprudence (Griffiths 2010, p.87)." [83]

Not surprisingly, the same concerns raised by Dnes about the application of the British higher courts' instruction to "adopt a liberal interpretive approach" is very similar to the same problems raised by Netanel (as he surveys and analyzes the results of studies of Fair Use Doctrine in the various regions of USA) wherein, despite Supreme Court decisions, statistics show lower American courts defaulting to a 'narrowness of interpretation' as Dnes notes is also occurring in the U.K.:

> "However, Beebe's quantitative study concludes that, despite the Supreme Court's express adoption of Judge Leval's transformative use doctrine, the influence of the doctrine has, in fact, been quite limited. Even after *Campbell*, over 40% of the reported district court opinions and almost 20% of circuit court opinions during the period of his study failed even to refer to the transformative use concept." [84]

This is significant, and it is possible that all other debates discussed in this Thesis turn on this reality, and that is, that the differences between the two regimes mean little if the judicial decision-making process defaults, over time, to the same or similar outcomes. What do we mean by this? To reiterate, Dnes isolates Fair Use Doctrine as having the unchallenged superiority of providing 'flexibility' and then says one of the primary

[82] Ibid, pg. 2.
[83] Ibid, pg. 7.
[84] Netanel, Neil Weinstock. Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715. (2011), Pg. 725.

criticism of the Fair Dealing regime is that lower courts tend to ignore an instruction to adopt a liberal interpretive approach' while Netanel faults the US Fair Use system with having a built-in 'liberal interpretative approach' which has been clarified and re-emphasized by Supreme Court decision, only to be similarly ignored or overlooked in the considerations of lower courts and outlaying US districts.

Consequently, we can ordinate and arrange the relevance of most other studies into useful categories, to the extent to which they address or supplement our understanding of the rudimentary factors isolated by Dnes and Netanel. The first studies that stand out are by Barton Beebe, [85] and his statistics based studies bring a quantitative qualification to areas of Fair Use Doctrinal applications where there otherwise was always debate, but debate mostly based on anecdote and speculation. Beebe's watershed study in 2008 is one of the most cited in legal commentary and decisions, even to this day. [86]

Continuing with Dnes's parallels between IP and real property is Michael Carrier's study into the 'propertization' of IP, which gives further weight to the 'transaction costs' calculations comments within the Dnes report. Carrier takes a route similar to Dnes, where Dnes emphasizes the doctrine to be found in the list British Fair Dealing exceptions to copyright, saying

> "One of the most revolutionary legal changes in the past generation has been the "propertization" of intellectual property (IP). The duration and scope of rights expand without limit, and courts and companies treat IP as absolute property, bereft of any restraints. But astonishingly, scholars have not yet recognized that propertization also can lead to the narrowing of IP." [87]

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[85] Beebe, Barton, Fair Use and Legal Futurism (June 12, 2012). Fair Use and Legal Futurism, 24 Law & Literature __ (2012); NYU School of Law, Public Law Research Paper No. 12-32. Available at SSRN: http://ssrn.com/abstract=2083318

[86] Beebe, Barton. An Empirical Study of U.S. Fair Use Opinions, 1978-2005, 156 Pa. L. Rev. 549 (2008)

[87] Carrier, Michael A., Cabining Intellectual Property through a Property Paradigm, 54 *Duke Law Journal* 1-145 (2004). Available at: http://scholarship.law.duke.edu/dlj/vol54/iss1/1

Dnes draws parallels between property law and IP law, as do many other commentators:

> "Both of these reasons really concern transaction costs and a parallel may be drawn between copyright exceptions and 'takings' such as exercise of eminent domain, adverse possession and regulatory takings, in other areas of property-rights doctrines, where international treatment also differs and controversies abound." [88]

Professor Carrier suggests a new paradigm for IP in general, and specifically,

> "facilitates the reorganization of defenses that courts currently recognize as well as a more robust set of defenses, which include a new tripartite fair use doctrine in copyright law . . ." [89]

Associate Professor Wendy Gordon builds her commentary [90] [91] around the key Fair Use Doctrine case, *Universal City Studios, Inc. v. Sony Corp. of America (Betamax).* [92] Betamax was the case where the US Supreme Court decided that time shifting (personal recording for later personal use) of video recordings constituted Fair Use, and effectively absolved the manufacturers of the recording machine and magnetic recording tape of culpability in any possible secondary infringement action. Gordon frames her discussion at the point where commercial or economic arguments meet the legal tests, saying

> "The Ninth Circuit took the position that "fair use" could only protect users who were productive second authors, and not persons who were making ordinary or "intrinsic" use like the home videotapers. In doing so, the circuit court rejected explicitly the economically oriented approach to fair use adopted by the Court of

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[88] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 6, Available at SSRN: http://ssrn.com/abstract=1858704

[89] Ibid.

[90] Gordon, Wendy J. Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors [article] *Journal of the Copyright Society of the U.S.A.*, Vol. 30, Issue 3 (February 1983), pp. 253-326 Gordon, Wendy J. 30 J. Copyright Soc'y U.S.A. 253 (1982-1983)

[91] See also Gordon, Wendy J., Keynote: Fair Use: Threat or Threatened [comments] *Case Western Reserve Law Review*, Vol. 55, Issue 4 (Summer 2005), pp. 903-916 Gordon, Wendy J. 55 Case W. Res. L. Rev. 903 (2004-2005)

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

Claims in Williams & Wilkins Co. v. United States." [93] [94]

Betamax establishes a commercial/non-commercial test for deciding Fair Use that dominates decisions in the US up to *Campbell*,[95] where the 'transformativeness' test is established. Consequently, Gordon's studies reinforce several arguments made by Dnes and demonstrate the spirit of comments by Dnes to the effect that 'no one really knows' regarding the ability to definitively distinguish between the two regimes, or at least to distinguish between their outcomes. Gordon, Netanel, and many others have a stated or unstated assumption in their arguments, which implies a 'rights accretion' theory. Justin Hughes produced a broad survey of the evolution of the Fair Use Doctrine in his study *Fair Use Across Time* in 2003. [96]

To continue our survey of studies which compare Fair Dealing with Fair Use, we look at how Professor Michael Madison picks up on themes in Gordon's study 'Fair Use: Threat or Threatened' and also in Hughes's early survey to lament Fair Use as a prime indicator of the paralysis setting into IP Law, as it seems to expand without limits:

> "Evidence of the problem is found in copyright's expansive scope and in its hyper-intricate compulsory and statutory licenses, digital copyright provisions, and statutory exemptions and limitations. Copyright's doctrine of fair use, apparently so cursed and situation-specific as a legal standard that one observer characterized it as "the right to hire a lawyer," serves as a particularly acute example." [97]

Madison couples Fair Dealing with Fair Use as a constitutional/Constitutional 'safety valve' that has lost its original intent to promote 'learning and the progress of

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[93] Gordon, Wendy J. Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors [article] *Journal of the Copyright Society of the U.S.A.*, Vol. 30, Issue 3 (February 1983), pp. 253-254 Gordon, Wendy J. 30 J. Copyright Soc'y U.S.A. 253 (1982-1983)

[94] *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973).

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

[96] Hughes, Justin. *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003).

