
Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use

Lior Zemer

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DePaul L. Rev. 1051 (2011)

Available at: <https://via.library.depaul.edu/law-review/vol60/iss4/5>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

COPYRIGHT DEPARTURES: THE FALL OF THE LAST IMPERIAL COPYRIGHT DOMINION AND THE CASE OF FAIR USE

Lior Zemer*

INTRODUCTION

The contemporary history of copyright tells us many stories. Economic and cultural motivations should, we are often told, direct us to develop these stories by examining basic normative questions that primarily debate the entitlement structure of copyright,¹ revisit its basic ideological framework² and its incentive structure,³ understand the symbiotic relationship between copyright and technology⁴ and be-

* Lecturer in Law, Radzyner School of Law, Interdisciplinary Centre Herzliya, Israel. I would like to thank Leslie Kim Treiger-Bar-Am, Guy Pessach, Tony Greenman, Miriam Bitton, and Irena Zolotova for their comments on earlier drafts. I would also like to thank Ortal Tzarfati-Bela, Aviv Gaon, and Amir Vitale for their excellent research assistance.

1. See, e.g., ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING MORAL RIGHTS LAW FOR THE UNITED STATES* (2010) (arguing that the present entitlement structure in U.S. copyright law should be revised in a way that more seriously includes moral rights as an integral part of this structure); see also Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 *STAN. L. REV.* 455 (2010) (discussing the extent to which a unified set of principles applies to both tangible and intangible property); Jeremy Phillips, *Authorship, Ownership, Wikiship: Copyright in the Twenty-First Century*, 3 *J. INTELL. PROP. L. & PRAC.* 788 (2008) (showing how recent technological developments destabilize basic ideas of ownership and rights).

2. See, e.g., Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 *HARV. L. REV.* 809 (2010) (examining intellectual property law's emerging role as a modern form of sumptuary law); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186 (2008) (challenging the prevailing views on the historical evolution of authorship); Madhavi Sunder, *IP³*, 59 *STAN. L. REV.* 257, 332 (2006) ("A cultural theory of intellectual property . . . views intellectual property . . . within a context of cultural development and social movements . . ."); Rebecca Tushnet, *Economics of Desire: Fair Use and Marketplace Assumptions*, 51 *WM. & MARY L. REV.* 513 (2009) (arguing that the motivation to create is not necessarily due to economic incentives, but also represents social desire to create).

3. See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 *HARV. L. REV.* 1569 (2009) (discussing whether unforeseeable benefits conferred by copyright are unnecessary from an incentive-based theory).

4. See, e.g., Niva Elkin-Koren, *Tailoring Copyright to Social Production*, 12 *THEORETICAL INQUIRIES L.* 309 (2011) (analyzing the social dimension of content production and its consequences for the governance of content in the social web); Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 *U. PA. L. REV.* 1831 (2009) (examining the consequences of uncertainty and legal delay in the intersection between technology and copyright).

tween copyright and free speech,⁵ identify copyright's inherent paradoxes,⁶ urge us to revisit and unbundle its basic principles,⁷ and inquire into the massive efforts to harmonize copyright standards and norms.⁸ We tend to follow this telling, neglecting others and losing sight of the advantages in interpreting modern copyright from other less cultivated argumentative routes. One of these routes is the view of modern copyright as a historical process, examining its transformation into an established area of law.

Inquiries into historical moments in the progressive evolution of copyright can guide our attempts to restructure the entitlement edifice in copyright, especially in light of announcements that "old-fashioned copyright" no longer exists,⁹ that "copyright law is in the midst of a revolutionary change,"¹⁰ that "[c]opyright is dead,"¹¹ or more generally, that the institution of intellectual property is "in intellectual crisis,"¹² that "[i]ntellectual property has come of age,"¹³ and that in recent decades "intellectual property law becomes literally a question of life or death."¹⁴ In *What is History?*, Edward Carr wrote that "man is capable of profiting . . . by the experience of his predecessors, and that progress in history, unlike evolution in nature, rests on the transmission of acquired assets. These assets include both the material pos-

5. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (proposing a First Amendment basis for a user's right of access to the public domain); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 587 (2004) ("Courts should recognize that various kinds of copying . . . promote free speech.").

6. See generally NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* (2008).

7. See, e.g., Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 93 (2010) ("[T]he golden era of fair use—if one ever existed—ended about a decade ago . . ."); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2537 (2009) (claiming that fair use cases tend to fall into "policy-relevant clusters"); Brad Sherman, *What Is a Copyright Work?*, 12 THEORETICAL INQUIRIES L. 99 (2011) (discussing how the work is configured in Anglo-Australian copyright law).

8. This process of harmonization includes efforts by the international community to establish multilateral treaties and conventions. Many have criticized the nature of these efforts due to the many attempts to unilaterally transplant Western standards in less developed legal traditions. See, e.g., Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1.

9. David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1420 (1995).

10. Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 337 (2002).

11. Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 814 (2001); see also Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millennium*, 47 J. COPYRIGHT SOC'Y U.S.A. 193 (2000).

12. David Vaver, *Patently Absurd*, 13 OXFORD TODAY, no.1, 2000, at 21, 21–22.

13. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1075 (2005).

14. Sunder, *supra* note 2, at 261.

sessions and the capacity to master, transform, and utilize one's environment."¹⁵ Understanding progressive historical processes that shaped modern copyright and the ways in which these processes were utilized and mastered imparts invaluable intellectual assets.¹⁶ They have the capacity to make us rethink the wisdom behind the core principles and doctrinal standards that control the allocation of rights and duties in contemporary copyright.¹⁷

One of these historical periods that had a decisive effect on the development of Western conceptions of copyright and their global diffusion is the period between the years 1860 and 1911 in the British Empire and its colonial offshoots. During this period, copyright became a recognized part of the legal tradition; it was consolidated, entrenched, and fossilized.¹⁸ The process of elevating copyright to the status of a recognized legal discipline culminated at a statutory level with the passage of the British Copyright Act of 1911.¹⁹ The latter

15. EDWARD HALLETT CARR, *WHAT IS HISTORY?* 155–56 (1961).

16. On this issue see, for example, Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 *BUFF. INTELL. PROP. L.J.* 3 (2001) (observing that an examination of the idea of progress in copyright explains the way copyright principles operate and captures the regulatory conception of copyright).

17. The historical evolution of copyright has attracted scholars from formidable polish. See, e.g., AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* (1899); RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695–1775)* (2004); BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT 1–25* (1966); JOSEPH LOEWENSTEIN, *THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT* (2002); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); THOMAS EDWARD SCRUTTON, *THE LAW OF COPYRIGHT 73–95* (4th ed. 1903); BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911* (1999); MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* (1994); Bracha, *supra* note 2, at 186; Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 *S. CAL. L. REV.* 993 (2006) (discussing incomplete claims about the historical evolution of key concepts in copyright); Justine Pila, 'Law and the Victorians: Intellectual Property,' *J. LEGAL HIST.* (forthcoming 2011); Catherine Seville, *Copyright*, in 6 *THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN* 214 (David McKitterick ed., 2009).

18. As Sherman and Bently put it, the period between 1860 and 1911 was "a time in which gradually, haphazardly and following no particular logic, the categories of modern intellectual property came to take on an institutional reality." SHERMAN & BENTLY, *supra* note 17, at 129.

19. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46 (Eng.) [hereinafter the 1911 Act]. Until the passage of the 1911 Act, copyright law was incomplete and often obscure and governed by no fewer than twenty-two Acts of Parliament, passed at different times between 1735 and 1906; and to these should be added a mass of Colonial legislation, frequently following blindly the worst precedents of English law The new Copyright Bill [eventually becoming the 1911 Act] makes a clean sweep of all these enactments and proposes to set up in their place a homogenous code of Copyright Law, drafted on the whole on sound and generous lines.

Copyright Law Reform, 216 *Q. REV.* 483, 489 (1910); see also SHERMAN & BENTLY, *supra* note 17, at 95–193. It should be noted that each of the twenty-two Acts contributed something to the

had become an expression of modern copyright law throughout the former British Empire.

Although most former colonies and other governed parts of the British Empire subsequently enacted their own copyright laws, for the most part, new copyright laws were designed with the imperial model of 1911 as the foundational source.²⁰ The legal transplantation of imperial laws onto the colonies' legal system was a common practice. Even after the colonies earned their independence, many of the intellectual property laws of former controlling powers survived state succession and remained valid for decades.²¹ The state of copyright law in Israel is a prime example of this post-independence practice. It took almost a full century until the State of Israel formally repealed the imperial model.²² Until 2007, Israel had remained the last jurisdiction of the former dominions of the British Empire to operate under

enactment of the 1911 Act. For example, the 1862 Fine Art Copyright Act—an Act that was designed to afford protection to painters and photographers—was “another and most important step towards the completion and perfection of the series of parliamentary enactments . . . of Art Copyright.” EMANUEL M. UNDERDOWN, *THE LAW OF ART COPYRIGHT: THE ENGRAVING, SCULPTURE AND DESIGNS ACTS, THE INTERNATIONAL COPYRIGHT ACT, AND THE ART COPYRIGHT ACT*, 1862, at 5 (1863).

20. The 1911 imperial model had great influence on the development of modern copyright laws in the former British colonies, such as Australia, Canada, India, Ireland, New Zealand, and South Africa. This influence, however, was not passively received. A recent inquiry into the legislative reforms in these ex-colonies shows that they actively challenged the imperial copyright model of 1911. See Robert Burrell, *Copyright Reform in the Early Twentieth Century: The View from Australia*, 27 *J. LEGAL HIST.* 239 (2006).

21. For example,

Until 1989, Lesotho operated under the Patents, Trade Marks and Designs Protection Proclamation of 1919, a United Kingdom instrument. Mauritius, a former French colony, continued to operate under its Trade Marks Act (1868) and Patents Act (1975) for over twenty years after obtaining independence in 1968. Swaziland also inherited its IP regime “as a colonial legacy.” The same is true with respect to other laws and institutions.

Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 *SING. J. INT'L & COMP. L.* 315, 335 n.73 (2003) (citations omitted).

22. The fact that Palestine was a mandate within the British Empire, not a colony, influenced the development of its legal system. Imperialism, Osterhammel writes, is more comprehensive than colonialism. JÜRGEN OSTERHAMMEL, *COLONIALISM: A THEORETICAL OVERVIEW* 16–21 (Shelly L. Frisch trans., 1997). While the latter refers to the domination of an indigenous majority by a minority of foreign invaders, the former encompasses all aspects that relate to the establishment of transcolonial empires and their enforcement of their laws and political interests. *Id.*; see also Lionel Bently, *The “Extraordinary Multiplicity” of Intellectual Property Laws in the British Colonies in the Nineteenth Century*, 12 *THEORETICAL INQUIRIES L.* 161 (2011) (showing the lack of apparent imperial strategy as to the development of intellectual property laws in Britain and the colonies in the nineteenth century).

the imperial model. The Copyright Act of 2007²³ ended the hegemony of the British Copyright Act of 1911 and the 1924 Copyright Ordinance, which Israel inherited from the British Mandate.²⁴ The many changes introduced by the 1911 Act created a new copyright reality for rightholders, users, the industry, and the public.

This Article is an endeavor in the intellectual history of copyright. No inquiry into the historical development of a legal doctrine can confine itself solely to the enacted laws. Paul Goldstein recently wrote that “[i]ntellectual property law’s divide between private property and the public domain is a legal artifact, not a natural phenomenon. The line shifts not only with the views of particular judges but also with national boundaries and with cultural attitudes.”²⁵ That is, in order to understand the actual politics of copyright change, it will not suffice to know the laws and decisions that guide authors and users in their daily life as either members of the creative community or consumers of the latter’s expressive commodities. Pure law and cultural ideology must be examined together. This Article proceeds accordingly. It examines both the law *and* ideology of copyright change in Israel before it draws doctrinal and other normative payoffs. It approaches this task by addressing the historical evolution of copyright in Israel from before the inception of the state. It takes fair use as a doctrinal exemplar reflecting the system’s ideological spirit.²⁶

This Article has four main objectives. First, it aims to explore key events in the historical process of copyright law reform in Israel. Sec-

23. Copyright Act 2007, 5768–2007, 2007 LSI 34 (Isr.). The 2007 Copyright Act entered into force on May 25, 2008. A translated version can be found at http://www.wipo.int/wipolex/en/text.jsp?file_id=132095.

24. The 1911 Copyright Act was applied to mandatory Palestine via the King’s Order in Council on the Copyright Act, 1911 (Extension to Palestine), 1924 L.P. Vol. C (H) 2661, (E) 2499 (1911) (Eng.). In 1924, the 1911 Act was amended via the Copyright Ordinance, 1924 Official Gazette 623 [1924] (Eng.) [hereinafter the 1924 Ordinance].

25. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 10 (rev. ed. 2003).

26. This Article provides a window into a copyright jurisdiction that has not received much scholarly attention, and although Israel attracts contemporary scholarly debates on various issues, intellectual property is not one of them. Israel’s enactment of the most recent copyright law, which emancipates it from its historical chains to the British Imperial Copyright Act, is a timely occasion for this inquiry. Recent research on Israeli law includes, for example, Daphna Kapeliuk, *The Limits of Judicial Discretion: Emotive Dispositions of Israeli Courts in Implementing the New York Convention*, 24 OHIO ST. J. ON DISP. RESOL. 291 (2009); Pnina Lahav, *American Moment[s]: When, How, and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools?*, 10 THEORETICAL INQUIRIES L. 653 (2009); Revital Sela-Shayovitz, *Social Control in the Face of Security and Minority Threats*, 49 BRIT. J. CRIMINOLOGY 772 (2009); Moshe Zaki, *The Field of Forensic Psychology in Israel—The State of the Discipline*, 28 MED. & L. 689 (2009); Binyamin Blum, Note, *Doctrines Without Borders: The “New” Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 STAN. L. REV. 2131 (2008).

ond, taking fair use as its organizing principle, it strives to show how the reform of this delicate legal doctrine can serve as a defining historical moment in copyright progress. Third, it uses the Israeli experience of fair use transplantation to highlight its general ideological and legal concerns and to argue that fair use systems should become the norm and that the survival of copyright systems is dependent on the ability to keep redefining the boundaries of fair use rather than declaring it obsolete. Fourth, this Article strives to show that comparative inquiries into copyright reforms are of notable value in a global polity where trade and commerce have internationalized.

As a way to access these objectives, this Article proceeds in eleven parts. Following the introductory part, Parts II and III present the foreground and discuss the historical and ideological evolution of copyright law in Israel.²⁷ Part IV shows why fair use reform is at a defining moment in copyright development.²⁸ Parts V and VI examine the old fair dealing and the new fair use as transplanted in Israeli copyright law.²⁹ Core social changes to the perceptions of fair uses are the theme of Parts VII and VIII.³⁰ Prior to the concluding Part, Parts IX and X explore and evaluate the role of courts, domestically and globally, in the design of contemporary models of fair use.³¹ Part XI concludes by highlighting the normative findings emerging from this inquiry.³²

II. HISTORIOGRAPHY

The history of copyright in Israel is an exercise in the study of the dynamics and evolution of imperial legal models and legal transplants in global legal cultures. It is an example of how “[w]orldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life.”³³ Copyright law in Israel had long waited for local action. As a legal field that affects our daily social life, copyright in Israel required rationalization via legal reform, which necessitated departure from obsolete imperial legal conceptions.³⁴ Drawing the timeline in which Israeli copyright law has

27. See *infra* notes 33–94 and accompanying text.

28. See *infra* notes 95–128 and accompanying text.

29. See *infra* notes 129–85 and accompanying text.

30. See *infra* notes 186–244 and accompanying text.

31. See *infra* notes 245–361 and accompanying text.

32. See *infra* notes 362–63 and accompanying text.

33. John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144, 145 (1997).

34. On the history of Israeli law, see generally Assaf Likhovski, Ron Harris & Sandy Kedar, *Between Law and History: On the Historiography of Israeli Law*, 26 TEL AVIV U. L. REV. 351

evolved is a multilayered task. It moves from the Ottoman Empire to the British Civil Administration of 1920, the introduction of the Imperial Copyright Act of 1911 alongside the 1924 Ordinance into the laws of Mandate Palestine, the inception of the State of Israel in 1948, and the changes made by the Knesset culminating with the 2007 Act.³⁵ Once this chain of historical evolution is explained, it will prove a source for comparative copyright inquiries, highlighting the challenges faced by ex-colonies when legal reforms become acute.³⁶

A. *Copyright in Pre-Mandate Palestine*

Prior to the inception of the State of Israel in 1948, intellectual property was not a developed field of law in the region. However, since “[i]ntellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority”³⁷ of imperial powers, it was not totally ignored. The legal life of copyright in pre-mandate Palestine begins with the Author’s Rights Act of 1910 introduced by the Ottoman Empire. Although the *Mejelle*—the Ottoman civil code promulgated in 1869—was silent regarding copyright, the 1910 Act brought to the region a law that encompasses some basic features familiar to contemporary copyright. The Act covered, for example, protected subject matter such as literary, pictorial, and musical works,³⁸ the exclusion of legislation from protection,³⁹ the requirement of formalities, registration, and deposit,⁴⁰ and a thirty-year copyright duration after the death of the au-

(2002) (Heb.) (discussing the many advantages in historical inquiries into the evolution of Israeli law), and *THE HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY: ISRAEL 1917–1967* (Ron Harris et al. eds., 2002); Assaf Likhovski, *Between a “Mandate” and a “Nation”: On the Historical Division of Israeli Law into Historical Periods*, 29 *HEB. U. L. REV.* 689 (1998) (Heb.) (showing that the legal history of Israel is best explained by reference to different periods). See also SUZIE NAVOT, *CONSTITUTIONAL LAW OF ISRAEL* (2007); *PUBLIC LAW IN ISRAEL* (Itzhak Zamir & Allen Zysblat eds., 1996).

Biographies written by prominent legal figures in Mandate Palestine greatly contribute to the understanding of the legal reality during that period. See, e.g., NORMAN BENTWICH & HELEN BENTWICH, *MANDATE MEMORIES: 1918–1948* (1965).

35. The Act contains seventy-eight provisions divided among eleven chapters.

36. I make no claim to present a complete and exhaustive survey of the historical evolution of copyright in pre- and post-Mandate Palestine. For a comprehensive survey, see Michael D. Birnhack, *Hebrew Authors and English Copyright Law in Mandate Palestine*, 12 *THEORETICAL INQUIRIES L.* 201 (2011).

37. Okediji, *supra* note 21, at 324.

38. See Author’s Rights Act of 1910, § 2, cited in Birnhack, *supra* note 36, at 205–06.

39. *Id.* § 8.

40. *Id.* §§ 4, 20–24.

thor.⁴¹ The Ottoman Criminal Act⁴² supplemented the 1910 Act by creating separate criminal offenses in cases of authorial infringement.

The 1910 Act appears to have never been applied.⁴³ It was only in 1930 that a copyright dispute was brought before a British judge, who in turn claimed the case to be the first copyright case in Palestine.⁴⁴ Indeed, the cultural scenery in the *Yishuv*—known as the Jewish Zionist Community—between the years 1910 and 1935 was then making its early steps towards what eventually became a vibrant and influential community.⁴⁵ Zohar Shavit remarks that the British rule was receptive towards the development of a literary and cultural environment and was supportive of the local community's efforts to become an established cultural center "starting with the building process of the new Jewish society and with the moving of literary centers from parts of Europe to Palestine."⁴⁶

B. Copyright in Post-Mandate Palestine

The British arrived in Israel in 1917 and departed thirty-one years later. A military administration was established in the region after it was conquered by the British Army in 1917. It was replaced by the

41. See *id.* § 6. The Act allowed a shorter period of protection of eighteen years to charts, engravings, and maps on the death of the author. *Id.* § 7.

42. See § 241 of the Ottoman Penal Code:

As the person who prints or causes to be printed a book contrary to the privileges of authors or makes or causes to be made a thing the manufacturing or doing of which has been restricted to an individual or a company as a privilege will have committed a sort of forgery . . . and from those who import into the Ottoman Empire such as have been printed or manufactured in this manner abroad . . . and those who knowingly sell such printings or manufactures are punished by the taking of a fine. . . .

43. See Birnhack, *supra* note 36, at 206.

44. CrimC 1844/29 Attorney General v. Guth (Jan. 9, 1930) (English Performing Rights Society Archive), cited in Birnhack, *supra* note 36, at 220.

The first officially published copyright case was CA 66/32 The Palestine Telegraphic Agency v. Adel Jaber [1933] 1 PLR 780 (Isr.). In that case the Supreme Court ruled on a dispute involving publication of news by the Palestine Bulletin. The news was obtained from the Palestine Telegraphic Agency. The editorial staff of the former put the news "into the language and literary style of that newspaper." *Id.* The appeal was dismissed holding that "[t]here is or may be copyright in the particular forms of language or modes of expression by which information is conveyed, and not the less so because the information may be with respect to the current events of the day." *Id.* (quoting Walter v. Steinkopff (1892), 3 Ch. D. 495 (Eng.)). For further discussion and examples of early copyright cases in Mandate Palestine, see Birnhack, *supra* note 36, at 219–23.

45. Birnhack shows that the legal field of copyright in Palestine could not properly address copyright conflicts in the *Yishuv* during the 1920s. These, in many instances, were settled by social norms. Birnhack, *supra* note 36, at 228–40.

46. Zohar Shavit, *The Development of Literary Life in Eretz Israel*, 29 LITERARY 13 (1979) (Heb.) (translation by author). See also Zohar Shavit, *The Crystallization of the Literary Centre in Eretz Israel Alongside the Process of the Establishment of the Local Society*, 16 CATEDRA 207 (1980) (Heb.).

British Civil Administration in 1920.⁴⁷ That copyright was not an alien concept is evident in the High Commissioner's issuance of an ordinance the same year declaring that, subject to certain changes,⁴⁸ the Ottoman Author's Rights Act of 1910 was still a valid law.⁴⁹

The immediate enactment of a copyright law prompted Michael Birnhack to question the reasons behind it: "Why did the British enact copyright law as early as August 1920, just a month after establishing the civil administration, and then reenact it less than four years later? Clearly, copyright was not the most urgent issue on the table of the High Commissioner. Land and immigration were the burning issues of the day."⁵⁰ The reason, he writes, is two-fold:

The introduction of copyright law seems to have been the result of two cumulative British interests. One was a general Imperial interest in copyright law: the nature of copyright combined with the then-emerging international scheme of the Berne Convention and the interests of British authors and publishers. A second British consideration was a specific interest in establishing a legal infrastructure for commercial activities in Palestine.⁵¹

Indeed, the attention given to copyright in Palestine should not be treated as a mere exercise of power for addressing the economic and cultural interests of the local community only. Colonial powers were not indifferent towards intellectual property laws. They were well aware of their economic and political importance. Ruth Okediji put this most eloquently:

The [early period of European trade relations with non-European peoples] was characterized predominantly by the extension of intellectual property laws to the colonies for purposes associated generally with the overarching colonial strategies of assimilation, incorporation and control. It was also characterized by efforts to secure national economic interests against other European countries in colonial territories.⁵²

In 1922, the Civil Administration was replaced by the British Mandate pursuant to Article 22 of the Covenant of the 1919 League of

47. On the status of the law in early Mandate Palestine, see RONEN SHAMIR, *THE COLONIES OF LAW: COLONIALISM, ZIONISM AND LAW IN EARLY MANDATE PALESTINE* (2000); Assaf Likhovski, *In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine*, 29 *ISR. L. REV.* 291 (1995).

48. For example, photographs and records had become a copyrightable subject matter, the duration of copyright was extended to fifty years after the death of the author, and formalities were cancelled. Copyright Ordinance, 1920, 172 *Official Gazette* 3 [1920].

49. *Id.*

50. See Birnhack, *supra* note 36, at 214.

51. *Id.* at 215. Great Britain ratified the Berne Convention on behalf of Palestine on March 21, 1924. Thorvald Solberg, *The International Copyright Union*, 36 *YALE L.J.* 68, 88 (1926).

52. Okediji, *supra* note 21, at 325.

Nations. The King issued the Order-in-Council.⁵³ The 1910 Act and the 1920 Ordinance continued in force until 1924, when the Copyright Act of 1911 (Extension to Palestine) Order was passed.⁵⁴ As the Official Gazette of Palestine provides,

Whereas His Majesty, King George V, has been pleased, by and with the advice of his Privy council, to order by and Order in Council entitled the Copyright Act 1911 (Extension to Palestine) Order, 1924, that the Act of the Imperial Parliament, known as the Copyright Act 1911, shall extend to Palestine, subject to certain modifications in the order contained.⁵⁵

Apart from the 1911 Act, copyright law in Mandate Palestine was governed by the Copyright Ordinance of 1924.⁵⁶ The Ordinance was the engine behind copyright amendments.⁵⁷ The 1911 Act and the 1924 Ordinance governed copyright in Israel until the passage of the new 2007 Copyright Act (the 2007 Act), negotiated over the course of three decades.⁵⁸ Although amendments were made to the earlier texts, they were sporadic at best.

The old law was enacted in an era when the movie industry was making its early steps, the television was not yet invented, and video, multimedia, file sharing, thumbnail photos, and Wikis were not even conceived. Undoubtedly then, the enactment of the 2007 Act in Israel

53. See NORMAN BENTWICH, *ENGLAND IN PALESTINE* (1932); see also Norman Bentwich, *The Legal System of Palestine Under the Mandate*, 2 *MIDDLE EAST J.* 33 (1948); JACOB REUVENI, *THE ADMINISTRATION OF PALESTINE UNDER THE BRITISH MANDATE 1920-1948: AN INSTITUTIONAL ANALYSIS* (1993) (Heb.).

54. Norman Bentwich, *The Legislation of Palestine, 1918-1925*, 8 *J. COMP. LEGIS. & INT'L L.* 9, 12 (1926) ("The Law of Copyright has been more directly brought into conformity with the law of the British Empire, because the Imperial Copyright Act itself has been applied in Palestine by Order in Council.").

55. 1924 Ordinance, 114 Official Gazette 623 [1924] (signed by the High Commissioner Herbert Samuel, April 23, 1924; published May 1, 1924). The Act itself, despite being proclaimed in 1924, was officially published a decade later.

56. *Id.* The Ordinance dealt with importation of copyright works into Palestine (§ 2) and with offenses and penalties in cases of copyright infringement (§ 3). The same official issue of the Gazette also published the Patents and Designs Ordinance 1924, 114 Official Gazette 625-41 [1924].

57. 1924 Ordinance, 114 Official Gazette at 623, § 4 ("The Copyright Act 1911 shall be read as modified or added to by this Ordinance.").

58. For a list of laws that regulate copyright, see Tony Greenman, *Israel, in COPYRIGHT THROUGHOUT THE WORLD* § 20:2 (Silke von Lewinski ed., 2010). See also Joshua Weisman, *Israel, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE* (Paul E. Geller ed., 2005).

Jewish law also serves as a source for interpretation and development of modern copyright principles. In the *Dead Sea Scrolls Case*, Justice Tirkel referred to Jewish law in order to interpret moral rights. CA 2790, 2811/93 Eisenman v. Qimron (*Dead Sea Scrolls Case*) 54(3) *IsrSC* 817 [2000] (Isr.). For a detailed study, see NACHUM RAKOVER, *COPYRIGHT IN JEWISH LITERARY SOURCES* (1991) (Heb.); see also NEIL W. NETANEL & DAVID NIMMER, *FROM MAIMONIDES TO MICROSOFT: THE JEWISH LAW OF COPYRIGHT SINCE THE BIRTH OF PRINT* (forthcoming 2011).

was crucial to meet the needs of the creative, legal, and user communities, to adapt to technological changes,⁵⁹ and to conform to obligations under international copyright laws and other bilateral agreements.⁶⁰

The 1911 Act was ill-defined, unclear, and had been unable to provide coherent legal mechanisms. The original version of the Act was subtle and ambiguous and included references to colonies and the rights of universities and colleges that are mentioned in the British Copyright Act of 1775. In the Hebrew-translated version, there were several omissions that created a legal reality absent core copyright principles. For example, the requirement of originality was omitted from § 1 of the translated version.⁶¹ Since the inception of the State of Israel, several changes were made to the Act. Still, until 2008, one had to resort to the British version in order to understand some of the principles in the translated version.

The 1924 Copyright Ordinance amended the 1911 Act. Until the entry into force of the 2007 Act, changes to Israel's copyright law were made via the 1924 Ordinance. For example, moral rights did not exist under the 1911 Act but were added to the Ordinance,⁶² and, while the duration of copyrighted works in the 1911 Act was life plus fifty years, the Ordinance imposed life plus seventy years, following the European Directive⁶³ and the U.S. Copyright Term Extension Act.⁶⁴ Thus, in order to get a complete vision of the state of copyright law in Israel, the 1911 Act and the 1924 Ordinance had to be read in tandem.⁶⁵ With the enactment of the 2007 Act, copyright law in Israel, as Tony Greenman remarks, "no longer mirrors British copyright law and has

59. On the challenges to copyright exceptions brought along by technological changes, see generally ROBERT BURRELL & ALLISON COLEMAN, *COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT* (2005).

60. Israel is a member of the majority of international treaties and conventions on intellectual property. See *Israel*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/wipolex/en/profile.jsp?code=IL> (last visited Apr. 7, 2011).

61. The Supreme Court did not spare its criticism of the Act. See, e.g., CA 360/83 Strosky Ltd. v. Glidat Vitman Ltd. 40(3) IsrSC 340, 346 [1985] (Isr.).

62. 1924 Ordinance, 114 Official Gazette at 623, § 4(a); Copyright Act 2007, Isr. 2199, §§ 45–46 (Isr.). See also *Dead Sea Scrolls Case* 54(3) IsrSC at 817. On the economic and moral rights of authors in Israel, see Tony Greenman, *supra* note 58, § 20:20, and 1 TONY GREENMAN, *COPYRIGHT*, chs. 5 & 14 (2d ed. 2008) (Heb.). See also Joshua Weisman, *The Personal Right (Droit Moral) in Copyright Law*, 7 BAR ILAN L. STUD. 51 (1989).

63. Council Directive 93/98/EEC, [1993] O.J. (L 290), art. 1(1) (harmonizing the term of protection of copyright and certain related rights).

64. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.). See also *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Cf. 1911 Act, 1 & 2 Geo 5, c. 46, § 3 (Eng.); 1924 Ordinance, 114 Official Gazette at 623, § 5(4); Copyright Act, 2007, LSI 2199 §§ 38–44 (Isr.).

65. See 1924 Ordinance, 114 Official Gazette at 623, § 8.

some distinctively American, Continental European and local flavors.”⁶⁶

III. IDEOLOGY

Legislative departures from imperial and colonial laws cannot alone refine a state’s copyright patterns. Copyright in Israel not only departed from the Imperial Copyright Act but also progressively retreated from certain aspects of copyright ethics that still dominate copyright ideology in other legal traditions. This was made possible by the courts’ willingness to reconsider the philosophical wisdom behind copyright and their frequent examination of a mix of theories in their rulings. Wendy Gordon once wrote, “[D]etermining the relevant calculus to accommodate the various goals is, at this stage of copyright’s development, a difficult matter. This is not a sign of copyright’s immaturity as a discipline; virtually all legal doctrines contain a mix of policies competing for strength.”⁶⁷ As this Part shows, the aspiration of Israeli courts to ethically align the local copyright agenda with pre-

66. Greenman, *supra* note 58, § 20:1. It should be noted, however, that the influence of Continental law on the 2007 Act is limited. The 2007 Act reassures that Israeli copyright law adheres to the Anglo-American version of copyright. This tendency to avoid principles from the Continental approach was criticized by Joshua Weisman for creating an overly strong pro-user reality under the 2007 Act. Joshua Weisman, *Comparative Reading: The Copyright Act 2007, Continental Law and Common Law*, in *AUTHORING RIGHTS: READINGS IN COPYRIGHT LAW* 69, 78 (Michael Birnhack & Guy Pessach eds., 2009) (Heb.). For example, he remarks that it was wrong to follow the Anglo-American approach to moral rights. *Id.* Weisman argues that these rights should last in perpetuity, as in France, Italy, Spain, Portugal, and Greece. *Id.* He writes,

[With regard to moral rights,] the Israeli legislature chose to follow the legal systems that limit the duration of these rights. This is another unfortunate example of the way the Israeli Act followed the Anglo-Saxon approach and another example of the new Act’s tendency to limit the rights of authors as opposed to the situation in many other countries.