[97] Madison, Michael J., Some Optimism About Fair Use and Copyright Law (June 3, 2010). Journal of the Copyright Society of the U.S.A., Vol. 57, No. 3, 2010; U. of Pittsburgh Legal Studies Research Paper No. 2010-21. Pg. 354; Available at SSRN: http://ssrn.com/abstract=1619916

knowledge, what eighteenth century philosophers and lawyers knew as learning and science.' As such, Madison sees 30 years of legal commentary or more as neglecting the relationship of Fair Use rights to free expression:

> "What gets too little detailed attention in copyright scholarship is the proposition that fair use and its fair dealing and "exceptions and limitations" counterparts are the private law cousins of public law free expression principles." [98]

This emphasis by Professor Madison is acknowledged in 'market' based studies including that of Professor Dnes, but according to Madison, acknowledgement still does not necessarily equal the privileging of the equitable statuses of free expression to Fair Use, as Dnes says:

> "In general it is important to focus on the minimization of transaction costs in considering fair-use laws. At the same time, it is important to note that other reasons, not connected with transaction costs, such as supporting free speech, providing access to works for the blind, or ensuring national archiving, may also justify copyright exceptions aside from fair-use and fair-dealing doctrines." [99]

To his credit, Dnes might have read Madison before beginning his study, since he also draws the caveat against 'market' and 'transaction costs' driven analyses needing a 'balance' with transcendent rights, concluding that:

> "From a general perspective, the task may be well described as drawing monopoly as narrowly as possible so as to maintain incentives for creative activity while simultaneously using exceptions to avoid unacceptable impacts on objectives such as free speech and to avoid incurring overwhelming transactions costs." [100]

Madison's emphasis on best practice versus code is echoed in many studies including treatises which are drawn up to consider professional best practice but in their

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[98] Madison, Michael J., Some Optimism About Fair Use and Copyright Law (June 3, 2010). Journal of the Copyright Society of the U.S.A., Vol. 57, No. 3, 2010; U. of Pittsburgh Legal Studies Research Paper No. 2010-21. Pg. 355; Available at SSRN: http://ssrn.com/abstract=1619916

[99] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 6, Available at SSRN: http://ssrn.com/abstract=1858704

[100] Ibid, pg. 6-7.

specificity to IP Law are invariably drawn to questions raised by Fair Use controversies. An example would be Rothman's study entitled, "*Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*". [101]

Dnes wants Fair Dealing to adapt to or be replaced by Fair Use to the extent that it can meet the goals to "to avoid unacceptable impacts on objectives such as free speech and to avoid incurring overwhelming transactions costs." It is probable that Madison would still see the Dnes statement above as too 'market' driven, i.e., emphasizing the 'commercial intent' versus 'non-commercial intent' in creating decisions allowing Fair Use exceptions, while Professor Josh Mitchell would probably see even Madison as not going far enough to return us to the eighteenth century writers' intent to promote 'learning and science,' which might resonate as with as another version of 'knowledge for the sake of knowledge', which constitutional historians would immediately relate to a constitutional right to the 'pursuit of happiness' which has at its foundation free expression, once again. Mitchell calls for a 're-constitutionalization' of IP Law to the extent that it has shifted from its transcendant purposes, or ceased to drive the debates:

> "In the realm of copyright, Congress and the courts have interpreted the clause as granting Congress a power not to promote progress but to establish limited IP monopolies. To return to an understanding of the IP power better grounded in the constitutional text, Congress and the courts should ensure that any IP enactment "promote[s] ... Progress" by considering whether it improves the quality or quantity of knowledge and aids the dissemination of knowledge, and whether it does so better than prior IP enactments." [102]

Mitchell wants to add a 'fifth factor' to the Fair Use Four Factor Test that forces courts to consider the original constitutional intent of granting copyright monopolies:

> "The courts can exercise the fair-use doctrine to aid in this re-constitutionalization of IP law by applying a fifth fair-use factor. This proposed

[101] Rothman, Jennifer E., Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law, Loyola Law School Los Angeles, September 16, 2010, *Journal of the Copyright Society, Forthcoming* *Loyola-LA Legal Studies Paper No. 2010-41*

[102] Mitchell, Joshua N., Promoting Progress with Fair Use, 60 *Duke Law Journal* 1639-1671 (2011). Available at: http://scholarship.law.duke.edu/dlj/vol60/iss7/3

> fifth factor would balance the progress-promoting value of the alleged infringer's use against the progress-promoting value of enforcing the copyright holder's rights. Reviewing courts should presume that any alleged infringement is fair if it promotes progress better than the enforcement of the copyright." [103]

In spite of the Dnes caveat, Dnes was commissioned by a British PM who conflates Fair Use in news releases with economic arguments about other fields of IP and Competition Law, and who has a remit to find an economic as well as a legal body of evidence to Professor Hargreaves to consider (Professor Dnes is an economist, after all). And in spite of Gordon, Madison, Mitchell and other voices in the comparative debates about the rationale for exceptions in general (whether Fair Dealing or Fair Use or some legal compromise, as seen in Israel and Singapore), what we see in our continuing survey of the literature is that economic arguments still tend to drive most of the debates.

Economic arguments tend to drive most of the debates: There seem to be a lot of arguments on each side of the legal reform debates (i.e., pro- or anti-US style Fair Use) which reference the economic incentive to the countries who are considering whether to switch from British 'Fair Dealing' statutory instruments and Common Law Defences, to the US 'Fair Use Doctrine' or some similar change. There are about eight distinct categories in to which we might place the journal articles surveyed in this Thesis, but as we will now see, the blurring of these categories begins, as discourses debating free expression roots to copyright exceptions versus economic models merge with debates that factor in issues triggered by new technologies, and all of these debates are lifted out of the Britain and the America landscapes into fully international debates, in the former 'Common Law Jurisdiction' states and beyond. [104] Consequently, our survey begins to reflect this jostled and less tidy categorization of issues. Antony W. Dnes's report to UK IPO is entitled, "A Law and Economics Analysis of Fair Use Differences Comparing the US and UK", as his introduction explains,

> "This paper examines fair-dealing and fair-use copyright exceptions in terms of their economic properties. A particular question in the United Kingdom is

[103] Ibid.

[104] At a time when the world is enduring an economic catastrophe not seen since the 1920s and 1930s, there is little wonder that economics arguments [Read: "But does it create jobs?" being the default demand driving a not-so-hidden and pervasive international debates about trade balances and economic competitiveness, etc.].

> whether there would be economic advantages, in terms of promoting economic growth through the encouragement of innovative creative work, from moving to a standard substantially similar to the fair-use copyright exception doctrine1 that can be accepted by the courts in the United States as a *general* defence to a claim of copyright infringement." [105]

This economic argument is echoed in both directions, sometimes with legal scholars and politicians claiming and economic benefit, and sometimes warning of economic loss. The benefits arguments usually claims that the UK or other former British colony, protectorate or otherwise 'Common Law Jurisdiction' (i.e., Canada, Singapore, Israel, Australia, etc.) is losing out because their legal regime is too rigid and not flexible enough to adapt and cope with market, cultural and technological changes, and as such is being held back and is losing financially to more 'competitive' legal regimes, almost always referring to the USA. Conversely, when these same countries take reviews to consider changing form Fair Dealing to Fair Use, there are often comments in the contributory evidence or reviewers' arguments which claim future losses to national economy, since as they claim, more people will avoid paying copyright royalties by using Fair Use Defenses and this will in turn harm their countries' profits and productivity:

> "By expanding what can be done without infringement, fair use could also significantly undercut the existing private copying levy as well as prospects for extending that levy to new media and to content other than music." [106]

Dire warnings as also made about disturbing important international relations with trading partners:

> "Fair use and/or expanded fair dealing systems are models that many of our trading partners, including the United Kingdom, the European Union, Australia and New Zealand, have expressly rejected. So did Canada when it last considered introducing an expanded fair dealing or fair use provision into Canadian law. In fact, of the 164 countries that are members of the *Berne*

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[105] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 2; Available at SSRN: http://ssrn.com/abstract=1858704

[106] Barry Sookman & Dan Glover, *More Fickle than Fair: Why Canada Should not Adopt a Fair Use Regime*, BARRY SOOKMAN (Nov. 22, 2009), http://www.barrysookman.com/2009/11/22/more-fickle-than-fair-why-canada-should-not-adopt-a-fair-use-regime.