Id. (translation by author).

It is not only the Israeli Act that is an example of a legislative mosaic. The originator of Israeli copyright law provides another example of the special affection for borrowing from other jurisdictions. Sherman and Bently explain,

Translations of non-English materials and regular reports from foreign envoys meant that Board of Trade and Parliament as well as commentators and critics more generally had access to a wide variety of materials ranging from updates on Saxon copyright law, Prussian patent applications and the nature of the Belgian textile industry through to information on the book-buying habits of the residents of St Petersburg and a translation of Kant’s *Was ist ein Buch?* The cross-fertilisation was reinforced by the fact that foreign parties were often involved in petitioning the UK parliament for changes in British Law.

SHERMAN & BENTLY, *supra* note 17, at 212–13 (footnotes omitted).

67. Wendy J. Gordon, *Copyright Norms and the Problem of Private Censorship*, in *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES* 67, 85 (Jonathan Griffiths & Uma Suthersanen eds., 2005).

vailing contemporary visions of copyright comes in the guise of such competing policies.

The natural property right argument, associated with John Locke's philosophy of property,⁶⁸ holds that an author enjoys an exclusive natural property right in the labor of his hands and expression of his talent until the right begins to injure society or its members.⁶⁹ Landmark U.S. and British cases have applied the Lockean rationale of labor, developing the rule of as you sow, so shall you reap.⁷⁰ Similarly, in *Geva v. Walt Disney Co.*,⁷¹ discussing whether a cartoonist can use Disney's Donald Duck animated figure in a book, the Israeli Supreme Court held that the goal of copyright law is not overtly utilitarian, but rather to reward the author for the laborious efforts he expends and the mental talent he invests in the production of creative works. More recently, two cases from the Supreme Courts of Israel and Canada explicitly referred to Locke's labor theory while discussing the public interest in intellectual property.⁷² Both cases show the relevancy of the Lockean theory in today's copyright jurisprudence.

In recent years, however, the attractiveness and centrality of Lockean justifications to copyright have declined. Courts in several jurisdictions have rejected it as a sufficient justification to copyright and have endorsed the utilitarian approach associated with Jeremy Bentham's philosophy.⁷³ In the landmark U.S. case of *Feist Publications v. Rural Telephone Service Co.*, the Supreme Court held that "[t]he primary objective of copyright is not to reward the labors of authors, but '[t]o promote the Progress of Science and useful Arts.' To this

68. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690); see also PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 41–72 (1996); Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3 (2003); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891 (2006).

69. The Lockean labor theory is a union of two propositions. First, that everyone has a natural property right in his own "person" and in the labor of his body. Second, that property rights are limited *ab initio* by specific social limitations. These limitations are the "no-spoliation" condition and the "sufficiency condition"—known as the Proviso. While the former respects the rule that "[n]othing was made by God for Man to spoil or destroy," the latter stipulates that man has a right to appropriate from the common as long as "enough, and as good [is] left in common for others." LOCKE, *supra* note 68, §§ 27, 31.

70. See, e.g., *Harper & Row v. Nation Enters.*, 471 U.S. 539, 546 (1985); Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918). British cases require sufficient "labour, skill and capital." See *Macmillan v. Cooper* (1923) 93 LJPC 113, 117 (Lord Atkinson) (Eng.).

71. PLA 2687/92 *Geva v. Walt Disney Co.* 48(1) IsrSC 251 [1993] (Isr.).

72. See PLA 8483/02 *Aloni Ltd. v. Ariel McDonald* IsrSC 314 [2004] (Isr.); *CCH Canadian Ltd. v. Law Soc'y of Upper Can.* [2004] S.C.R. 339 (Can.).

73. See generally JEREMY BENTHAM, A MANUAL OF POLITICAL ECONOMY (1843).

end, copyright assures authors the right to their original expression"⁷⁴ Also, in the recent Canadian case of *CCH Canadian v. Law Society of Upper Canada*, the Supreme Court of Canada held that labor cannot alone merit property protection in authorial works.⁷⁵

Similarly, the Israeli Supreme Court, in *Interlego A/S v. Exin-Line Bros. SA*,⁷⁶ departed from the British-style labor justification. Rejecting its own earlier argument developed in *Geva*,⁷⁷ the court subscribed to the view that the labor approach inappropriately places the author, instead of the public, at the center of the copyright ownership dilemma. In this landmark copyright case, the court was asked to review copyright protection for functional items (Lego parts). Focusing on the goal of copyright in Israel, former President Meir Shamgar rejected the natural property right justification and the "sweat of the brow" argument and emphasized the utilitarian nature of Israeli copyright: "A copyright holder enriches society's creative realm. The goal of copyright is to provide incentives for creative activities. [Copyright] laws are tools that provide private protection for public goods" ⁷⁸ Therefore, the goal of these laws is "to encourage the diversity of expressions and knowledge and to enrich the pool of expressions."⁷⁹ Subsequent cases followed suit. For example, in the *City of Holon v. NMC Music*,⁸⁰ the Israeli Supreme Court examined whether the lending of CDs in public libraries constitutes fair dealing. Finding that a public library does not infringe copyright when lending CDs for non-commercial use, Justice Levin reiterated that the justificatory basis for copyright is utilitarian: "In Anglo-American law the basic justification for copyright is the need to provide an incentive for authors in order to maximise public access to the works created. The ideology of copyright law in Israel is this ideology."⁸¹ Following these rulings, courts in Israel remain, in most cases, steadfast to utilitarian justifications to copyright. They adopted the Benthamite utilitarian rationale

74. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (quoting U.S. CONST. art. 1, § 8, cl. 8).

75. See *CCH Canadian S.C.R.* at 339.

76. CA 513/89 *Interlego A/S v. Exin-Line Bros. SA* 48(4) IsrSC 133, 161 [1994] (Isr.).

77. PLA 2687/92 *Geva v. Walt Disney Co.* 48(1) IsrSC 251 [1993] (Isr.).

78. *Interlego* 48(4) IsrSC at 161.

79. *Id.*; see also Guy Pessach, *Copyright in the Supreme Court: Trends, Considerations and a Look Towards the "Information Age,"* 2002 ALEY MISHPAT 347 (Heb.).

80. CA 326/00 *City of Holon v. NMC Music* 57(3) IsrSC 658 [2003] (Isr.).

81. *Id.*; see also CA Football Ass'n Premier League Ltd. v. Amoa't'za Lehesder Ha'himurim Basport 08(3) IsrSC 938 [2008] (Isr.).

It should be noted, however, that natural right justifications did not completely disappear after *Interlego*. See, for example, Justice Dorner's remarks in *ACUM Ltd. v. Galey Zahal Radio Station*. PLA 6141/02 *ACUM Ltd. v. Galey Zahal Radio Station* 57(2) IsrSC 625 [2003] (Isr.).

that limited monopolies and economic incentives in the guise of copyrights are necessary for authors and other creative minds to foster the continuous enrichment of the public domain.⁸²

The question remains, however, of whether the economic incentive-based approach to copyright can cure the shortcoming of the doctrine. I agree that, as Cass Sunstein writes, without economic incentives, “many people will not produce desirable products, and society will be much poorer and more ignorant as a result.”⁸³ But as much as the utilitarian approach seems attractive, it has its flaws: too many incentives have a chilling effect on the social and cultural development of society. In order to arrive at a proper formula for ethical copyright, recourse to other approaches is required. Madhavi Sunder recently argued that “[d]espite . . . real world changes, intellectual property scholars increasingly explain their field through the lens of economics.”⁸⁴ And Rebecca Tushnet asserted that “[p]sychological and sociological concepts can do more to explain creative impulses than classical economics.”⁸⁵ Indeed, scholars, in their attempt to construct their vision of copyright, have developed new approaches to copyright outside the realm of economics and invited considerations from the parlance familiar in other disciplines.

One of these approaches is social-institutional planning. This methodology is based on William Fisher’s social planning approach to cop-

82. Legislative instruments adopting a utilitarian vision can be traced back to the first modern copyright law, the Statute of Anne, 1709, and its influences on the evolution of Anglo-American copyright laws. The title of that legislation reads, “An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors, or Purchasers, of such Copies, during the Times therein mentioned,” further holding the law to be “For the Encouragement of Learning Men to Compose and Write Useful Books.” Also, the utilitarian justification for the logic of copyright and patent regimes is best captured by the wording of the U.S. Constitution: Congress is empowered “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST., art. 1, § 8, cl. 8.

The proposal for the new Israeli Copyright Act of 2007 also provides, in its explanatory memorandum, that the role and ideology of copyright is to balance between the different interests within the copyright system: “between the need to provide adequate incentives to creative endeavours, in the guise of economic rights, and between the need to allow the public access and use of copyrighted works in order to develop science and culture . . .” 196 Official Journal 1161 (July 20, 2005).

83. CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 165 (2006).

84. Sunder, *supra* note 2, at 261. She continues and remarks that current social developments make us aware of the fact “that traditional law and economics analysis fails to capture fully the struggles at the heart of local and global intellectual property law conflicts.” *Id.* at 263.

85. Tushnet, *supra* note 2, at 515; see also Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (arguing against the view of reducing creativity to either economics-based or rights-based theories).

wright⁸⁶ and is similar to utilitarianism in its teleological orientation, but dissimilar in its willingness to deploy visions of a desirable society richer than the conceptions of "social welfare" deployed by utilitarians.⁸⁷ Fairness from socio-institutional planning advocates a less rigid set of intellectual property laws and cultural hierarchy in order to facilitate a freer communicative sphere.⁸⁸ Copyright, Netanel argues, must leave ample space for expression "from a multiplicity of sources."⁸⁹ This vision of copyright did not find support in the *Geva* decision. In that case, the Israeli Supreme Court rejected an invitation by the caricaturist Geva to treat Donald Duck's figure in the following way:

Donald Duck's figure has become a widely known cultural symbol and part of the reality surrounding us. As such, it has become part of the public domain . . . a sign that has acquired a precise meaning in the collective cultural language of educated people, living in Western cultures. It is therefore part of the cultural language that people use in the course of communication. . .⁹⁰

An additional theory justifying copyright and the imposition of limits on rightholders that attracted scholars' attention is the social construction theory. According to this approach, which firmly rejects notions of the romantic author, the creative process is a collective social process. Viewing copyright from the perspective of social construction is premised on the general social construction theory that is defined by Ian Hacking as "various sociological, historical, and philosophical projects that aim at displaying or analyzing actual, historically situated, social interactions or causal routes that led to, or were involved in, the coming into being or establishing of some present entity or fact."⁹¹ It is not too remote to expect courts to be attentive to the

86. See William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203 (1998).

87. See *id.* at 1215.

88. See, e.g., ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1926 (2000).

89. Netanel, *supra* note 88, at 1926; see generally NETANEL, *supra* note 6; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

90. PLA 2687/92 *Geva v. Walt Disney Co.* 48(1) IsrSC 251, 260 [1993] (Isr.). Similarly, taking the Mickey Mouse image as an example, Jeremy Waldron argues that once a cultural object is "thrust out into the cultural world to impinge on the consciousness of all of us," we cannot ignore it, "it has become . . . part of our lives." Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 883 (1993). Hence, it should now be treated as part of the public domain.

91. IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* 48 (1999). On copyright and social constructionism, see Peter Jaszi & Martha Woodmansee, *Introduction*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 1* (Martha Woodmansee & Peter Jaszi eds., 1994) (positing the singular author within a social context and showing his

rationale of this theory. The Israeli Supreme Court implicitly referred to the social construction theory in *Aloni Ltd. v. Ariel McDonald*, a case dealing with an infringement of the McDonald's trademark. The court remarked that

[t]he success of a work protected under copyright laws is a direct result of social reality. . . . Despite the fundamental contribution of the public to the value of a copyrighted commodity, the law provides a private property right in these commodities. At the same time, it subjects the right to fair dealing exceptions and limitations. . . .⁹²

And, in the recent *Shoham v. Shmuel Harrar* case, dealing with infringement of a design right, the court went further and explicitly referred to the social construction theory reminding us that "property rights are all fruits of social construction."⁹³

To sum up, Israeli copyright law considers Benthamite-style utilitarianism the best option for the system's ideological basis, having rejected the natural right approach. At the same time, it draws benefits from other theoretical methodologies. Approaching copyright from a multiplicity of ideologies should become the norm, not the exception. It would enable courts to recognize that "the interrelationship between culture and economics goes well beyond incentives."⁹⁴ Only a pluralistic ideological agenda will allow courts a wider interpretive soil on which to develop norms of fairness within copyright law commensurate with the needs of both authors and the public.

IV. FAIRNESS AND FAIR USE

A. Fair Use Reform as a Defining Historical Moment

There are ample ways to approach comparative assessments of historical change and legal reform. Finding a common ground between the system under scrutiny and other systems is perhaps the best first step. Western democracies ensure that their copyright laws adequately balance between various competing interests via the recogni-

dependency on collaboration in the creative process). I further explore this argument in LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT (2007) and in Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247 (2006).

92. PLA 8483/02 *Aloni Ltd. v. Ariel McDonald* IsrSC 314, 353–54 [2004] (Isr.) (Heb.) (translation by author).

93. PLA 2287/00 *Shoham v. Shmuel Harrar* ¶ 18 [2005] (Isr.) (unpublished) (Heb.) (translation by author).

94. Sunder, *supra* note 2, at 264. On the role of integrating various economic and social justifications and values in property, see Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 1999 (2008) ("[P]roperty should reflect various goals and values, which at times cohabit comfortably and in other instances make necessary a conscious compromise in the construction of specific property rules . . .").

tion of certain standards. Together, these standards define the ownership spectrum and the strength of trespassory rules that authors and other creative beneficiaries enjoy.⁹⁵ One of the defining methods for these standards is found in the fair use doctrine. The 2007 Act replaced the dogmatic British fair dealing doctrine with the U.S. fair use model. This change is the most fundamental change in the 2007 Act. It does not merely indicate legal departure but instead marks a substantive ideological change.

Fair use systems disclose how the given copyright system treats the concept of fairness in the design of regulations and norms. Their substantive terms also tell us how any given system applies these norms to a sensitive field of law that regulates the dissemination of knowledge and the acquisition of property over cultural commodities and other collective enterprises. The way by which the Israeli legislature grounded fairness in the 2007 Act tells us three main things. First, it informs us of the system's wider ethical vision of copyright in its dealing with the "multitude of dangers" that intellectual property systems create.⁹⁶ Second, it explains the system's openness to rethink the entitlement structure inherent in its copyright regime and its willingness to accommodate unforeseen social needs and cultural changes. Third, it reveals the system's commitment to ensuring that fair use and other lists of exceptions and limitations to authorial and artistic rights are not "incredibly shrinking."⁹⁷

B. *Fairness and Copyright Stability*

Fairness, in every legislative arrangement, is a core factor in the law's ability to achieve and maintain social acceptance and practical stability. Although fairness is a principle that does not explicitly direct us to a particular meaning,⁹⁸ it sits at the heart of what defines the legitimate boundaries of every legal doctrine.⁹⁹ Courts find it difficult

95. As James Harris put it, "By instituting trespassory rules whose content restricts uses of the ideational entity, intellectual property law preserves to an individual or group of individuals an open-ended set of use-privileges and powers of control and transmission characteristic of ownership interests over tangible items." J.W. HARRIS, *PROPERTY AND JUSTICE* 44 (1996).

96. JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 68 (2008).

97. See Symposium, *Fair Use: Incredibly Shrinking or Extraordinarily Expanding*, 31 *COLUM. J. L. & ARTS* (2008).

98. As Easterbrook and Fischel once remarked, "Fairness is an invulnerable position; who is for unfairness? But for lawyers fairness is 'a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice.'" Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 *YALE L.J.* 698, 703 n.17 (1982) (quoting George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 *J. LEGAL STUD.* 1, 4 (1972)).

99. See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES* 161 (2006) ("[F]airness is a key factor in the long-term success of

to define fairness. The U.S. Supreme Court once remarked that fundamental fairness is “a requirement whose meaning can be as opaque as its importance is lofty.”¹⁰⁰ Despite the difficulty to define its proper scope and definitional boundaries, it is a fundamental principle of every legal culture. It is a social concern, which means that errors in the adequate elaborations on the applicability of the principle involve social and other costs.¹⁰¹ “‘Fairness’ is a nebulous value susceptible to many different interpretations and applicable across a wide range of legislation.”¹⁰² In other words, fairness is a concept that refers to an arsenal of competing interpretations, conceptions, and permutations, rendering its meaning “essentially contested.”¹⁰³

Fairness in copyright has a special and important meaning to both rightholders and the public. In the words of Wendy Gordon, fair use “seeks to accommodate the author’s need to remuneration and control while recognizing that in specific instances that author’s rights must give way before a social need for access and use.”¹⁰⁴ As the law that regulates the allocation of property rights in authorial and artistic commodities, copyright is responsible for taking into account the interests of two prominent and competing camps. Paul Goldstein calls these two camps optimists and pessimists:

On one side are lawyers who assert that copyright is rooted in natural justice, entitling authors to every last penny that other people will pay to obtain copies of their works. These are the copyright optimists: they view copyright’s cup of entitlement as always half full, only waiting to be filled still further. On the other side of the debate are copyright pessimists, who see copyright’s cup as half empty: they accept that copyright owners should get some measure of control over copies as an incentive to produce creative works, but they would like copyright to extend only so far as is necessary to give this incentive, and treat anything more as an encroachment on the general freedom of everyone to write and say what they please.¹⁰⁵

the firm.”); HARISH C. JAIN ET AL., *EMPLOYMENT EQUITY AND AFFIRMATIVE ACTION: AN INTERNATIONAL COMPARISON*, at ix (2003) (“[F]airness is a crucial element in any social compact.”); Ian B. Lee, *Fairness and Insider Trading*, 1 COLUM. BUS. L. REV. 119, 121 (2002) (arguing that market fairness rationale “is devoid of principled content”).

100. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24 (1981).

101. See, e.g., Sandra Rousseau, *The Use of Warnings in the Presence of Errors*, 29 INT’L REV. L. & ECON. 191 (2009).

102. Amy Coney Barrett, *Substantive Cannons and Faithful Agency*, 90 B.U. L. REV. 109, 179 (2010).

103. I elaborate on this argument below. See *infra* Part IX.A.2.

104. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602 (1982).

105. GOLDSTEIN, *supra* note 25, at 10–11.

Striking this balance between the camps is not an easy task. Copyright laws make available a bundle of exclusive rights to creators and owners of copyrighted works,¹⁰⁶ but declare that this bundle is not unlimited. Copyright laws design a set of principles and norms in order to accommodate the consequences of the monopolization of authorial endeavors.¹⁰⁷ This set attests to the law's commitment to maintaining fairness. It is "neither unfair nor unfortunate."¹⁰⁸ It is the means by which copyright promotes the "Progress of Science and . . . Arts."¹⁰⁹ For example, copyright laws limit the length of the right and its scope. The former refers to the acceptable standards of the limited duration of the right,¹¹⁰ and the latter to the idea/expression dichotomy, which ensures that ideas remain free and reside within the public domain.¹¹¹

Fair use, a copyright doctrine that "endlessly fascinates us,"¹¹² is perhaps the most important one in this set of principles. Ideologically speaking, the doctrine serves to rectify two different inherent problems within copyright. The first, as the *Gowers Review of Intellectual Property* provides, is transaction costs: "There are uses of copyright protected material for which it would be too costly and too time consuming to clear the rights"¹¹³ The second concerns issues of equity. Whereas the former refers to the economics of allocating rights in the marketplace of ideas, the latter refers to the general public interest. The economic argument is a response to market conditions that bar users from access to copyrighted materials.¹¹⁴ The

106. Similar to tangible property, copyright confers an exclusive title, which gives its owner the right to use, the right to exclude all others both from use and possession, and the right to transmit use and possession to others. See, e.g., Tony Honoré, *Ownership*, in *MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL* 161, 166–79 (1987).

107. On the evils of intellectual monopolies, see MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* 68–96 (2008).

108. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

109. U.S. CONST. art. I, § 8, cl. 8.

110. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

111. Copyright Act of 1976, 17 U.S.C. § 102(b) (2006). If copyright is to achieve its goals, every idea must remain "in the air." As Justice Frankfurter remarked in *Marconi Wireless v. United States*, great inventions and copyrighted works "have always been parts of an evolution, the culmination at a particular moment of an antecedent process . . . the history of thought records striking coincidental discoveries—showing that the new insight first declared to the world by a particular individual was 'in the air.'" 320 U.S. 1, 62 (1943) (Frankfurter, J., dissenting).

112. Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 433 (2008).

113. HM TREASURY, *GOWERS REVIEW OF INTELLECTUAL PROPERTY* 14 (2006).

114. The economic approach to fair use is associated with Wendy Gordon's article on "Fair Use as Market Failure." Gordon, *supra* note 104, at 1600. Reacting to the *Sony* saga, she claims that fair use is a legitimate user's departure from the market. *Id.*; see also *Sony Corp. v. Univer-*

argument from equity is aimed at curing specific situations where the public's access would be prohibited despite the presence of an ethical or social reason that supports their claim. Immediate examples include the enabling of use licenses for educational purposes, by news reporters, by disabled people, or in cases of incidental inclusions. In other words, the fair use doctrine is a zero-price compulsory license on copyrighted works for particular uses identified by the law, ensuring that certain acts do not infringe copyright even in the absence of an author's permission. Given the doctrine's commitment to simultaneously respond to market conditions and social needs, it sits at the heart of contemporary copyright debates discussing the dangers inherent in treating copyright as a "Caesar right."¹¹⁵

Fair use is a contestable concept. This is evident in the ways jurisdictions design their versions of fair use. The U.S. model is claimed to be "broader and less well defined than even facially comparable doctrines in other countries."¹¹⁶ The Philippines,¹¹⁷ Singapore,¹¹⁸ and now Israel have legislated a U.S.-like fair use doctrine composed of an open-ended list of exceptions and limitations to authors' exclusive rights, where these enumerated exceptions are merely illustrative examples of allowable exceptions.¹¹⁹ Other common law jurisdictions,

sal City Studios, Inc., 464 U.S. 417 (1984). Market conditions that merit such departure include, for example, excessive transaction costs. Once a court has concluded that market conditions allow the imposition of a limitation to the right of an author or artist, a fair use argument can be raised. In the words of Gordon,

Fair use is one label courts use when they approve a user's departure from the market.

A useful starting place for analysis of when fair use is appropriate is therefore an identification of when flaws in the market might make reliance on the judiciary's own analysis of social benefit appropriate.

Gordon, *supra* note 104, at 1614. Gordon designs a three-stage test to determine fair use: "(1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner." *Id.* On the economic approach to copyright, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

115. Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 77 (2004).

116. JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 528 (2006).

117. See An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes, Rep. Act No. 8293, § 185 (Phil.).

118. See Singapore Copyright Act 1987, S 107/87 ch. 63, § 35(2) [1988] (Sing.). Although the Act refers to fair dealing, the provision is in fact an adoption of the fair use model. See NG-LOY WEE LOON, *LAW OF INTELLECTUAL PROPERTY IN SINGAPORE* ¶ 11.3.16 (2008).

119. On the difference between exceptions and limitations and the different fair use doctrines, see SAM RICKETSON, *WIPO STUDY ON LIMITATIONS AND EXCEPTIONS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT* (Standing Committee on Copyright & Related Rights, June 23–27, 2003). See also MARTIN SENFTLEBEN, *COPYRIGHT, LIMITATIONS AND THE THREE-STEP-TEST* (2004).

such as the United Kingdom, Canada, Australia, New Zealand, and India, as well as European Union member states, subscribe to a closed list of exceptions and limitations—thereby severely limiting the interpretive spectrum of the doctrine.¹²⁰ As Bently and Sherman put it, under United Kingdom fair dealing doctrine, the dealing must be fair for the purposes enumerated in the closed list, and “it is irrelevant that the use might be fair for a purpose not specified in the Act, or that it is fair in general.”¹²¹ An immediate result of these jurisdictional differences is the difficulty with international harmonization of a workable toolkit for fair use incidents.¹²²

Calls to redesign fair use doctrines are abundant.¹²³ One of the reasons for these calls is the fact that courts tend to embrace classical notions of property when dealing with cultural appropriation. Although “the traditional forms of tangible property can be carried over to intangible property even after the rise of modern technologies,”¹²⁴ this does not necessitate the perpetuation of the perception that “[a]uthors tend to win.”¹²⁵ Certainly, a property right is a legitimate Blackstonian wish of every individual or group of individuals,¹²⁶ which remains relevant in the digital era.¹²⁷ However, given the impact of copyrighted materials on the cultural development and stability of society and its members, systems allocating exclusive rights of use and exploitation in cultural properties must remain attentive to the social consequences of this preference. Treating cultural properties as assets that can be subjected to exclusive ownership essentially means that our culture and social reality can be *owned*, with the prerequisites of buying, selling, destroying, abandoning, transferring, and excluding. The fair use doctrine is an exemplar of a legal mechanism designed to overcome such consequences.

Fair use in Israel, as modified by the legislature and interpreted and shaped by courts, is still in the process of being realized and rationalized. The success of this rationalization process is dependent on the availability of a multiplicity of ideological approaches to copyright to

120. See *infra* notes 252–69 and accompanying text.

121. L. BENTLY & B. SHERMAN, *INTELLECTUAL PROPERTY LAW* 193 (2d ed. 2004).

122. International conflicts concerning the interpretation of fairness in copyright prove that harmonization is a muddy task. See WORLD TRADE ORGANIZATION, *REPORT OF THE PANEL ON UNITED STATES—SECTION 110(5) OF THE U.S. COPYRIGHT ACT* (June 15, 2000).

123. See generally Symposium, *supra* note 97.

124. Epstein, *supra* note 1, at 456.

125. Boyle, *supra* note 96, at 116.

126. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, bk. 2, 1 (Butterworth & Son, 16th ed. 1825).

127. See Robert P. Merges, *The Concept of Property in the Digital Era*, 45 *HOUS. L. REV.* 1239, 1240–41 (2008).

overcome its inherent conflicts. Recourse to these approaches, whether by the courts or in the course of legislative processes, can help to disclose the bare anatomy of copyright and the flawed legal intersections that made fair use “the most troublesome [doctrine] in the whole law of copyright.”¹²⁸

V. THE OLD FAIR DEALING DOCTRINE

A. *Fair Dealing Under the Imperial Model Act*

The British 1911 Copyright Act (the 1911 Act) defined fair dealing by prescribing a closed and exhaustive list of fair dealing incidents, such as making a photograph of a work that is permanently in a public place or publication in a newspaper of a report of a lecture delivered in public.¹²⁹ In these incidents a user would not be liable for infringement or requested to pay any royalties in cases of use of the

128. *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 969 (9th Cir. 1981) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939)).

129. 1911 Act, 1 & 2 Geo. 5, c. 46 (Eng.). Section 2(1) relating to the “Infringement of Copyright” read as follows:

2. — (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright: —

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:

(ii) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of the work:

(iii) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate[d] in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art:

(iv) The publication in a collection, mainly composed of non-copyright matter, *bonâ fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:

(v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries:

(vi) The reading or recitation in public by one person of any reasonable extract from any published work.

Id. § 2(1)(i)–(vi).

rightholder's work without consent. In addition to these exceptions, the legislature enacted a specific provision in 1996 to regulate private and domestic use.¹³⁰ Apart from the prescribed fair dealings, § 2(1)(i) did contain a more general norm: "any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary." This provision was an earlier version of the classic fair dealing doctrine found in other common law countries, such as the United Kingdom,¹³¹ Australia,¹³² Canada,¹³³ India,¹³⁴ New Zealand,¹³⁵ and South Africa.¹³⁶ However, the narrow nature of this provision made it impossible for courts to adequately respond to contemporary copyright challenges.

B. *Fair Use as a Judicial Legal Transplant*

Fair use doctrines have been judicially created and shaped.¹³⁷ The first legislative appearance of any such doctrine in a common law jurisdiction was in the 1911 Copyright Act. Until 1911, the United Kingdom fair dealing standard was closer to a quasi-American fair use one. Courts were expected to determine fairness on grounds not specified in legislation¹³⁸ and permit, for example, fair abridgement in order to not "put manacles upon science."¹³⁹ Just as the 1911 Act codified the British judges' prescriptions for fair dealings, the U.S. Copyright Act of 1976¹⁴⁰ is based on and follows Justice Joseph Story's description in *Folsom v. Marsh*¹⁴¹ of how a court should ex-

130. See 1924 Ordinance, 114 Official Gazette 623, § 3C [1924] (Eng.) ("Recording or copying a work on recordable media for private and domestic, but not commercial, uses shall not be a violation of copyright and performers' rights.").

131. See Copyright, Designs and Patents Act (CDPA), 1988, c. 48, § 29 (Eng.). Section 29 complies with the closed list of exceptions and limitations provided under Article 5 of the Directive of the European Parliament and the Council "on the harmonisation of certain aspects of copyright and related rights in the information society." Directive 2001/29/EC, 2001 O.J. (L 167 10, art. 5) [hereinafter InfoSoc Directive].

132. See Copyright Act 1968, pt. III, div. 3 (cth) (Austl.).

133. See Copyright Act R.S. 1921, § 29 (Can.).

134. See The Copyright Act, No. 49 of 1999, [INDIA CODE] ch. XI (1957), Vol. 14 (Ind.).

135. See Copyright Act 1994, §§ 42-43 (N.Z.).

136. See Copyright Act 98 of 1978, § 12 (S. Afr.).

137. See generally WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995).

138. See, e.g., *Wilkins v. Aikin*, (1810) 17 Vesey 422 (Eng.); *Smith v. Chato*, (1874) 31 L.T. 77 (Eng.).

139. *Cary v. Kearsley*, (1803) 170 Eng. Rep. 679, 680 (K.B.) (Eng.).

140. 17 U.S.C. § 107 (2006).

141. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

amine a claim for fair abridgement.¹⁴² These jurisdictions' statutes notably vary in how they approach fair use today,¹⁴³ but both find their roots in judicial opinions.

To this day, courts continue to play a crucial role in the development of fair use doctrines. Recently, for example, the Canadian Supreme Court had redefined the scope of fair dealing in that country. In *CCH v. Law Society of Upper Canada*, the court unanimously held that the Law Society did not infringe on copyright because its great library reproduction services were permitted under the fair dealing list of exceptions.¹⁴⁴ The court endorsed the following six factors to determine the fairness of the dealing: the purpose (and the commercial nature) of the dealing; the character of the dealing; the amount taken; alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.¹⁴⁵

Similarly, the reality of an outdated copyright law required the courts' guidance. The Israeli Supreme Court responded to this need in *Geva*.¹⁴⁶ This case concerned a dispute between Walt Disney, the owner of the Donald Duck character, and one of the most famous cartoonists in Israel, the late Dudu Geva. The latter used Donald Duck's image in his story "Mobi Duck" published in his book entitled *The Duck's Book*. The court examined whether Geva's use of the character constituted a fair dealing and, for the first time, imported the four-factor fair use test from § 107 of the U.S. Copyright Act of 1976.¹⁴⁷

The *Geva* decision was a signal from the court to the legislature and to the copyright community that it will aggressively react when the legislature is late in its response to market conditions and other social

142. Justice Story never used the words "fair use" in that case. It took twenty-eight years until the first appearance of the term in the case of *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869).