Convention, only four have implemented it." [107]

And again with:

> "Adopting a fair use or expanded open ended fair dealing model could also put Canada off-side its treaty obligations, which require that Canada confine limitations or exceptions to certain special cases that do not conflict with a normal exploitation of a right or unreasonably prejudice the legitimate interests of authors or right holders." [108]

Arbitrators of the conflicting sides imagine US Fair Use as a compromise that is flexible with innovation whilst avoiding too much damage to the 'interests' of copyrights holders, i.e., loss of economic levy for their IP rights:

> "Fair use, possibly among other factors, appears to have allowed innovations to emerge rapidly in the US and also allows innovative practices, such as format shifting, that currently conflict with UK law, but which may be of high value to consumers without generating significant damage to the interests of copyright holders." [109]

Also factored into the economic arguments is the idea that the US doctrine is more flexible to innovation and changes, and doesn't require new and costly legislation with every technological or market fluctuation, thereby economizing both political capital as well as legislative costs:

> "At the heart of the fair-use doctrine are the perceived benefits from establishing a flexible approach that can be used by judges in the courts to adjust copyright exceptions to changing, and often unforeseen, developments without a need for further legislation. It seems there is no alternative to fair use if the desire really is to produce a high degree of flexibility in the face of change. [110]

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[107] Barry Sookman & Dan Glover, *More Fickle than Fair: Why Canada Should not Adopt a Fair Use Regime*, BARRY SOOKMAN (Nov. 22, 2009), http://www.barrysookman.com/2009/11/22/more-fickle-than-fair-why-canada-should-not-adopt-a-fair-use-regime.

[108] Ibid.

[109] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 2; Available at SSRN: http://ssrn.com/abstract=1858704

[110] Ibid.

Another key debates is that changes to US Fair Use will create legal chaos and uncertainty in IP producers, businesses and consumers:

> "The fair-use question also begs some others, particularly concerning the appropriate entitlements of copyright holders, the economic standard to be applied in assessing possible legal change, and the extent to which fair use creates uncertainty for copyright holders and users compared with fair dealing."[111]

And more warnings of 'uncertainty' from the Canadian debate:

> "Far from solving copyright problems, adopting fair use would lead to uncertainty, expensive litigation and important public policy decisions made by courts instead of Parliament." [112]

One might ask as to why it is possible for different sides of the debate to forcefully argue about the benefits of expanding copyright exceptions through Fair Use, while another side might use the same studies to argue about the disadvantages of this expansion, but the confusion this seems to create might be explained by the fact that both 'increases and decreases in copyright protection' have been indicated with increased creative production of works, so it might be safe to assume that the situation is less an "either/or" argument (or either more or less protections) and more complicated than that, as Dnes notes:

> "Statistical analysis by Ku, Sun and Fan (2009, p.1708), which also addresses a concern that much earlier work focuses on older, print media, rather than the modern digital economy, shows that changes in general copyright law have had uneven effects across different sectors: in fact, both *increases* and *decreases* in copyright protection could be associated with increased production of new work, as reflected in copyright registrations, which seem to be driven over the long run by other factors." [113]

Dnes seems to inject this note to balance the sides:

> "An interesting finding of Ku, Sun and Fan (2009, p.1707) is that the US Supreme

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[111] Ibid, pgs. 2-3.

[112] Barry Sookman & Dan Glover, *More Fickle than Fair: Why Canada Should not Adopt a Fair Use Regime*, BARRY SOOKMAN (Nov. 22, 2009), http://www.barrysookman.com/2009/11/22/more-fickle-than-fair-why-canada-should-not-adopt-a-fair-use-regime.

[113] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 3; Available at SSRN: http://ssrn.com/abstract=1858704

> Court's opinion on parody as fair use [114] resulted in a 30 per cent increase in the registration of serials, consistent with the liberalization of fair use leading to an increase in secondary creative innovation for which authors wished to claim protection."

McEwin echoes this finding of Ku, Sun and Fan in his study entitled "The Interoperation of Intellectual Property and Competition Law Rules and Principles"[115] wherein (from both an economic as well as legal view, but in this instance informed by Commercial Law and Competition Law) he notes, that

> "The scope of an IPR can affect the development of both complementary IPRs and follow-on IPRs. [116]

The economic arguments seek to use evidence to support one view or another (i.e., the choice between specific Fair Dealing defences or general, and a presumably more expansive Fair Use Doctrine) and Dnes offers key examples of scholarly attempts to assert evidence on behalf of expansive rights, citing two works:

> "A paper by Boldrin and Levine (2002) claimed that extending fair use in the US to allow Napster-like downloading and file-sharing services would be unlikely to reduce the value of copyrighted work. The paper is a variant on ideas put forward by Liebovitz (1985) that developmental spin offs can improve returns to the original work." [117]

Dnes builds his discussion with a summary of studies which seem to support the

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[114] Referring to the decision in *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

[115] "The Interoperation of Intellectual Property and Competition Law Rules and Principles" by Dr R Ian McEwin, Visiting Professor of Law, National University of Singapore & Chulalongkorn University Bangkok, Director, Global Economics Group, Chicago, Senior Economic & Regulatory Advisor, Rajah & Tann, Singapore; Dr R Ian McEwin, Visiting Professor of Law, National University of Singapore & Chulalongkorn University Bangkok, Director, Global Economics Group, Chicago, Senior Economic & Regulatory Advisor, Rajah & Tann, Singapore, accessed online at: http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_rt_ip_sin_11/wipo_rt_ip_sin_11_ref_rulesandprinciples.pdf

[116] Ibid.

[117] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 5; Available at SSRN: http://ssrn.com/abstract=1858704

liberalization of copyright exceptions, unlike Sookman and Glover[118] who tend toward more vague claims in their article, as Dnes exhaustively notes,

> "The extent of fair use and fair dealing is an influence on the intensity of copyright protection, e.g. comparable to a change in copyright term, and the more general studies have implications for liberalizing copyright exceptions." [119]

Dnes succinctly reduces the arguments to the overriding question of 'transaction costs' affording by IP rights versus exceptions, but tempers it with this caveat,

> "In general it is important to focus on the minimization of transaction costs in considering fair-use laws. At the same time, it is important to note that other reasons, not connected with transaction costs, such as supporting free speech, providing access to works for the blind, or ensuring national archiving, may also justify copyright exceptions aside from fair-use and fair-dealing doctrines."