The following explanation of Justice Story has become the most cited passage in the history of fair use: "In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Folsom*, 9 F. Cas. at 348. For an overview of the case, see R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses (Copyright)*, in *INTELLECTUAL PROPERTY STORIES* 259 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

143. See *supra* notes 117–21 and accompanying text.

144. See *CCH Canadian Ltd. v. Law Soc'y of Upper Can.* [2004] S.C.R. 339, 379 (Can.).

145. *Id.* For a comparative analysis of these six factors, see generally Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 *MCGILL L.J.* 309 (2008).

146. PLA 2687/92 *Geva v. Walt Disney Co.* 48(1) *IsrSC* 251 [1993] (Isr.).

147. See *id.*

values that represent the spirit of a democratic copyright agenda. In this case the court applied the method of judicial legal transplantation by inviting a foreign standard into local law. As Assaf Likhovski writes, "Legal norms are sometimes imported and exported not only because of their intrinsic worthiness, but also because the process of transplantation is conducive to sending various types of signals to various types of audiences."¹⁴⁸ The court did not do what American common law courts routinely do—using the parlance of Melvin Eisenberg, the court did not enrich an existing model,¹⁴⁹ or as William Eskridge remarked, it did not engage in the process of "dynamic statutory interpretation."¹⁵⁰ Rather, the court actively imported into the local law a new standard of fairness that had no independent basis in the text of its existing copyright statutes.

The immediate consequence of this court-made rule was the creation of a two-prong cumulative test for fair use in Israel that was based on both the British 1911 Act's fair dealing test and the U.S. fair use test. Indeed, as Justice Maltz remarked in *Geva*, in every case of fair dealing, the court would have to separately examine the purpose of the use and its fairness. This created a more difficult situation for defendants, who now had to show that the use was included in the list of fair dealings and that it was fair on the basis of the four factors. The new test for fairness suffered from two major problems: "the lack of flexibility resulting from the nature of the closed list of exceptions in the fair dealing doctrine and the lack of legal certainty associated with the four conditions."¹⁵¹

Subsequent decisions delivered by the Israeli Supreme Court applied and refined the two-prong test. In *Mifal Hapais v. The Roy Export Establishment Co.*, a case concerning the use of Charlie Chaplin's character in a commercial for the Israeli lottery, the Court rejected the argument that the use was fair because a fictional character does not deserve copyright protection and that the use was for nonprofit purposes and for matters of criticism. Justice Tirkel found that the

148. Assaf Likhovski, *Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling*, 10 THEORETICAL INQUIRIES L. 619, 621 (2009). On legal transplants, see generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993); Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 441 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3 (1994).

149. MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 6–7 (1988).

150. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481 (1987).

151. Niva Elkin-Koren, *Users' Rights Under Copyright*, in *AUTHORING RIGHTS: READINGS IN COPYRIGHT LAW*, *supra* note 66, at 327, 353 (Heb.) (translation by author).

first part of *Geva's* test, the purpose of the use, is less important, while the second part, the fairness of the use, is crucial. Justice Tirkel held that the use of Sir Charles Spencer's character was for commercial purposes and was therefore not fair dealing.¹⁵²

In the later case of *Eisenman v. Qimron* (the *Dead Sea Scrolls Case*),¹⁵³ the court reapplied *Geva's* test and held that the reconstruction and decipherment of the Dead Sea Scrolls entitled its author to copyright. The Scrolls, claimed to be the single most important archaeological find of the twentieth century,¹⁵⁴ provide fresh evidence from the period in which Judaism was consolidated and Christianity was born. Scholars reconstructed the text of the ancient Scrolls and, although they were not the authors of the Scrolls, argued for copyright in their version because of the many educated guesses that the fallible process of reconstruction necessitated. The court supported the scholars' claim for copyright with the following argument:

Deciphering the text dictates, to some extent, the arrangement of the "islands" of fragments; the arrangement influences the possible meaning of the text, its construction and content, and the way of filling the gaps in it. The different phases of the work should not be separated from each other, and should be considered as one work. Examining the work, with its various phases, as one whole work, reveals undoubted originality and creativity.¹⁵⁵

Here again, Justice Tirkel emphasized the role of the two-prong test and, in just couple of paragraphs, dismissed the fair dealing defense because the appellants used the deciphered text in its entirety and without any attribution to Qimron.¹⁵⁶

VI. THE NEW FAIR USE FORMULA

A. Definition

The fair use formula developed in *Geva* is grounded in Chapter D of the 2007 Israeli Copyright Act, under the title of "Permitted

152. CA 8393/96 Mifal Hapais v. The Roy Export Est. Co. 54(1) IsrSC 577, 587 [2000] (Isr.) [hereinafter *Charlie Chaplin Case*].

153. See generally CA 2790, 2811/93 Eisenman v. Qimron (*Dead Sea Scrolls Case*) 54(3) IsrSC 817 [2000] (Isr.).

154. See generally Hector L. MacQueen, *Copyright Law and the Dead Sea Scrolls: A British Perspective*, in ON SCROLLS, ARTEFACTS AND INTELLECTUAL PROPERTY 99 (Timothy H. Lim, Hector L. MacQueen & Calum M. Carmichael eds., 2001); see also David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1 (2001).

155. *Dead Sea Scrolls Case* 54(3) IsrSC at ¶ 14. This is quoted from an unofficial translation available at <http://www.tau.ac.il/law/members/birnhack/DSstransaltion.pdf> (last visited Apr. 8, 2011).

156. See *Dead Sea Scrolls Case* 54(3) IsrSC at ¶¶ 19–20.

Acts.”¹⁵⁷ Chapter D prescribes twelve permitted uses and an open-textured norm directing courts to review fair use according to four factors of fairness. Apart from the U.S. influence, this formula relied on the international standard harmonizing exceptions and limitations,¹⁵⁸ fair dealing systems from other jurisdictions,¹⁵⁹ including the 1968 Australian Copyright Act, the 1988 British CDPA, and European Union legislation.¹⁶⁰

Six core changes were introduced in Chapter D: replacing “fair dealing” with “fair use”; opening the closed list of exceptions and limitations; replacing “newspaper summary” with “journalistic reporting”; adding new uses such as “quotations” and “instruction and examination by an educational institution”; legislating *Geva*’s cumulative test; and providing the Israeli Minister of Justice a role in determining further conditions for fair uses.

B. Open-Textured Norm

A fair use doctrine is expected to create “a checklist of things to be considered rather than a formula for decision.”¹⁶¹ This rationale defines the U.S.-style fair use policy, which was adopted almost verbatim

157. Amira Dotan et al., *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience*, J. COPYRIGHT SOC’Y U.S.A. 447, 511–15 (2010).

158. This standard is known as the “Three Step Test” legitimizing exceptions and limitations in copyright. Article 9(2) of the Berne Convention provides that

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Berne Convention for the Protection of Literary and Artistic Works (1886) (Paris Act, July 24, 1971). See also Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) art. 13.

159. For a general comparative reading of the new Act, see Weisman, *supra* note 66, at 69. On comparative aspects of fair use, see generally PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* § 5.5 (2001). See also 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* 755–878 (2d ed. 2005).

160. For example, the main items in § 24, dealing with exceptions in the field of computer programs, were borrowed from the EC Directive 91/250/EEC, *Legal Protection of Computer Programs*, 1991 O.J. (L122/42); § 24(c)(2) is based on § 47F of the Australian Copyright Act, 1968.

161. *Ty, Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d 512, 522 (7th Cir. 2002).

by the Israeli legislature.¹⁶² Section 19 of the 2007 Act provides the following:

- (a) Fair use of a work is permitted for purposes *such as*: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.
- (b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, *inter alia*, all of the following:
 - (1) The purpose and character of the use;
 - (2) The character of the work used;
 - (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
 - (4) The impact of the use on the value of the work and its potential market.
- (c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.¹⁶³

162. For matters of comparison it is worth quoting § 107 of the U.S. 1976 Copyright Act in full:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.

17 U.S.C. § 107 (2006).

163. Copyright Act 2007, 5768–2007, 2007 LSI 34 (Isr.). Despite the similarities between the U.S. fair use doctrine found in § 107 and chapter D of the new Israeli Act, the doctrines are not fully identical. For example, (1) U.S. courts do not pay much attention to the purpose of the use and emphasize the four factors of fairness, whereas in Israel courts are expected to apply both parts of *Geva's* test; (2) the first factor in § 19(b) refers to “the purpose and character of the use,” whereas § 107 of the U.S. Act mentions “the purpose and character of the use, including whether such is of a commercial nature or is for nonprofit educational purposes”; (3) under § 19(c), “[t]he Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.” This ministerial prerogative does not exist in the U.S. doctrine. I further explore these differences in the analysis below. See also Neil W. Netanel, *Israeli Fair Use from an American Perspective*, in *AUTHORING RIGHTS: READINGS IN COPYRIGHT LAW*, *supra* note 66, at 377, 377 (Heb.). This Part of the present Article expands issues I examined in Lior Zemer, *The Emancipation of Fair Use*, in *THE COMMON LAW OF INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF PROFESSOR DAVID VAVER 281* (Catherine W. Ng et al. eds., 2010). For a brief account on § 19, see Orit Fischman Afori, *An Open Standard “Fair Use” Doctrine: A Welcome Israeli Initiative*, 2008 *EUR. INTELL. PROP. REV.* 85.

Chapter D cured many of the deficiencies in the old law by expanding the scope of fair use, adding new uses, and opening the interpretive boundaries of the doctrine. The addition of the term “such as” in § 19(a) has opened up the list of exceptions, which would allow courts a flexible interpretation of fair use.¹⁶⁴ Before the enactment of Chapter D, courts found it difficult to use previous texts to solve certain problems. In some instances they reached absurd decisions in clear cases of fair dealing. For example, § 2(1) of the 1911 Act does not refer to educational purposes or to instruction and examination. In *Ronen Bergman v. State of Israel*, the court refused to grant the fair dealing defense in a case brought against the Israeli Ministry of Education by an author–journalist. The former used one of the latter’s essays published in a local magazine in a matriculation exam. Although the court found that the use was a legitimate use for an educational cause, and that it did not inflict any harm on the author, it ruled that the conditions for fair dealing were not satisfied because an exam is not covered by § 2(1).¹⁶⁵

Furthermore, the old law did not include criticism, review, and quotation as fair dealings. Courts developed this exception and interpreted “criticism” generously. In the *Geva* saga, parody was recognized as a form of legitimate criticism.¹⁶⁶ In the later *Charlie Chaplin Case*, the court broadened the scope of “criticism” and included satire, contrary to the U.S. approach.¹⁶⁷ This generous interpretation, however, was mainly theoretical since in both cases the court rejected the fair use claim. An Israeli court allowed a fair use claim for parody in only one case. In *Mosinzon v. Haephrati*, Judge Zaft of the Tel Aviv-Yaffo District Court held that a “modern sequel” parodying a famous children’s series of stories fit under the fair dealing exception.¹⁶⁸ Here, the author of the sequel imagined the heroes of the children’s stories at their maturity and ridiculed them as adults. Although criticism and review are now part of § 19(a), the open character of the section will allow courts to further widen the boundaries of the doctrine and invite new uses into its scope.

164. Copyright Act 2007, 2007 LSI 34. The original version of § 19(a) referred to “inter alia” instead of “such as.” The legislature adopted the latter since it considered the former too wide in scope. It is questionable whether “such as” and “inter alia” are distinct to the degree that courts will apply them differently.

165. CC 12595/98 Ronen Bergman v. State of Israel Mag. Haifa (unpublished) (Jan. 2, 2001).

166. See PLA 2687/92 Geva v. Walt Disney Co. 48(1) IsrSC 251 [1993] (Isr.).

167. See generally *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

168. CC (TA) 1437/02 Mosinzon v. Haephrati 03(2) Tak-Dist. 30775 [2003] (Isr.).

C. Individual Exceptions and Limitations

Together, the two parts of the *Geva* formula have widened the normative boundaries of what amounts to a “use” and whether the use is “fair.” Codifying the first part of the *Geva* test, the 2007 Act’s Chapter D provides a list of twelve incidents where users can access copyrighted materials without obtaining the consent of the copyright owner and without paying any royalties for the use.¹⁶⁹ These incidents include the following: the use of works in judicial or administrative procedures;¹⁷⁰ reproduction of a work deposited for public inspections;¹⁷¹ incidental use;¹⁷² broadcasting or copying of a work in a public place;¹⁷³ reproduction or making of a derivative work of a computer program by a possessor of an authorized copy of the program (for instance, backup copies, maintenance and service, and error corrections);¹⁷⁴ ephemeral recordings;¹⁷⁵ temporary copies when the copy “is an integral part of a technological process”;¹⁷⁶ additional artistic works made by an artist;¹⁷⁷ copying for preservation, renovation,

169. Copyright Act 2007, § 18 provides,

Notwithstanding the provisions of section 11 [copyright subject matter and what copyright means], the doing of the actions specified in sections 19 to 30 is permitted subject to the conditions specified respectively in the aforesaid sections and for the purpose of carrying out the objectives specified therein, without the consent of the right holder or payment, however with respect to the activities specified in section 32—upon payment and in accordance with the provisions of that section.

Copyright Act 2007, 5768–2007, 2007 LSI 34, § 18 (Isr.).

Section 32 creates a compulsory license to reproduce musical works in sound recordings against payment of royalties. Copyright Act 2007, 2007 LSI 34, § 32. Cf. Copyright, Designs and Patents Act (CDPA), 1988, c. 48, § 303(2) (Eng.); 17 U.S.C. § 115 (2006).

170. Copyright Act 2007, 2007 LSI 34, § 20. Cf. CDPA 1988, c. 48, § 45; InfoSoc Directive, *supra* note 131, art. 5.3(e).

171. Copyright Act 2007, 2007 LSI 34, § 21. Cf. CDPA 1988, c. 48, §§ 47, 49.

172. Section 22 allows incidental use of a work “by way of including it in a photographic work, in a cinematographic work or in a sound recording, as well as the use of a such work in which the work was thus incidentally contained, is permitted . . .” Copyright Act 2007, 2007 LSI 34, § 22. Cf. CDPA 1988, c. 48, § 31. Section 22 limits the exception for musical works: “[T]he deliberate inclusion of a musical work, including its accompanying lyrics, or of a sound recording embodying such musical work, in another work, shall not be deemed to be an incidental use.” Copyright Act 2007, 2007 LSI 34, § 22; *see also* CDPA 1988, c. 48, § 31(3).

173. Copyright Act 2007, 2007 LSI 34, § 23 (“Broadcasting, or copying by way of photography, drawing, sketch or similar visual description, of an architectural work, a work of sculpture or work of applied art, are permitted where the aforesaid work is permanently situated in a public place.”). Cf. *Leicester v. Warner Bros.*, 232 F.3d 1212 (9th Cir. 2000).

174. Copyright Act 2007, 2007 LSI 34, § 24.

175. *Id.* § 25. *See also* InfoSoc Directive, *supra* note 131, art. 5(2)(d); 17 U.S.C. § 112 (2006).

176. This exception is mainly related to use of works in a computer program and in a communication network. Following Article 5(1) of the InfoSoc Directive, § 26 permits “transient copying, including incidental copying, of a work . . . if such is an integral part of a technological process.” Copyright Act 2007, 2007 LSI 34, § 26; cf. InfoSoc Directive, *supra* note 131, art. 5(1).

177. Copyright Act 2007, 2007 LSI 34, § 27.

and reconstruction of buildings;¹⁷⁸ public performance in educational institutions;¹⁷⁹ and uses by libraries and archives.¹⁸⁰ Chapter D also provides that the minister may designate, by way of regulations confirmed by the Knesset's economic committee, other types of educational institutions, libraries, or archives¹⁸¹ that may preserve copies. In doing so, the minister must take into consideration "the character of their respective activities."¹⁸²

Two additional comments should be made in order to provide a more complete picture of fair use in the 2007 Act. First, private copying is still governed by the 1924 Copyright Ordinance, which provides that the recording and reproduction of a recording of a copyrighted work for noncommercial, private, and domestic use is allowed.¹⁸³ These exceptions refer to recording on a device, such as a tape recorder, on which a visual or audio recording can be made. However, the 1924 provisions do not apply to devices "intended for use in a computer."¹⁸⁴

Second, although the new version of fair use in the 2007 Act seems more receptive to societal needs, it is unfortunate that uses by the disabled were not explicitly included in the Act. Interestingly, in their attempt to design copyright *Eurotopia*,¹⁸⁵ the framers of the proposal

178. *Id.* § 28. See also InfoSoc Directive, *supra* note 131, art. 5(3)(e).