Geiger, Kur and Senftleben call these 'other reasons' by the name 'horizontal issues' and suggest that they be prioritized in the debates:

> "Second, an effort should be made to explore the relevance of "horizontal issues", i.e. topics which, without being specific to the individual IP disciplines, have an impact on all of them. Inter alia, the discussion of horizontal issues should address the consequences of globalization and the potential aims of harmonization as well as the impact of current changes in the technical and economic environment. It should also include ethical issues like human rights, free speech, freedom of information, etc., and should finally also address certain legal aspects of a more general character." [120]

Dnes's crunching of the studies and reports leads to this guiding conclusion:

> "From a general perspective, the task may be well described as drawing monopoly as narrowly as possible so as to maintain incentives for creative activity while simultaneously using exceptions to avoid unacceptable impacts on

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[118] Barry Sookman & Dan Glover, *More Fickle than Fair: Why Canada Should not Adopt a Fair Use Regime*, BARRY SOOKMAN (Nov. 22, 2009), http://www.barrysookman.com/2009/11/22/more-fickle-than-fair-why-canada-should-not-adopt-a-fair-use-regime.

[119] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 6; Available at SSRN: http://ssrn.com/abstract=1858704

[120] Geiger, C., Kur, A., & Senftleben, M. (2003). A New Framework for Intellectual Property Rights - Conference of the Max Planck Institute for Intellectual Property at Elmau Castle, 22-23 November, 2002. *IIC - international review of intellectual property and competition law*, *34*(6), 632-646.

> objectives such as free speech and to avoid incurring overwhelming transactions costs."

Dnes is comparing studies in consideration of introducing a more flexible, British model at the 'Member state' level, but it's almost as if he anticipates what controversy the collision of IP Law with these 'other reasons' might play in whether the broader 'at the EU level and beyond, i.e., international accords including WTO instruments, TRIPS, etc.:

> "Limitations and exceptions provisions in international copyright law, especially in the TRIPS Agreement, have in the past been interpreted by the WTO Panel in an unbalanced manner, leading to great disapproval in academic circles. It appears that the reading of the limitations and exceptions provisions by the WTO dispute settlement body was not compliant with principles of interpretation of public international law. As a reaction, many attempts were made to propose alternative interpretations that respect interests deriving from human rights and fundamental freedoms, interests in competition and other public interests." [121]

Geiger completes this idea started by Dnes in his literature review of the debates over Fair Dealing versus Fair Use, but opens his study with the observation that ultimately, there exists a hierarchy of European and international legal rights which could trump all the debates at 'Member state' level and between Britain and her world trading partners, namely, Human Rights, with the statement that "Any Agreement Has to Be Placed in the Context of the Entire Legal Order":

> "A larger perspective has to be taken into consideration. This means that even if the TRIPS Agreement is part of trade law, international obligations resulting from treaties protecting human rights and fundamental rights to which member states are part of must be taken into account while interpreting its provisions." [122]

Geiger is proposing possible expansion of a Fair Use Doctrine as an EU level, but states

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[121] Geiger, C. (2009). Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions. *IIC - international review of intellectual property and competition law*, *40*(6), 627-642.

[122] Ibid, Page 2. Geiger continues that "Such international obligations can derive, for example, from the Universal Declaration of Human Rights (UDHR) of 1948 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 19 December 1966, both of which must be used as a guideline for the interpretation of the TRIPS Agreement, and therefore of the three-step test. Such an interpretation of TRIPS in the light of the international fundamental rights provisions could result from the General Rule of interpretation of treaties to be found in Art. 31 of the Vienna Convention of 23 May 1969, which entered into force on 27 January 1980."

that economic and legal debates might be trumped by EU and international subordination of these debates and whatever accords they produce to broader Human Rights, etc. In contrast, there are examples where not only can the economic arguments be construed so as simultaneously to (seem to) support differing sides of the debates, but also ca n the consideration of 'international obligations' be used to support opposing sides. Here in the Australian debate, we see legal scholars contest the notion that 'international obligations' exclude Fair Use expansion of exceptions (the inverse use of the Human Rights argument, contained in the objection "A fair use exception would be contrary to Australia's international obligations, in particular, the three step test."):

> "A fair use exception would be contrary to Australia's international obligations, in particular, the three step test." This objection is largely speculative, and effectively moot given the position of the US and the lack of any likelihood that the US view on compliance with Berne would ever be challenged. And, of course, when the US finally adhered to the Berne Convention in 1989, they were not obliged to amend their fair use provision. In any event, academic views differ considerably on whether fair use – with its development of exceptions through case law – should be considered inconsistent. It is also worth noting that the US is not alone – Singapore has also recently introduced an open-ended fair use exception – in fact, as a specific response to Singapore's own FTA with the United States." [123]

Comparative studies on Fair Dealing/Fair Use with conclusions on our analyses: At this point our survey continues, but we become even more specific in the literature categories, in order to bring current the debate, and in order briefly to show some of the external or peripheral topics influencing the debates. Earlier in the Thesis we introduced in a general way the debates, and discussed at some length our motive for privileging what we called the 'popular' debates versus the 'scholarly' debates. We did this because we wanted to show how the popular debates can become so forceful and pervasive that

[123] Kimberlee Weatherall, Emily Hudson, *Issues Paper: Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other copyright exceptions in the Digital Age.* July 2005. Pg. 26, No. 3; Submission by IPRIA and CMCL made to the Attorney General's Department, University of Melbourne, http://www.ipria.org/publications/submissions.html

they begin to influence and drive the scholarly debates. In an important comparative study of IP systems across many nations, [124] the authors asked:

> "How does copyright law take into account the interests of third parties, especially the general public interest in the greatest possible dissemination of knowledge and culture?"

While we do not want to imply that our PM David Cameron, nor scholars including Professor Hargreaves and Professor Dnes are not, while seeking evidence to contribute to the reform of British IP Law, also neglecting to bear in mind "the general public interest in the greatest possible dissemination of knowledge and culture". That said, we wondered why reading widely on the topic of this Thesis why little or no mention is made by our PM, Hargreaves or Dnes of this primary motivation for permitting copyright monopolies. Instead, it seems that every exception mentioned in Dnes and Hargreaves is then quickly related to an economic rationale. We believe that this reveals a bias that has entered the scholarly debates, originating or at least gaining a foothold in the popular debates. That bias is an idea, that the 'core purpose' of copyright is to protect the property rights of owners, with a possible side effect being the stimulation of innovation, and hence, a benefit in the 'public interest'. As Hargreaves tells us:

> "Copyright exceptions are designed to allow uses of content that offer benefits deemed either more important than those delivered by the core aims of copyright and/or benefits that do not significantly detract from those aims." [125]

Our PM has asked for a review that considers reforms to Fair Dealing among other IP issues AND 'Growth' – i.e., 'economic growth', and has thereby instructed Dnes and Hargreaves to produce an economic rather than a legal or philosophical rationale for the reforms, with attached costs/risks benefits reports, etc. But we take issue with this approach and see a gap in the otherwise exhaustive investigation of Hargreaves. That gap is more a gaping hole, which asks, where in the analysis of 'transaction costs' and 'economic justification' which might 'justify' any modification of limited monopolies on property, does the core purpose of "To promote the Progress of Science and useful Arts"