179. Copyright Act 2007, 2007 LSI 34, § 29. See also Copyrights, Designs and Patents Act (CDPA), 1988, c. 48, § 34 (Eng.). See also Copyright Regulations (Public Performance in Educational Institutions), 6867 Official Journal 758 (Feb. 9, 2011).

180. Copyright Act 2007, 2007 LSI 34, § 30. For similar arrangements, see 17 U.S.C. § 108; CDPA 1988, c. 48, §§ 37–42; InfoSoc Directive, *supra* note 131, art. 5(2)(c). See also *CA 326/00 City of Holon v. NMC Music 57(3) IsrSC 658 [2003]* (Isr.).

181. See Copyright Regulations (Libraries and Archives), 6732 Official Journal 229 (Dec. 23, 2008).

182. Copyright Act 2007, 2007 LSI 34, § 31. Other laws complement the exceptions in the 2007 Act. For example, § 6 of the Communications (Telecommunications and Broadcasts) Act of 1982 requires that licensed cable and satellite operators in Israel carry broadcasts confirmed under the Second Television and Radio Authority Act and by the Israel Broadcasting Authority (IBA). Licensees are exempted from paying royalties to the owners of copyright or performers' rights in these broadcasts. The pending Electronic Commerce Bill provides exemption for ISPs from liability for copyright infringement in certain situations. The Tel Aviv-Yafo Magistrate Court has already exempted an ISP from liability for hosting infringing copies of works applying the fair dealing doctrine. See *CC (Mag TA) 64045/04 Al-Hashulchan Gastronomic Centre Ltd. v. Ort Israel 07(14) IsrSC 486 [2007]* (Isr.). And most recently, the Israeli Supreme Court ruled that, due to the lack of legislative regulation, it will not be possible to oblige an Internet service provider to unmask the identity of an anonymous commenter. *RCA 4447/07 Rami Mor v. Barak [2010]* (Isr.).

183. Copyright Ordinance 1924, 114 Official Gazette 623, § 3C [1924] (Eng.).

184. *Id.* § 3B. Also, the Israeli Supreme Court has held that these provisions apply to devices such as CD-R, DVD-R, or other similar devices. See *City of Holon 57(3) IsrSC at 658*.

185. David Vaver, *Copyright in Europe: The Good, the Bad, and the Harmonized*, 10 *AUSTL. INTELL. PROP. J.* 186 (1999).

for the European Union InfoSoc Directive included a special exception for people with disabilities. Although the original exception was limited to only visually-impaired or hearing-impaired persons and excluded all other disabled people, such as those with learning difficulties or mental and physical disabilities, the final version of the Directive's Article 5(3)(b) now covers all persons "with a disability." Still, the updated version contains restrictive language that the exception only applies "directly" to the disability and that the use should be of a "non-commercial nature," raising similar concerns as the original version. It is hoped that application by Israeli courts of fair use exceptions for the disabled will attract the optimal interpretive flexibility.

VII. THE FOUR FACTORS

The second part of the *Geva* two-prong test codified by the 2007 Act consists of the four factors specified in § 19(b).¹⁸⁶ The transformative nature of the use is the most crucial consideration in applying the first factor, as held in a landmark U.S. case *Campbell v. Acuff-Rose Music, Inc.*¹⁸⁷ Transformative use recasts the original work and creates a new work by virtue of the added value created, altering the original source with new expression, meaning, or message. That is, "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."¹⁸⁸ Judge Leval viewed the extent of transformative nature as critical to whether a use "fulfill[ed] the objective of cop-

186. See PLA 2687/92 *Geva v. Walt Disney Co.* 48(1) IsrSC 251 [1993] (Isr.). For a hierarchical organization of the factors, see D'Agostino, *supra* note 145, at 356–58. For a comprehensive analysis of how U.S. judges use the four-factor test to adjudicate the fair use defense, see Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 554 (2008) ("[M]uch of our conventional wisdom about our fair use case law, deducted as it has been from the leading cases, is wrong.").

187. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). In considering whether 2 Live Crew's rap song *Oh Pretty Woman* might qualify as a fair use of Roy Orbison's song *Pretty Woman*, the Court elaborated on the first fair use factor and held,

The central purpose of the investigation is to see . . . whether the new work merely supersede[s] the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright

Id. at 579 (alteration in original) (citations omitted).

188. *Id.*

right law to stimulate creativity.”¹⁸⁹ Proponents of this argument hold that the transformative nature of use supports fair uses without the consent of the rightholder in exchange for introducing some social value.¹⁹⁰

There is a fundamental difference between the stipulation of the first factor in § 107(1) of the U.S. Copyright Act and § 19(b) in Israel’s 2007 Act. While the former follows the rationale that “fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright”¹⁹¹ and provides that the examination of the purpose and character of the use should include “whether such use is of a commercial nature or is for nonprofit educational purposes,” the latter does not refer to the commercial nature of the use and does not make an explicit distinction between commercial uses and nonprofit uses. This omission is a signal from the Israeli legislature to the courts to put less emphasis on the commercial nature of the use.¹⁹² This message to the courts is similar to the interpretation of the first factor in the Canadian *CCH* case, holding that this factor “should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”¹⁹³

Commercially oriented uses should be expected to display other qualities that will justify the use.¹⁹⁴ Courts have already debated these qualities. For example, in *Kelly v. Arriba Soft Corp.*,¹⁹⁵ the U.S. Court of Appeals for the Ninth Circuit held that the defendant’s search engine’s copying of lower resolution thumbnails constituted fair use. The court held that the new version of the images served a function novel from the original images; therefore, they were sufficiently transformative and hence fair. And, in *Perfect 10 v. Amazon.com*, the

189. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990). Judge Leval explains, in weighing “the strength of the secondary user’s justification against factors favoring the copyright owner,” courts have to consider whether “the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.” *Id.*

190. On transformativeness, see Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 457–66 (2008) (showing that although everything is transformative if examined from the perspective of the reader, this argument highlights the limits of transformativeness); Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1103 (2008) (arguing that “[a]uthorship is itself transformative”).

191. *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 61 (2d Cir. 1980).

192. In his comprehensive study, Beebe finds that the commerciality of a use “ha[s] no significant influence on the outcome of [a case].” Beebe, *supra* note 186, at 556.

193. *CCH Canadian Ltd. v. Law Soc’y of Upper Can.* [2004] S.C.R. 339, ¶ 54 (Can.).

194. *See, e.g., Loew’s, Inc. v. Columbia Broad. Sys., Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955).

195. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003).

same court concluded that the transformative nature of Google's use overrides any commercial aspects of Google's search engine and Web site.¹⁹⁶ Prior to the adoption of the four-factor test, first by the court and then by the legislature, courts in Israel could not declare similar uses fair.

Parodies are a good example here. Most parodies are distributed to the public, and the financial gains to the parodists can sometimes be significant. However, if they are sufficiently transformative; if they advance other social values, cultural criticism, and creativity; and if they are not derived solely out of profit-making motivations,¹⁹⁷ they may enjoy exemption under fair use doctrines. Israeli copyright experience prior to the 2007 Act made fair use exemptions unavailable for parodies and satires where the social aspect of the use was secondary to the commercial aspect.¹⁹⁸ In light of the wording of the first factor in § 19(b) that does not require a mandatory examination of the commercial nature of the use, balancing between the commercial nature of a use and its social impact is likely to be less complicated in the future.

While the first factor relates to the later work, the second factor—the character of the work used—relates to the original work. Here a court will have to examine whether the work merits protection—namely, whether it is creative and not a mere idea and whether it is published or unpublished and, hence, “‘closer to the core of intended copyright protection than are more fact-based works.’”¹⁹⁹ For example, some works, such as the photos of the assassination of President Kennedy²⁰⁰ or Prime Minister Rabin, are more fact-based and hold great historical significance. It would be essential to copy them in their entirety. In addition, the *CCH* case held that “for the purpose of

196. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1147 (9th Cir. 2007). Paul Goldstein warns us of the danger in decisions like *Perfect 10*:

[A] slogan or catch phrase will be mistaken for a fair use category. “Transformative use” is a current, notable example. This concept, that the Court employed in *Campbell v. Acuff-Rose* to measure the claims of a particular parody, has become, in cases like . . . *Perfect 10 v. Amazon* . . . , a triumph of mindless sound bite over principled analysis. Parody is a fair use category; the mere transport of a work intact from one medium to another—without abridgment or other modification—is not.

Goldstein, *supra* note 112, at 442.

197. See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); see also *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

198. See PLA 2687/92 *Geva v. Walt Disney Co.* 48(1) IsrSC 251 [1993] (Isr.); CA 8393/96 *Mifal Hapais v. The Roy Export Est. Co.* 54(1) IsrSC 577, 587 [2000] (Isr.). Cf. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

199. *Kelly*, 336 F.3d at 820 (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001)).

200. See *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

research or private study, it may be essential to copy an entire academic article or an entire judicial decision.”²⁰¹

Published works are more likely to qualify as open to fair use. When unpublished works are at stake, a defendant will find it difficult to justify fair use. In *Harper & Row Publishers v. Nation Enterprises*, the U.S. Supreme Court created a presumption against fair use of unpublished works.²⁰² In that case, a magazine, *The Nation*, published a private manuscript used in former President Gerald Ford’s autobiography. Despite the newsworthiness of the subject matter, the court rejected the magazine’s claim for fair use because authors should enjoy the right to control the first publication of their work, which includes the choice of where and how to publish it. In a similar way, the Israeli Supreme Court held in the *Dead Sea Scrolls Case* that the fair use defense was not available because the defendants violated the author’s right of first publication.²⁰³

The third factor—the scope of the work, typically considered the least important—concerns the question of whether the amount and substantiality of the part used in relation to the copyrighted work as a whole is qualitatively and quantitatively reasonable in relation to the purpose of the copying. If a defendant has taken an excessive amount that is not commensurate with the purpose of the use, the use will not be fair. This third factor “operates on a sliding scale: the more a dealing goes beyond *de minimis* use, the more likely it goes against fair use.”²⁰⁴ In most instances, copying the entire work or the verbatim copying of a substantial part is unfair.²⁰⁵ In the *Dead Sea Scrolls Case*, the defendants clearly violated the author’s copyright because the entire work was copied and published. In *Harper & Row*, only 300 words were taken verbatim from a 200,000 word manuscript.²⁰⁶ Nevertheless, this was considered excessive taking because these words

201. *CCH Canadian Ltd. v. Law Soc’y of Upper Can.* [2004] S.C.R. 339, ¶ 56 (Can.).

202. See *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985). In this case Justice O’Connor remarked that “[t]he fact that a work is unpublished is a critical element of its ‘nature.’” *Id.* at 564. Furthermore, “[u]nder ordinary circumstances, the author’s right to control the first public appearance of his undissemated expression will outweigh a claim of fair use.” *Id.* at 555. See also *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991); *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev’d*, 811 F.2d 90 (2d Cir. 1987). For an example from the U.K., see *Hyde Park Residence Ltd. v. Yelland*, [2000] Civ. EWCA 37 (Eng.).

203. See CA 2790, 2811/93 *Eisenman v. Qimron (Dead Sea Scrolls Case)* 54(3) IsrSC 817 [2000] (Isr.). The question remains, what if the unpublished work is of a great public interest? In the *CCH* case, it was held that “if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work.” *CCH Canadian* S.C.R. 339, ¶ 58.

204. D’Agostino, *supra* note 145, at 347.

205. See, e.g., *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998).

206. *Harper & Row*, 471 U.S. at 539.

constituted the heart of the manuscript, concerning President Ford's decision to pardon President Richard Nixon. However, in *Campbell*, 2 Live Crew's use of the line "Pretty woman, walking down the street"—the heart of the work—was fair use because the rest of the lyrics were distinctive enough to make the parody they produced sufficiently transformative.²⁰⁷

In other situations, copying the entire work will be the only possibility and the third factor will not play a decisive role. In *Perfect 10*, the court dealt with Google's search engine that displayed thumbnail versions of Perfect 10 photographs and provided "in-line" links to third party websites containing full-size versions of the photographs.²⁰⁸ The court found that Google's use of the photographs was a highly transformative use, although it merely minimized the original photographs. In such cases, the courts have to rely on the other three factors to distinguish between infringement and fair use.

The fourth factor—the impact of the use on the value of the work and its potential market—requires an evaluation of the actual and potential market harm to the original work caused by the use. The tendency in U.S. courts to treat this factor as the most important one²⁰⁹ was changed in *Campbell*, in which the U.S. Supreme Court held that the importance of each factor should be examined on a case-by-case basis. The Canadian high court likewise reduced the importance of this factor in *CCH*. Israeli courts nevertheless still treat this factor as an important one.²¹⁰ Section 19(b) of the 2007 Act refers to harm to market value and the potential market of the work. Indubitably, disproportionate harm will be caused where a use is directed to a market similar to that of the original work or where the new work acts as a substitute for the original. The art of evaluating potential harm is a difficult task because of the unpredictability of the fair use doctrine.

207. The Court held, "If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588–89 (1994). For similar reasons it was held that Alice Randall's book *The Wind Done Gone* was fair use of *Gone with the Wind*. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

208. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); see also *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Allen v. Toronto Star Newspapers Ltd.* [1995] 26 O.R. 3d 308 (Can.).

209. In *Harper & Row*, the Supreme Court stated that the fourth factor was "undoubtedly the single most important element of fair use." 471 U.S. at 566. Beebe's empirical research shows the strength of the fourth factor: 59% of courts' opinions explicitly cited this factor. Beebe, *supra* note 186, at 617.

210. *CCH Canadian Ltd. v. Law Soc'y of Upper Can.* [2004] S.C.R. 339 (Can.). This factor is in line with the Berne three-step-test requirement that fair uses must not disproportionately prejudice the legitimate interests of rightholders or unreasonably affect the normal exploitation of the work. See Berne Convention, *supra* note 158, art. 9(2).

Furthermore, avoiding disproportionate market harm may severely limit the incentives necessary for creativity. In order to avoid imbalanced interpretations of the fourth factor, courts will have to remain steadfast to the social objectives underlying copyright law.

It is crucial to note that the four factors form a non-exhaustive test. Section 19(b) provides that “[i]n determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, *inter alia*, all of the following.”²¹¹ This grants courts ample space to take into account additional considerations, unspecified in the 2007 Act, before a use is labeled fair or not. Such unspecified factors may include the likelihood of market failure,²¹² the chilling effect on speech,²¹³ whether the defendant’s use was reasonable and necessary in his field of expertise,²¹⁴ the age of the work,²¹⁵ and distributive values.²¹⁶

In practice, Israeli courts involve other principles of justice and equity in the process of defining fairness. For example, a fair use claim will be dismissed if the moral right of the author is infringed. In the *Dead Sea Scrolls Case*, the paternity right was infringed since the defendant did not credit the decipherer of the Scrolls in the publication.²¹⁷ In another case, a court held that the use of a part of a film in a documentary program produced by the Israeli Broadcasting Authority infringed the author’s moral right because the use was made in a context that mutilated the creative idea behind the original film.²¹⁸ The frequency of the use might also affect the legitimacy of the use. That is, newspapers are eligible to use materials as long as the use is informational. However, such use may sometimes exceed the normativity of fair use and will not be permitted. In addition, the Israeli

211. Copyright Act 2007, 5765-2007, 2007 LSI 34 (Isr.).

212. See Wendy J. Gordon & Daniel Bahls, *The Public’s Right to Fair Use: Amending Section 107 to Avoid the “Fared Use” Fallacy*, 2007 UTAH L. REV. 619, 622–23.

213. See, e.g., Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429 (2007).

214. See, e.g., Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 409–10 (2005).

215. See, e.g., Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003).

216. See, e.g., Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

217. See CA 2790, 2811/93 Eisenman v. Qimron (*Dead Sea Scrolls Case*) 54(3) IsrSC 817, 838 [2000] (Isr.). Lastowka suggested adding the provision of credit and attribution as a fifth factor to the fair use test. See Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 85 (2007). The CDPA 1988 recognizes the requirement for “sufficient acknowledgement” for the fair dealing defense to apply in certain circumstances. See Copyright, Designs and Patents Act (CDPA), 1988, c. 48, §§ 29(1)–(1B), 30(1)–(3), 178 (Eng.). See also Pro Sieben Media v. Carlton Television, [1999] FSR 610, 625 (Eng.).

218. CC 2228/95 Peled v. IBA Dinim Shalom, [1999] 15 (Mag TA) 675 (Eng.).

experience shows that courts will also resort to principles such as unjust enrichment²¹⁹ and good faith²²⁰ when necessary to legitimize fair use.

VIII. FROM DEFENSES TO RIGHTS

Chapter D indicates that the Israeli legislature aimed to change existing social tendencies in copyright, to upgrade the general public interest, to secure free speech and democratic dialogue, and to allow better access to knowledge while maintaining free competition in the marketplace of ideas. The open-ended nature of the fair use doctrine along with twelve defined incidents of fair uses for certain purposes²²¹ raises an inevitable question: whether the fair use doctrine is composed of mere privileges of use,²²² a prescription of defenses against infringement,²²³ a list of users' rights in the strict sense of the word, or a combination of all these aspects.²²⁴

Fair use in the 2007 Act is grounded in three different ways: first, in the "old way," that is, defining permitted uses as non-infringing acts. For that matter, § 47 provides that "[a] person who does in relation to a work, any of the acts specified in section 11, or who authorizes another person to perform any such act, without the consent of the copyright owner, infringes the copyright, unless such act is permitted pursuant to the provisions of Chapter D." Second, § 18, which opens Chapter D, states that the Chapter creates a list of uses that every user can make without the consent of the rightholder or the payment of any royalties. Third, § 19 creates an open-ended list of exceptions and limitations and an open-ended four-factor test to determine the fairness of a given use.

219. See, e.g., CA 5768/94 Ashir Import Prod. & Distribution v. Forum Avisarim & Consumption Prods. 52(4) IsrSC 289 [1998] (Isr.).

220. Another possibility is, as in *CCH*, to examine possible alternatives for the use in cases where use of the copyrighted work was not "reasonably necessary to achieve the ultimate purpose." See *CCH Canadian Ltd. v. Law Soc'y of Upper Can.* [2004] S.C.R. 339, ¶ 57 (Can.).

221. See *supra* notes 169–85 and accompanying text. It should be noted that the legislature narrowed the scope of several exceptions in order to limit illegitimate uses. For example, §§ 20 and 21 permit use "to the extent that is justified taking into consideration the purpose of the aforesaid use." Versions of this condition exist in most provisions. Furthermore, some provisions contain no explanation for the limits they impose. For example, § 22 does not include incidental use of a musical work: "[T]he deliberate inclusion of a musical work, including its accompanying lyrics, or of a sound recording embodying such musical work, in another work, shall be deemed to be an incidental use." Copyright Act 2007, 5768–2007, 2007 LSI 34 (Isr.).

222. See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966).

223. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007); *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986).

224. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985).

Although the explanatory memorandum to the 2007 Act refers to “interests” and not to “rights,” the language used in Chapter D and the stipulation of §§ 18, 19, and 47 may direct one to think that the legislature’s implicit intention was to elevate the status of the list of fair uses to that of a list of users’ rights. This assumption is supported by the Israeli Supreme Court’s frequent remark that fair use should not be strictly interpreted.²²⁵

If this proposition is correct, then users’ rights in the 2007 Act can be treated as independent rights. Using Hohfeldian terminology, the 2007 Act created rights for users and not mere privileges or defenses in cases of infringement. Correlative to the right of a user is the owner’s duty not to bar the former from accessing the said copyrighted work because “even those who use the word [right] and the conception ‘right’ [or claim] in the broadest possible way are accustomed to thinking of ‘duty’ as the invariable correlative.”²²⁶ In this Article I argue that the 2007 Act has narrowed the scope of authors’ rights, mainly the right of exclusive use and enjoyment, and compels us to think of the *duty* of the rightholder to allow use and access to his works.²²⁷ Using the parlance of rights and duties in the context of fair use is a welcome development. It creates a user-centric normative reality and supports a more flexible problem-solving approach to copyright’s inherent conflicts.

The inability of copyright laws to secure the public interest has attracted scholarly debate claiming that fair use should be treated as a list of *rights*. In their seminal study criticizing the view of copyright as the law that rewards authors in the guise of property, Ray Patterson and Stanley Lindberg offer their vision of copyright as *A Law of Users’ Rights*.²²⁸ They claim that “users have rights that are just as

225. See, e.g., CA 8393/96 Mifal Hapais v. The Roy Export Est. Co. 54(1) IsrSC 577, 596 [2000] (Isr.).

226. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 31 (Walter Wheeler Cook ed., 1919). See also Hohfeld’s earlier article Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

227. In the words of Waldron,

It is always tempting to take the perspective of the right-bearer, and show what a marvelous thing it is for him to have all these rights. They protect and promote his personality. They vindicate his right to the labor of his body. They reward his desert. They allow him to make plans, and to exercise his autonomy. The virtue of the Hohfeldian analysis is that it compels us to concentrate on the other side of the coin: the correlative duty.

Waldron, *supra* note 90, at 844.

228. L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* (1991). See also Elkin-Koren, *supra* note 151, at 327; D’Agostino, *supra* note 145, at 309. On the conceptual and legal problems that the concept of users’ rights may raise, see Darren Hudson Hick, *Mystery and Misdirection: Some Problems of Fair Use and User’s Rights*,

important as those of authors and publishers.”²²⁹ In order to achieve its constitutionally mandated objectives, the copyright system must provide “reasonable rights for the users.”²³⁰ Pamela Samuelson contends that the U.S. Copyright Act of 1976 is in need of reform and that “[a]dditional work on user rights should be part of a model copyright law project.”²³¹ Wendy Gordon and Daniel Bahls likewise claim that the public should be regarded as a rightholder.²³² Courts struggling to define the boundaries of fair use quickly responded to these calls to reconceptualize fair use.

In *CCH*, a pro-user judgment, the Supreme Court of Canada treated users’ rights as an integral part of the entitlement structure in copyright, stating that fair dealings “should not be given a restrictive interpretation.”²³³ The court “sought to align itself . . . with the more flexible U.S. approach,”²³⁴ just as the Israeli Supreme Court did earlier in the *Geva* decision. In *CCH*, the court adopted David Vaver’s argument that “[u]ser rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”²³⁵ The court held,

[R]eviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations

56 J. COPYRIGHT SOC’Y U.S.A. 485, 485, 500 (2009) (arguing that “the very idea of [users’] rights is conceptually flawed”). See also Genevieve P. Rosloff, “Some Rights Reserved”: *Finding the Space Between All Rights Reserved and the Public Domain*, 33 COLUM. J.L. & ARTS 37, 58 (2009) (showing that the natural rights approach well balances “between the authors’ and users’ rights that more accurately reflects the current theoretical underpinnings of U.S. copyright law”).

229. PATTERSON & LINDBERG, *supra* note 228, at 11.

230. *Id.* at 14. Scholars criticize the neglected attention users receive in copyright law and theory. See, e.g., Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005). She contends that users have four primary purposes of uses: “consumption, communication, self-development, and creative play.” *Id.* at 370. See also Jessica Litman, *Creative Reading*, 70 LAW & CONTEMP. PROBS. 175, 183 (2007) (claiming that in copyright we have to pay more attention to listeners, readers, and viewers and that if we ignore them we are likely to remain with a copyright system that is out of kilter); Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C. L. REV. 397 (2003) (noting that contemporary copyright law lacks any “persuasive or coherent theory of the consumer”).

231. Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 566.

232. They suggest a revision of § 107 so that it will recognize that “the fair use of a copyrighted work . . . is a right and not an infringement of copyright.” Gordon & Bahls, *supra* note 212, at 656. See also Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 463 (2010) (offering an alternative paradigm to the First Amendment “using the lens of substantive due process and liberty to evaluate users’ rights”).

The U.S. federal courts have already proclaimed that the public has “a federal right to ‘copy and to use’” what the patent and copyright laws do not recognize as the exclusive realm of the rightholders. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 156 (1989).

233. *CCH Canadian Ltd. v. Law Soc’y of Upper Can.* [2004] S.C.R. 339, ¶ 54 (Can.).

234. D’Agostino, *supra* note 145, at 325.

235. DAVID VAVER, *COPYRIGHT LAW* 171 (2002).

about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.²³⁶

Since the new Israeli Copyright Act went into force in 2007, the CCH-like users' rights approach has already been made part of Israel's copyright judicial reality.²³⁷ In one of the pioneering yet controversial decisions based on the 2007 Act, the Tel Aviv District Court held that the status of users' rights in the 2007 Act has been seriously strengthened. In *Football Ass'n Premier League (FAPL) v. John Doe*²³⁸ the court considered the public's interest under the 2007 Act as a "right" and held that the identity of the person operating a website providing video streaming of live sporting events shall not be disclosed to the plaintiff, the Premier League.²³⁹

The case concerned the streaming of soccer games through the Internet, asking whether it amounts to fair use in the meaning of the 2007 Act.²⁴⁰ Judge Michal Agmon-Gonen accepted the position that certain sporting events have significant cultural and collective social values and benefits.²⁴¹ Therefore, although these works are copyrightable under the 2007 Act, their use is still fair use despite commercial considerations and potential damage to rightholders.²⁴² The judge also found support for her decision in the law/norm gap argument, remarking,

236. *CCH Canadian* S.C.R. 339, ¶ 48.

237. In its recent response to copyright consultations, the The Libraries and Archives Copyright Alliance (LACA) in the United Kingdom contends that we must recognize "the importance of users' rights to the vitality of the copyright regime. These users' rights are enshrined in the exceptions and limitations to copyright introduced by the Legislator at international, European and national level." The Libraries and Archives Copyright Alliance, © the Future 1 (Feb. 6, 2009), available at <http://www.ipa.gov.uk/responses-copyissues-laca.pdf>.

238. CC 11646/08 The Football Association Premier League (FAPL) v. John Doe Tak (3)09 (Dist TA) 8372 [2009] (Isr.) (currently under appeal to the Israeli Supreme Court). See also 1 TONY GREENMAN, COPYRIGHT LAW 330-35 (2008) (Heb.).

239. *Premier League*, (3)09 (Dist TA) 8372.

240. Apart from fair use, the case tackles several major issues, including international jurisdiction over the Internet, the Israeli John Doe procedure, what constitutes copyright infringement, as well as the sociological importance of sporting events and their availability to the public. The question of whether Judge Agmon-Gonen went too far in labeling the public as a right-bearer is awaiting the decision of the Israeli Supreme Court in an appeal submitted in November 2009.

241. *Premier League*, (3)09 (Dist TA) 8372, at 48.

242. *Id.* at 31.

When courts interpret and apply the fair use provision in order to strike a balance between copyrights and users' rights, they have to take account of the fact that each and every member of society will be affected by its interpretation, and ensure that all these people will not be harmed by a narrow interpretation of their rights. Courts must be careful not to turn a whole nation to an infringing nation.²⁴³

Chapter D's list is a newcomer in the landscape of copyright law in Israel. It formally applied the courts' long call to fully recognize the fair use model as the appropriate standard. Chapter D transformed the status of the fair dealing doctrine from a provider of defenses against liability for infringement to that of a storehouse of users' rights.²⁴⁴ It transformed the fluid and unbalanced relationship between the public and authors to that of a relationship between rightholders and dutyholders; it created a list of duties on rightholders to permit members of the public free access and use of protected, copyrighted materials. The many theoretical justifications for fair use legitimize this transformation.

IX. FAIR USE AND JUDICIAL IDEOLOGY

A. *Advantageous Ambiguity*

That fair use is not a static doctrine is evident from the evolution of copyright and transplantation of the fair use model in Israel. It has been crafted in a way that allows courts greater freedom when exercising their interpretive authority. In *Geva*, the Israeli Supreme Court fully utilized its authority to transplant the fair use model²⁴⁵ and in the recent *Premier League* case, a district judge was daring enough to declare that the newly enacted fair use standard is a storehouse of users' rights.²⁴⁶ These decisions do not prescribe a clear and hermetic fair use test, but was it the intention of the fair use framers to provide a defined and closed set of incidents for when users can access protected materials with no permission? The U.S. Congress recognized that

243. *Id.* at pt. C. Judge Agmon-Gonen supported her argument by John Tehranian's remark that

[n]ow, copyright law is of direct importance to the hundreds of millions of individuals who download music and movies for their iPods, engage in time- and place-shifting with their TiVos or Slingboxes, own CD or DVD burners, operate their own websites, write blogs, or have personal pages on MySpace, Facebook, or Friendster.

John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 539.

244. See Elkin-Koren, *supra* note 151, at 327; see also Dotan et al., *supra* note 157, at 511. Cf. Parchamovsky & Weiser, *supra* note 7, at 91 (offering a system of user privileges).

245. See PLA 2687/92 *Geva v. Walt Disney Co.* 48(1) IsrSC 251 [1993] (Isr.).

246. *Football Association Premier League* (3)09 (Dist TA) 8372.

even for the courts that developed the four factor test, the factors were “in no case definitive or determinative” but rather “provide[d] some [gauge] for balancing the equities.”²⁴⁷ In *Campbell*, the U.S. Supreme Court wrote that fair use “‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”²⁴⁸ Like the U.S. and Israeli Supreme Courts, their Canadian counterpart used its interpretive freedom to redefine fairness in copyright and promulgated a six-factor test in its landmark *CCH* decision.²⁴⁹ These examples show that “[a] well-recognized strength of the fair use doctrine is the considerable flexibility it provides in balancing” the competing interests in copyright.²⁵⁰ Using the words of David Vaver, these examples also show a continuation of a tradition, dating from nineteenth century U.S. and British practice

of letting judges set and monitor a reasonable balance of rights between copyright holders and users as different technologies and usages arise and develop. On this theory, while specific targeted exceptions serve a purpose, legislatures can neither anticipate new developments nor respond to them effectively and quickly; so courts are assigned the role of creating appropriate boundaries between private rights and the public domain in the course of deciding concrete disputes.²⁵¹

As opposed to the United States, Canada, and Israel, U.K. courts espouse a stricter view on how courts should interpret and apply the fair use/fair dealing doctrines. U.K. courts examine the fairness of the use by referencing parameters that emerged from U.K. case law:²⁵² whether the work is unpublished, how the work was obtained,²⁵³ the amount taken,²⁵⁴ the use made of the work,²⁵⁵ the motives for the dealing,²⁵⁶ the consequence of the dealing,²⁵⁷ and whether the purpose of the use could have been achieved by different means.²⁵⁸ Although these parameters seem ambiguous and non-determinative,

247. H.R. REP. NO. 94-1476, at 65 (1976).

248. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

249. *CCH Canadian Ltd. v. Law Soc’y of Upper Can.* [2004] S.C.R. 339 (Can.).

250. Samuelson, *supra* note 7, at 2540.

251. See David Vaver, *Canada’s Intellectual Property Framework: A Comparative Overview*, 17 INTELL. PROP. J. 125, 150 (2004).

252. See BENTLY & SHERMAN, *supra* note 121, at 194–96.

253. See *Beloff v. Pressdram*, [1973] All E.R. 241 (Eng.).

254. See *Hubbard v. Vosper*, [1972] All E.R. 1023 (Eng.).

255. See *Newspaper Licensing Agency v. Marks & Spencer*, [2000] A.C. 551 (Eng.).

256. See *Hyde Park Residence Ltd. v. Yelland*, [2000] EWCA (Civ) 37 (Eng.).

257. See *Hubbard*, All E.R. at 1023.

258. *Hyde Park Residence*, EWCA (Civ) at 37.