[124] *Hilty, R. & Nérisson, S., Balancing Copyright - A Survey of National Approaches, p. 1-78, Springer, 2012; Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-05*

[125] The *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity - A review of Intellectual Property and Growth*. Section 5.2; http://www.ipo.gov.uk/ipreview-finalreport.pdf

fit in? This line from the US Constitution clearly says that the expansion and dissemination of knowledge are not "benefits deemed either more important than those delivered by the core aims of copyright" but rather the core aim and purpose, not a side effect or derivative result. We are not exaggerating this point – the studies by Dnes and Hargreaves reason primarily from an economic point of origin, and this is clearly stated in both these studies. Hargreaves, for example, states that the 'purpose' of the 'exceptions' "are intended to promote knowledge, skills and innovation in the economy" [126] rather than the purpose of copyright being to "to promote knowledge, skills and innovation in the economy". This is an important distinction, which we believe lies at the heart of a part of the debate that is being overlooked in the U.K. government led investigation. Innovation is always paired rhetorically with the 'economy' rather than a value related to the proverbial 'knowledge for the sake of knowledge':

> "In these circumstances, copyright in its current form represents a barrier to innovation and economic opportunity." [127]

Hargreaves and Dnes start off looking for an economic rationale, rather than a legal rationale based upon a philosophical grounding, and then they project this rationale upon every other country that has considered the same shift to Fair Use Doctrine, i.e., "to embrace new economic opportunities":

> "There are also learning points from elsewhere. Some other countries see a need for similar flexibility to embrace new economic opportunities." [128]

Hargreaves is making his analysis from within the 'Commonwealth' legal tradition, which in the course of the years of judicial decisions and opinions has discovered and held various principles, which make up the overall 'doctrine' within British law. Dnes points to and emphasizes this doctrinal basis to Fair Dealing laws (but always within the context of 'economic function' and to the extent that is foster 'innovation' as always, coupled with 'growth'):

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[126] Ibid, 5.5.
[127] Ibid, 5.10.
[128] Ibid, 5.18.

> "The detailed analysis of the guidelines and sub-factors used in case law is in terms of doctrinal links to the mitigation or amplification of impediments to the efficient use of intellectual property in encouraging growth and innovation. The emphasis is on the economic function of legal doctrine." [129]

Allow us to make a general point here, that we tend to agree on most points with the highly diligent studies and analysis of Professors Hargreaves and Dnes, and we can see how and why they have come to the conclusions they have reached – they both effectively admit the there is no other option than US Fair Use if 'flexibility' to economically beneficial developments are to be responded to with the least legislative expense and the most benefit to the economy. The PM did pay for an investigation about 'IP reforms AND growth' and the scholars have delivered, and not without bringing Cameron's popular rhetorical excess into the sobering context of qualified, scholarly precision and clarity. But again, where does the concept of '"To promote the Progress of Science and useful Arts" fit into these studies, if not merely for how it can be reckoned into economic theory and argument? Perhaps we are being pulled into a tangent here, that some might say does not exist, but we think not. And is it not another point of irony, which is, that the stereotypical (and frequently accurate) criticism of British observers of American rules and culture, is to brand 'the Yanks' as "amoral, capitalism-driven, valueless 'Philistines'"? But this time it seems that the moral and principled rationale is instead at the heart of the US Fair Use debate, while both Dnes and Hargreaves are telling us that the 'heart of the Fair Use debate' is about 'flexibility' to 'economic opportunity'. Dnes and Hargreaves have emphasized economic expediency, as instructed by the government funding their studies. Their stated goals of these studies is to see how UK law might be modified to adopt or adapt to US Fair Use attributes, which seem to have economic benefits. Could it be that they are missing the point? The point being, that merely grafting onto existing British defences 'attributes' of US law, without codifying the principles behind the doctrine, leaves the investigation seeming solely concerned with values that can be measured with a balance sheet, rather

[129] Dnes, Antony. *"A Law and Economics Analysis of Fair Use Differences Comparing the US and UK"* (June 6, 2011). Hargreaves Review of Intellectual Property and Growth, HMSO: Intellectual Property Office, London, 2011. Pg. 3, Available at SSRN: http://ssrn.com/abstract=1858704

than values that establish the philosophical *raisons d'être* for making laws in the first place.

Has the British debate lost its moral 'centre'?: Here we have aggressively asserted a point that asks if the scholarly 'world' debates' association with the popular debates has betrayed the overall thrust of the British scholarly debates. We assert this point as a cadence within our survey, wherein we have also woven our various observations and conclusions from our 'flowing' analysis of the debates. We attempted to be responsible and broadly circumspective in our approaches, both in methods and critical analysis for this Thesis. Here we have provided a point, which recapitulates and builds upon all of the work we have done to point, including our introduction, overviews and surveys. In attaining to circumspection, we noted how we agreed with Dnes, Hargreaves and other that it might not be possible to know the real distinction between Fair Dealing and Fair Use, and that they are likely two paths to the same destination. It is within this attempt to be circumspect that we also noted that the current, British discussion seems lacking when compared to more altruistic tine and content of surrounding the long history of legal evolution leading to current US Fair Use Doctrine. Professor Netanel provides the best, and most up-to-date overview of Fair Use Doctrine, [130] as he incorporates important, prior studies by Burrell, Ballard, Beebe, Samuelson, Zemer, and Nimmer among other we listed in our Bibliography, with notes as needed. [131] [132] [133] [134] [135] What stands out about Netanel's survey and analysis is that his discussion is wrapped up with privileging legal doctrine. He gives us a history of how the prior Supreme Courts elevated the Fourth Factor (i.e., the commercial/non-commercial intent, which is widely reckon by legal commentary as an 'economic' argument for protecting the exceptions).

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[130] Netanel, Neil Weinstock. Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715.
[131] Ballard, Tony. *Fair Use and Fair Dealing*, 17/8 Entertainment Law Review 239 (2006) Ent. L.R. 2006, 17(8), 239-241
[132] Nimmer, David. "*Fairest of them All" and Other Fairy Tales of Fair Use*, 66 Law and Contemporary Problems 263-288 (Winter 2003).
[133] *Burrell*, *R*., '*Reining in Copyright Law*: Is Fair Use the Answer?' [2001] IPQ 361.
[134] Zemer, Lior Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use [article] *DePaul Law Review*, Vol. 60, Issue 4 (Summer 2011), pp. 1051-1114 Zemer, Lior 60 DePaul L. Rev. 1051 (2010-2011)
[135] Samuelson, Pamela. *Mapping the Digital Public Domain*: *Threats and Opportunities*, 66 Law & Contemp. Prob. 147, 147 (2003).

Then Professor Netanel tells us how the most recent court in *Campbell* reverses this elevation of an 'economic' argument over the other four factors:

> "The Court also sharply limited the weaker version of the *Sony* presumption, that commercial uses carry a presumption of market harm under the fourth factor . . . Further, the Court flatly contradicted *Harper & Row*'s elevation of the fourth factor. It underscored that courts must consider all four statutory factors, without any single factor being the most important." [136]

So, to complete our point regarding the underlying rationale driving the British scholarly and /or popular debates, we cannot help but wonder if the debates need to be informed by the reasoned, cumulative sagacity of multiple generations of US Supreme Court and District and Circuit court rulings, which have held that privileging only the Fourth 'economic and commercial expediency' factor is erroneous when deciding how to protect the aims of copyright through lawful exceptions. This is why the distinction we mentioned earlier is important, because it seems that the British approach is to see if a 'Singapore-style' compromise can be effected, [137] [138] since Hargreaves has blamed the European Union and the Berne Convention for preventing the creation of 'new exceptions' (this, notwithstanding the fact that the US also is signatory to the Berne Convention, and notwithstanding the fact that there are highly qualified legal scholars in the EU who are pushing actively for a Fair Use Doctrine in EU Law. To conclude this

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[136] Netanel, Neil Weinstock. Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715. Pg. 722.

[137] In Singapore, deciding whether or not a use is considered fair use is similar to that in U.S. law, with a fifth point added:"(e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price." (Chap. 63, Sec 35(2)(e))

[138] Laws of Singapore, CHAPTER 12 INTELLECTUAL PROPERTY LAW, Section 1 Copyright and Neighbouring Rights: *Permitted Acts* 12.1.12 In addition, there are defences catering to a variety of more esoteric acts, such as

- reproduction for purposes of judicial proceedings, professional advice or simulcast;
- temporary, incidental or transient reproduction of a work as part of the technical process of making or receiving a communication;
- observing, studying or testing the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program;
- making a backup of a non-infringing copy of a computer program if it is made for the sole purpose of being used in lieu of the original in the event that the original is lost, destroyed or rendered unuseable;
- incidental inclusion of a work in a film, television broadcast or cable programme; and
- reading or recitation of an extract of a reasonable length from a published literary or dramatic work in public.

point, we contrast the statements by Hargreaves and Dnes which seem to privilege 'flexibility' for the purpose of economic expediency to the near exclusion of the moral compunction to protect the public from unlawful monopolies, when those monopolies interfere with the core aim of copyright, which according to the US Constitution and EU Directives is to "the general public interest in the greatest possible dissemination of knowledge and culture". On the hand we have Netanel holding up the 'venerable' Beebe as the scholarly hero of US legal commentators for his groundbreaking merger of quantitative data with doctrinal analysis, but Beebe is instead privileging the measurement of 'consistency' in the court as to when they elevate equally the Four Factors, including the 'nature and purpose' of the work (First Factor) which contains an inherent emphasis upon 'transformativeness' (held by Campbell), which in turn privileges human knowledge over commercial gain or ownership:

> "Turning to the heart of his study, Beebe does find some consistency in how courts apply the four factors as well as various sub-factors." [139]

We do not want to imply by our use of the word 'moral' centre that there is any amorality in the economic arguments driving Hargreaves, Dnes and others, nor are we in any way disparaging the scholarship or content of their studies, and furthermore, we will show in the final chapter of this Thesis that we mostly agree with their conclusions. We are just making the point that 'grafting on' parts dissected from a principled US legal doctrine might risk extracting and moving the parts while leaving behind the doctrinal 'soul' of the law. We are also not implying that the US legal system is inherently more moral or in any superior to the British system, except to the extent that scholars, including Hargreaves and Dnes are saying exactly that – that there are superior outcomes in the US system. Hargreaves ponders this and concludes that the superior outcomes, at least in economic and business terms, of the US system, cannot be solely attributed to Fair Use, but from the entire structure of 'business-friendly' laws in the US including 'safe harbour' provisions within the DMCA, [140] etc.:

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[139] Netanel, Neil Weinstock. Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715. Pg. 723, (2011)

[140] The (USA) Digital Millennium Copyright Act (DMCA) 17 U.S.C. §§ 512, 1201–1205, 1301–1332; 28 U.S.C. § 4001.

> "Fair Use is (from the viewpoint of high technology companies and their investors) just one aspect of the distinctiveness of the American legal framework on copyright, albeit in the view of most an important part. In such discussions, the "safe harbour" provisions of the Digital Millennium Copyright Act are usually mentioned as another part of the legal context which encourages risk taking and innovation by protecting platform providers from legal responsibility for content carried on their networks." [141]

And so we will conclude this section by asking whether Hargreaves and Dnes would arrive sooner at the outcomes they hope to transplant form US legal doctrine, by writing into the British constitution the guiding principles which have led the US Courts to arrive sooner at the same conclusions and doctrines the British judges seem destined to find or have already held in their opinions. Of course, we do not mean writing something into the UN-written constitution, but perhaps amending the Digital Economy Act or other such law to reflect this altruistic set of values and principles, which really are at 'heart' of the debates.

[141] The *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity - A review of Intellectual Property and Growth*. Section 5.16;
http://www.ipo.gov.uk/ipreview-finalreport.pdf

Part IV: Conclusion

Beyond Britain: Alternative Debates on Fair Dealing/Fair Use

And debates in Europe and other countries

Conclusion: From both historical and theoretical legal approaches, the general problem considered in this dissertation was outlined in key questions:

1. What are the defenses to alleged copyright infringement available to both practicing lawyers and to interested parties under the British system of 'Fair Dealing'?

2. What are the defenses to alleged copyright infringement available to both practicing lawyers and to interested parties under the United State's system of the 'Fair Use Doctrine?

3. What is the history of this debate between the two systems, and how do these two systems compare and contrast with each other, and what might the specific advantages or disadvantages of each system be?

4. What legal alternatives to the American-style 'Fair Use Doctrine' are being proposed in the U.K. and why?

5. Why did the recent U.K. government-commissioned Hargreaves Review reject a new 'Fair Use Law' for the UK, and what are the implications of this rejection, especially in the context of eventual harmonization or compliance with European Law?

6. What relevant conclusions can be drawn that would be useful to all 'stakeholders' in these debates i.e., producers and consumers of copyrighted products, distributors and broadcasters/service providers distributing these products, and to practicing lawyers as well as legislators, in the context of commercial and non-commercial uses, and under applicable European Intellectual Property and Competition Laws and especially with regard to specific 'Economies of Innovation' within the British 'Cultural & Creative Industries' (including but not limited to academic publishing, music, film, television and 'New Media' products)?

At this point we will examine each these guiding questions to see how we might measure the level of our success in the Thesis, to answer these demands. First of all, we asked:

1) What are the defenses to alleged copyright infringement available to both practicing lawyers and to interested parties under the British system of 'Fair Dealing'?

In answer to this question we sufficiently provided two overviews, which were not exhaustive, but attained to be a point of reference in order to make accessible our study. Consequently, in the overview of Fair Dealing we listed every defense, along with key cases to bear in mind, and while also listing key case law supporting these defenses.

2) What are the defenses to alleged copyright infringement available to both practicing lawyers and to interested parties under the United State's system of the 'Fair Use Doctrine?

In answer to this question we sufficiently outlined the most important points around the defense of 'Fair Use'. We related the Four Factor test and discussed key developments including 'transformativeness' and also gave examples of the interplay of technological development at driving legal expansion of copyright exceptions under this regime.

3) What is the history of this debate between the two systems, and how do these two systems compare and contrast with each other, and what might the specific advantages or disadvantages of each system be?

Our overview and survey together construct a history of these debates, and we prioritized our literature review to select the most recent and up-to-date commentary, prioritizing commentary, which cited prior studies in a cumulative retelling of the debates' histories. In the short term we provided a narrative describing the recent debate in the U.K. and leading up to the Hargreaves review, bridging this British version of the IP going back to Gower (2006) and before.

4) What legal alternatives to the American-style 'Fair Use Doctrine' are being proposed in the U.K. and why?

The fairest summary of the Hargreaves Review would acknowledge that after careful and diligent consideration, Professor Hargreaves laid out clear, unambiguous reasons as to why adoption of the US Fair Use doctrine was not likely to happen in the U.K.:

> "The advice given to the Review by UK Government lawyers is that significant difficulties would arise in any attempt to transpose US style Fair Use into European law. It is against this background that the Review has stuck to its Terms of Reference and sought to isolate the particular benefits for economic growth that Fair Use exceptions provide in the US, with a view to understanding how these benefits can be most expeditiously obtained in the UK." [142]

In layman's terms, one could say the answer was a qualified, "No, but . . ." and it is in the "but . . ." that some fragments of legal alternatives are being studied, to see how and if they can be most quickly implemented. The list of fragmentary enhancements recommended by Hargreaves includes "enabling New Research Tools' including text mining and data analysis, Private copying / format shifting, eliminating added taxes on copying devices, an "extension of the non-commercial research exception to all forms of copyright work extension of archiving, an exception for parody and pastiche." [143]

5) Why did the recent U.K. government-commissioned Hargreaves Review reject a new 'Fair Use Law' for the UK, and what are the implications of this rejection, especially in the context of eventual harmonization or compliance with European Law?

The reasons that Hargreaves has said "No" to adopting a US Fair Use Doctrine is mostly blamed on the EU, and it is probably justified culpability, not merely more British Euro-skeptic reactions. So, the short answer here is that it will likely cost too much to make the changes, and even after the money an time is spent, there is no guarantee what the EU will do, so this is too 'iffy' to pursue at the present time on a domestic basis in Britain:

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[142] The *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity - A review of Intellectual Property and Growth*. Section 5.19;
http://www.ipo.gov.uk/ipreview-finalreport.pdf

[143] Ibid, sections 5.26 through 5.32.

> "Evidence considered by the Review on the legal arguments about the feasibility of introducing Fair Use into the EU legal framework and so into the UK is violently diverse. It ranges from those who argue that it could, in effect, be achieved within the terms of current EU law, to those who see this as definitively impossible." [144]

In our next question we will address the EU and other legal accords and treaties, which bind U.K. law making. But suffice it to say that Hargreaves looked at the situation in relation to present EU Law, as they now stand, and decided it was not worth the effort to force the issue. However, Hargreaves seems to have convinced him and his team that, but for the EU Law impediments, their recommendations for the U.K. would have gone much further. He drops numerous hints that recognize the U.K. is not alone in considering this shift, and by these hints he makes clear that he is not closing the door completely on a future reform to British law toward an American Fair Use model:

> "But even if the UK were to set aside the powerfully stated objections of the UK creative sector and potentially in the future join forces with the Irish Government or others to promote a Fair Use exception in Europe, the result would be a very protracted political negotiation, against a highly uncertain legal background." [145]

Hargreaves does not stop there, and confirms that he and his colleagues intend to instruct the government strongly to pursue a policy of lobbying and voting for change at an EU level, in two specific areas:

> "In order to make progress at the necessary rate, the UK needs to adopt a twin track approach: pursuing urgently specific exceptions where these are feasible within the current EU framework, and, at the same time, exploring with our EU partners a new mechanism in copyright law to create a built-in adaptability to future technologies which, by definition, cannot be foreseen in precise detail by today's policy makers. This latter change will need to be made at EU level, as it does not fall within the current exceptions permitted under EU law. We strongly commend it to the Government: the alternative, a policy process whereby every beneficial new copying application of digital technology waits years for a bespoke exception, will be a poor second best." [146]

And again he suggests:

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[144] Ibid, Section 5.18.
[145] Ibid, section 5.18.
[146] Ibid, section 5.23.

> "We therefore recommend below that the Government should press at EU level for the introduction of an exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work (this has been referred to as "non-consumptive" use5). The idea is to encompass the uses of copyright works where copying is really only carried out as part of the way the technology works. For instance, in data mining or search engine indexing, copies need to be created for the computer to be able to analyse; the technology provides a substitute for someone reading all the documents. This is not about overriding the aim of copyright – these uses do not compete with the normal exploitation of the work itself – indeed, they may facilitate it. Nor is copyright intended to restrict use of facts. That these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect." [147]

The 'evidence' that Hargreaves refers to above as being 'violently diverse' is an accurate of characterization that we also alluding to when we noted the 'heated' nature of commentary in the 'popular' debates, that was in some instances informing the scholarly debates. At a European level the distinction between heated popular debates and polite scholarship is not as neat and tidy. Professor Hargreaves is widely read and in touch with many developing trends, and he is no doubt aware that the U.K. debates has already contributed to a broader acceptance of the debate in Europe, to the point that Hargreaves suggests lobbying to change EU Law, by making alliances with 'likeminded' parties on the continent. Some of the 'Beyond Britain's Shores' scholarship that Hargreaves considered and refers to includes Brenncke, [148] Hilty and Nérisson, [149] Carter, [150] Craig, [151] D'Agostino, [152] Geiger, [153] Ginsburg, [154] Griffiths, [155] Helberger, Natali and

[147] Ibid, section 5.24.

[148] Brenncke, Martin. Is "fair Use" an Option for U.K. Copyright Legislation? Volume 71 of Beiträge zum transnationalen Wirtschaftsrecht, Inst. für Wirtschaftsrecht, 2007, ISBN:3860109634, 9783860109632

[149] *Hilty, R. & Nérisson, S., Balancing Copyright - A Survey of National Approaches, p. 1-78, Springer, 2012; Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-05*

[150] Carter, Edward L., HARMONIZATION OF COPYRIGHT LAW IN RESPONSE TO TECHNOLOGICAL CHANGE: LESSONS FROM EUROPE ABOUT FAIR USE AND FREE EXPRESSION; 30 U. La Verne L. Rev. 312 2008-2009

[151] Craig, Carys J., Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32 (August 6, 2010). FROM RADICAL EXTREMISM TO BALANCED COPYRIGHT: CANADIAN

Hugenholtz, [156] Leistner, [157] Senftleben, [158] Song, [159] Sookman, and Glover, [160] among others. And now we turn to our final question:

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[152] D'Agostino, Giuseppina. *53 McGill L. J. 309 (2008)* Healing Fair Dealing - A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use, [58 pages, 309 to 366]

[153] Geiger, C., Kur, A., & Senftleben, M. (2003). A New Framework for Intellectual Property Rights - Conference of the Max Planck Institute for Intellectual Property at Elmau Castle, 22-23 November, 2002. *IIC - international review of intellectual property and competition law*, *34*(6), 632-646. See also: Geiger, C. (2009). Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions. *IIC - international review of intellectual property and competition law*, *40*(6), 627-642.

[154] Ginsburg, Jane C., European Copyright Code - Back to First Principles (with Some Additional Detail) (January 2011). Auteurs et Medias (Belgium), 2011; Columbia Public Law Research Paper No. 11-261. Available at SSRN: http://ssrn.com/abstract=1747148

[155] Griffiths, Jonathan, Unsticking the Centre-Piece – The Liberation of European Copyright Law? (January 24, 2011). Journal of Intellectual Property Information Technology and e-Commerce Law, Vol. 87, 2010 . Available at SSRN: http://ssrn.com/abstract=1747177 or http://dx.doi.org/10.2139/ssrn.1747177

[156] Helberger, Natali and Hugenholtz, P. B., No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law (February 23, 2012). Berkeley Technology Law Journal, Vol. 22, No. 3, 2007; Amsterdam Law School Research Paper No. 2012-35; Institute for Information Law Research Paper No. 2012-29. Available at SSRN: http://ssrn.com/abstract=2010007 ; See also: Hugenholtz, P. B. and Senftleben, Martin, Fair Use in Europe: In Search of Flexibilities (November 14, 2011). Available at SSRN: http://ssrn.com/abstract=1959554 or http://dx.doi.org/10.2139/ssrn.1959554

[157] Leistner, Matthias. The German Federal Supreme Court's Judgment on Google's Image Search – A. Topical Example of the "Limitations" of the European Approach to Exceptions and Limitations, IIC, 417 (2011); See also: Seville, Catherine. (2004). CURRENT DEVELOPMENTS: III. INTELLECTUAL PROPERTY. International and Comparative Law Quarterly, 53 , pp 487-493

[158] Senftleben, Martin. Fair Use in the Netherlands: A Renaissance? 33 TIJDSCHRIFT VOOR AUTEURS, MEDIA EN INFORMATIERECHT 1 (2009) (Neth.) [VU University Amsterdam]; See also: Senftleben, Martin, Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law (March 1, 2006). International Review of Intellectual Property and Competition Law, Vol. 37, No. 4, pp. 407-438, 2006. Available at SSRN: http://ssrn.com/abstract=1723871

[159] Song, Seagull Haiyan, 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 (2011). IDEA: The IP Law Review, Vol. 51, No. 3, 2011; Loyola-LA Legal Studies Paper No. 2012-23. Available at SSRN: http://ssrn.com/abstract=2118957

[160] Sookman, Barry. Copyright reform for Canada: what should we do? A submission to the copyright consultation, Computer and Telecommunications Law Review 2010; Sweet & Maxwell, 2012 Thomson Reuters (Professional) UK Limited. See also: Barry Sookman & Dan Glover, *More Fickle than Fair: Why Canada Should not Adopt a Fair Use Regime*, BARRY SOOKMAN (Nov. 22, 2009), http://www.barrysookman.com/ 2009/11/22/more-

6) What relevant conclusions can be drawn that would be useful to all 'stakeholders' in these debates i.e., producers and consumers of copyrighted products, distributors and broadcasters/service providers distributing these products, and to practicing lawyers as well as legislators, in the context of commercial and non-commercial uses, and under applicable European Intellectual Property and Competition Laws and especially with regard to specific 'Economies of Innovation' within the British 'Cultural & Creative Industries' (including but not limited to academic publishing, music, film, television and 'New Media' products)?

The 'relevant conclusions' that can be drawn have been mostly answered in the previous five questions. Areas for future study in Technology arguments for Fair Dealing/Fair Use. In our reading we considered these debates, as they are central to many of the popular debates, as well as being the main impetus for legal challenges, and hence are also central to many scholarly debates. To this end, we tried to read and incorporate into our analysis an exemplary sampling of commentary in this area, which simultaneously fulfilled our requirement to consider "'Economies of Innovation' within the British 'Cultural & Creative Industries' (including but not limited to academic publishing, music, film, television and 'New Media' products)" – mostly driven by technological developments, but also driven by a marriage of technology and changes in society, i.e., IP issues within online social media, online shopping, etc. Our reading included BÄSLER, [161] Geist, [162] Cammaerts, Bart and Meng, Bingchun,[163] Smith, [164] Cheng, [165] de Zwart, [166]

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fickle-than-fair-why-canada-should-not-adopt-a-fair-use-regime.

[161] BÄSLER, WENCKE. Technological Protection Measures in the United States, the European Union and Germany: How Much Fair Use Do We Need in the "Digital World"? VIRGINIA JOURNALOFLAW &TECHNOLOGY, FALL 2003, UNIVERSITY OF VIRGINIA, VOL. 8, NO. 13, Pg. 1-29

[162] COPYRIGHT AND THE DIGITAL AGENDA, pp. 177-203, Michael Geist, ed., Irwin Law: Toronto, 2010 . Available at SSRN: http://ssrn.com/abstract=1781001

[163] Cammaerts, Bart and Meng, Bingchun (2011) *Creative destruction and copyright protection: regulatory responses to file-sharing.* Media policy brief, 1. Department of Media and Communications, London School of Economics and Political Science, London, UK.

[164] Smith, Marlin H., The Limits of Copyright: Property, Parody, and the Public Domain, 42 *Duke Law Journal* 1233-1272 (1993). Available at: http://scholarship.law.duke.edu/dlj/vol42/iss6/5

Favale,[167] Klein and Lerner,[168] Kumar,[169] Lerner,[170] Reynolds,[171] Romer,[172] and Samuelson.[173]

Another area that drives more of the popular debates than scholarly debates are the alternative discourses, which Hargreaves barely acknowledges except to the extent that these discourses might discredit property rights laws, and therefore make enforcement nearly impossible, if accepted at a mass level.[174] Dnes notes the importance and influence of these arguments in numerous places throughout his study, citing Boyle and

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[165] Cheng, Tania Su Li --- "A Brave New World for Intellectual Property Rights " [2006] JlLawInfoSci 2; (2006) 17 Journal of Law, Information and Science 10 [footnote number 35].

[166] de Zwart, Melissa --- "Robert Burrell and Allsion Colemen, Copyright Exceptions: The Digital Impact" [2006] MonashULawRw 10; (2006) 32(1) Monash University Law Review 216

[167] Favale, M. (2011), 'Approximation and DRM: can digital locks respect copyright exceptions?', *I. J. Law and Information Technology* 19 (4), 306-323.

[168] Klein, Benjamin; Lerner, Andres V.; Murphy, Kevin M. American Economic Review. May2002, Vol. 92 Issue 2, p205-208. 4p. INTELLECTUAL PROPERTY: DO WE NEED IT? The Economics of Copyright "Fair Use" in a Networked World. Subjects: COPYRIGHT; PIRACY (Copyright); NAPSTER Inc.; Prerecorded Compact disc (except Software), Tape, and Record Reproducing; Sound Recording Studios; SOUND -- Recording & reproducing; COMPUER files Database: Business Source Premier

[169] Kumar, Parul. 'Locating the Boundary between Fair Use and Copyright Infringement: The Viacom – YouTube Dispute.' *Journal of Intellectual Property Law & Practice* 184, no. 1 (October 2008).

[170] Lerner, Josh. American Economic Review. May2002, Vol. 92 Issue 2, p221-225. 5p. 2 Charts. THE ECONOMICS OF TECHNOLOGY AND INNOVATION . 150 Years of Patent Protection. Subjects: PATENTS; COPYRIGHT; PROPERTY rights; BUSINESS law Database: Busines Source Premier

[171] Reynolds, Rowan F., GOOGLE NEWS AND PUBLIC POLICY'S INFLUENCE ON FAIR USE IN ONLINE INFRINGEMENT CONTROVERSIES, Journal of Civil Rights and Economic Develoment, Summer, 2011; 25 J. Civ. Rts. & Econ. Dev. 973

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