Judge Ungood-Thomas has asserted that fair dealing is a “dealing which is fair for the approved purposes and not dealing which might be fair for some other purpose or fair in general.”²⁵⁹ This means, in other words, that U.K. courts will be expected to restrict their interpretive authority. For example, in *Pro Sieben Media v. Carlton Television*, Judge Laddie held that the fair dealing provisions “are not to be regarded as mere examples of a general wide discretion vested in the courts to refuse to enforce copyright where they believe such refusal to be unfair and reasonable.”²⁶⁰

Leading British intellectual property scholars Bill Cornish and David Llewellyn provide one explanation for why the U.K. approach should not adopt the fair use standard: “Judges. . . are not to be furnished with any general tool for criticizing the scope of the legislation. Their role is confined to interpretation of its meaning.”²⁶¹ At the same time, however, U.K. courts do not remain aloof towards social needs and have encouraged a liberal approach to what constitutes fair dealing.²⁶² After all, Lord Denning reminded us that “[i]t is impossible to define what is ‘fair dealing.’”²⁶³ This call to liberally interpret fair dealing is complemented by an escape clause in the 1988 CDPA for when public policy matters should override proprietary interests of copyright owners,²⁶⁴ and also complemented by the 1998 Human Rights Act requiring courts to consider public interest motives.²⁶⁵ Due to the existence of these sources that enable courts wider interpretive freedom, coupled with the strict view on the role of courts in interpreting and applying conceptions of fair dealing, calls to adopt a fair use formula in the U.K. were rejected in the past.²⁶⁶ The issue of adopting a general fair use doctrine was canvassed again when the *Gowers Review of Intellectual Property* recommended no serious change to be made to the present state of fair dealing under the

259. *Beloff*, All E.R. at 262.

260. *Pro Sieben AG v. Carlton UK Television Ltd.*, [1998] FSR 43, 49 (Eng.), *rev'd*, [1999] 1 W.L.R. 605 (Ct. App.) (Eng.). See generally Jonathan Griffiths, *Preserving Judicial Freedom of Movement—Interpreting Fair Dealing in Copyright Law*, 2000 INTELL. PROP. Q. 164.

261. BILL CORNISH & DAVID LLEWELYN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHTS, TRADE MARKS AND ALLIED RIGHTS*, at pts. 11–38 (2003).

262. See *Newspaper Licensing Agency v. Marks & Spencer*, [2000] 4 All E.R. 239, 257 (Eng.); *Pro Sieben*, 1 W.L.R. at 620; *Ashdown v. Telegraph Group Ltd.*, [2002] Ch. 149, 172 (Eng.).

263. *Hubbard v. Vosper*, [1972] 2 Q. B. 84, at 93 (Eng.).

264. Copyright, Designs and Patents Act (CDPA), 1988, c. 48, § 171(3) (Eng.). See, e.g., *Glyn v. Weston Feature Film Co.*, [1916] Ch. 261 (Eng.); cf. *Stephens v. Avery*, [1988] Ch. 457 (Eng.).

265. Human Rights Act, 1998, c. 42, § 12 (Eng.).

266. The Whitford Committee’s recommendation to adopt in the U.K. a fair use formula similar to the U.S. model was rejected by the government. WHITFORD COMMITTEE, *REPORT ON COPYRIGHT AND DESIGNS LAW*, 1977, at 685 (U.K.). The Committee remarked that a general fair use doctrine will be vulnerable to “dangers of producing uncertainty and misuse.” *Id.* at 675.

CDPA. The report suggested updating the closed list by only introducing new exceptions, such as format shifting,²⁶⁷ caricature and parody,²⁶⁸ and a wider exception for libraries and archives.²⁶⁹

The vague conceptual boundaries of principles such as fairness, dealing, and the four-factor test, coupled with the nature of fair use doctrines as fact intensive and case by case, affect the achievement of legal certainty.²⁷⁰ Apart from the many jurisdictions that have inquired into and subsequently rejected the possible adoption of the U.S. fair use model for lack of certainty and predictability,²⁷¹ many

267. GOWERS REVIEW OF INTELLECTUAL PROPERTY, *supra* note 113, recommendation 8.

268. *Id.* recommendation 12.

269. *Id.* recommendation 10(a). In a later review of these recommendations, the Intellectual Property Office announced that the legislative proposals regarding fair dealing will focus on “educational provisions, preservations by libraries and archives, and fair dealing for research and private study purposes.” U.K. INTELLECTUAL PROPERTY OFFICE, TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY: SECOND STAGE CONSULTATION ON COPYRIGHT EXCEPTIONS 5 (2010). *See also id.* Annex A, at 47–53 (presenting a draft of The Copyright Permitted Acts Amendment Regulations 2010). The review also provides that the exceptions offered by the Gowers Report on format shifting (private copying) and parody should be examined within an EU context about a broad exception for non-commercial use. U.K. INTELLECTUAL PROPERTY OFFICE, *supra*, at 2–3. *See also* Ronan Deazley, *Copyright and Parody: Taking Backward the Gowers Review?* 73 MOD. L. REV. 785, 807 (2010) (a broad exception for non-commercial use “would hardly function as a satisfactory alternative to the introduction of a bespoke exception for parody”).

270. In 2008 the U.K. Intellectual Property Office took the first stage consultations relating to the Gowers Review. In its report it rejected the possibility of adopting a fair use mechanism because, among other things, “[i]dentifying where the boundaries should lie is critical in ensuring that our copyright system remains fit for today’s world. A system of strong rights, accompanied by limited exceptions, will provide a framework that is valued by and protects right holders and is both understood and respected by users.” U.K. INTELLECTUAL PROPERTY OFFICE, *supra* note 269, at 1–2.

In a recent comment to the U.K. Independent Review of Intellectual Property and Growth, the Motion Pictures Association commented that “[t]he UK and European regulatory approach is not the same [as the United States] and it would not necessarily be easy or beneficial to transpose the US approach to a foreign context, even if the Fair Use doctrine had theoretical appeal.” UNITED KINGDOM INDEPENDENT REVIEW OF INTELLECTUAL PROPERTY AND GROWTH: COMMENTS OF THE MOTION PICTURE ASSOCIATION 13 (Mar. 4, 2011), available at <http://www.ipo.gov.uk/ipreview-c4e-sub-motion.pdf>.

271. The Australian government’s paper “Fair Use and Other Copyright Exceptions” considered the adoption of a fair use formula in the Copyright Act. This suggestion was rejected for various reasons including the impossibility of distinguishing between infringement and fair use, the expenses involved in defending a fair use claim in court, and the risk to existing business and licensing arrangements. *See* Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age (Issues Paper 2005).

In its review of copyright law, the New Zealand government also considered fair use, but identified significant problems associated with this possibility. These included the fragility of the country’s small marketplace, noncompliance with the three-step test of the Berne Convention, and the uncertain character of the doctrine. *See* Digital Technology and the Copyright Act 1994 (Internal Working Paper 2002).

The issue of replacing fair dealing with fair use in Canada was recently raised by the latest round of copyright consultations announced by the Canadian government. This issue was also

U.S. scholars argue that the doctrine is indeed a host to too many conceptual and normative problems. David Nimmer wrote that the four factors are so unclear that “had Congress legislated a dartboard rather than the particular four fair use factors . . . it appears that the upshot would be the same.”²⁷² Lawrence Lessig described the fair use doctrine as an “astonishingly bad” system amounting to little more than “the right to hire a lawyer.”²⁷³ Wendy Gordon reiterated that the doctrine is “indeed ill.”²⁷⁴ Michael Madison claimed that the doctrine “has become too many things to too many people to be of much specific value to anyone.”²⁷⁵ Gideon Parchomovsky and Kevin Goldman observed that “fair use is at once the most important and the most ‘troublesome’ doctrine in copyright law. . . . [T]he case law is characterized by widely divergent interpretations of fair use, divided courts, and frequent reversals.”²⁷⁶ And Barton Beebe recently labeled the doctrine “the most important—and amorphous—limitation” on rightholders.²⁷⁷ The unpredictable nature of the fair use doctrine resulted in “commonplace” reversals and divided courts,²⁷⁸ and, as William Fisher and William McGeeveran found, it may bring members of the education sector to avoid copies of copyrighted materials for

raised in the past. In 1985 the Canadian Sub-Committee on the Revision of Copyright specifically rejected replacing fair dealing with fair use. Two main reasons were raised: the Canadian experience had worked very well and the U.S. experience had shown that a general clause for fair dealings is not a desirable legal tool. The problems of lack of certainty and predictability and possible noncompliance with international obligations under the Berne Convention and TRIPs were not absent from the report. See generally Barry Sookman & Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations*, 22 INTEL. PROP. J. 29 (2009). Cf. Michel Geist, *Designing a Copyright Bill That’s Built to Last*, TORONTO STAR, Aug. 17, 2009, at B2.

Finally, in its 2008 Green Paper on “Copyright in the Knowledge Economy,” the European Commission did not even revisit the question of whether to adopt a fair use system. Rather, it proposed refining the existing exceptions on the InfoSoc Directive’s closed list. COMMISSION OF THE EUROPEAN COMMUNITIES, GREEN PAPER: COPYRIGHT IN THE KNOWLEDGE ECONOMY (2008), available at http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf.

272. David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 280 (2003).

273. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004).

274. Wendy J. Gordon, *Fair Use: Threat or Threatened?*, 55 CASE W. RES. L. REV. 903, 912 (2005).

275. Madison, *supra* note 214, at 397.

276. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1484–86 (2007).

277. Beebe, *supra* note 186, at 551.

278. Leval, *supra* note 189, at 1106–07.

classroom use while these uses are permitted by the Act.²⁷⁹ A copyright culture based on confusion or fear is definitely not what the framers of fair use doctrines envisioned.²⁸⁰ Furthermore, the lack of legal certainty is such that it can put jurisdictions in violation of their international obligations.²⁸¹

Should these visions of fair use direct us to conclude that courts' interpretive authority should be limited—that owners and users of copyrighted materials should negotiate over and enter into contracts specifying permitted uses—or should we just announce that fair use doctrines are “especially unstable”²⁸² or “not working”?²⁸³ Are we now stuck with an Israeli version of a “botched job”²⁸⁴ like § 107²⁸⁵ and should we eagerly wait for the courts to make the best of what we have?

First, leaving the determination of fair uses to the market is not a desirable option. Fair uses are not negotiable commodities. They are rights that the law deems not to infringe copyright and which are bestowed on the public for the many theoretical and economic reasons discussed above. Converting fair uses to negotiable commodities amounts to the transformation of the doctrine to something resem-

279. William W. Fisher & William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* (Berkman Center for Internet & Society, Pub. Research No. 2006-09, 2006).

In his recent inquiry into fair use, Jason Mazzone remarks that

[t]he failure of Congress and of the courts to provide clear guidance on the meaning of fair use permits copyright owners to leverage the vagueness of the law and persuade prospective users that virtually any unauthorized use constitutes copyright infringement—and that if the use is not paid for it will result in a lawsuit and substantial damages.

Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 395 (2009).

280. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007) (showing how fair users are requested to pay for licenses in order to avoid subsequent litigation). See also Parchamovsky & Weiser, *supra* note 7, at 100 (users “will always prefer to take less than what they perceive to be the permissible amount and will be sheltered from liability”). This consequence is best captured in the words of Michael Carroll claiming that the fair use doctrine is “so case-specific that it offers precious little guidance about its scope to artists, educators, journalists, Internet users, and others who require use of another’s copyrighted expression in order to communicate effectively.” Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007).

281. See Herman C. Jehoram, *Restrictions on Copyright and Their Abuse*, 27 E.I.P.R. 359 (2005). Jehoram argues that “the open American ‘fair use’ system in fact violates the Berne Convention with its specific restrictions which serve to guarantee the rights of authors and the interests of users by providing them with legal certainty.” *Id.* at 360.

282. Beebe, *supra* note 186, at 574.

283. Mazzone, *supra* note 279, at 395.

284. Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1151 (1990).

285. 17 U.S.C. § 107 (2006).

bling a Lockean state of nature for fair uses: a pre-political arrangement in which “every one has the Executive Power of the Law of Nature.”²⁸⁶ In this state, men “have an uncontrollable Liberty, to dispose of his Person or Possessions.”²⁸⁷ In this situation, only the economically strong will survive and dictate to the entire community how fair uses should be applied. Second, announcing that fair use doctrines do not work is a simplistic conclusion that signals no direction towards an alternative way. Until an alternative to the present formulation of fair use doctrines would be accepted and proved workable, discussions on foreclosing fair use or the doctrine’s unlikelihood to survive “is a dangerous direction for copyright law.”²⁸⁸ Courts should play a decisive role in the development of the doctrine and its derivative norms, as well as its ethical vision and boundaries.

I agree that calls to rethink fair use doctrines for their lack of certainty and predictability are not without standing. However, devaluing fair use for lack of predictability, as much as it may sound legitimate, ignores a fact we all know; the fact that, as Timothy Endicott suggested, predictability is not a problem unique to copyright. Rather, “[p]redictability in the law is to some extent unattainable,”²⁸⁹ and “vague language cannot be eliminated from the law.”²⁹⁰ Limiting the interpretive authority of courts due to the generality and ambiguity of the doctrine carries the risk of sending wrong and indeterminate signals to the copyright community. Arguably, the copyright community needs best practices in fair use,²⁹¹ an arbitration system for users who cannot negotiate a license from the owner of the copyrighted work,²⁹² a recognition of users’ right to hack digital codes,²⁹³ specific

286. LOCKE, *supra* note 68, at 293 (emphasis omitted).

287. *Id.* at 288–89.

288. Gordon & Bahls, *supra* note 212, at 620.

289. TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW 4 (2000) (emphasis added).

290. *Id.* at 189.

291. See D’Agostino, *supra* note 145, at 354–58. See also Dotan et al., *supra* note 157, at 447 (discussing the process of building a Code of Fair Use Best Practices for the use of copyrighted materials in Higher Education Institutions in Israel); Michael J. Madison, *Some Optimism About Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC’Y U.S.A. 351 (2010) (supporting the model of best practices and arguing that law reform in copyright is not exclusively a matter for public authorities).

An alternative, which does not dismiss the idea of “best practices,” was offered by Pamela Samuelson and the members of the Copyright Principles Project (CPP). They offer a mechanism of “opinion letters” according to which “Individuals or firms considering whether a contemplated use of a copyrighted work would qualify as a fair use could submit a request to the Copyright Office for an opinion.” See Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 31 (2011), available at http://www.law.berkeley.edu/files/bclt_CPP.pdf.

292. See generally David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11 (2006).

safe harbors that indicate amounts of permissible copying,²⁹⁴ a restructuring of consumers' use privileges,²⁹⁵ a low-cost administrative tribunal that provides indication on whether a putative use is fair or not, or an administrative agency responsible for generating regulations that determine what constitutes fair use in specific contexts.²⁹⁶ Some would even consider it appropriate to wait for the legislature to react to market conditions by adding new exceptions, despite the costs of delayed reactions.²⁹⁷ In the 2007 Act the Israeli legislature offers an additional alternative. Section 19(c) authorizes the minister to "make regulations prescribing conditions under which a use shall be deemed a fair use." Before any of these recommendations reach maturity and gain international recognition,²⁹⁸ the copyright community needs to accept the following two propositions: first—for those who think it is amorphous and uncertain—that "unpredictable as it might be, the fair use doctrine at least seems the best defense we have against copyright becoming tyrannical and oppressive. . .";²⁹⁹ and second, courts should be expected to use the interpretive authority fair use doctrines give them in order to overcome undesirable consequences and guide owners and users of copyrighted materials on when a use is fair.

Two arguments *for* vagueness in law and *against* wrong assessment and categorization of fair use cases further strengthen the above propositions. The argument *for* vagueness recognizes that vague legal concepts are vulnerable to fierce criticism as they provide no particular prescription for their application. However, conceptual vulnerability is sometimes an advantage in the law, not a deficit. We tend to

293. Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998).

294. See Parchomovsky & Goldman, *supra* note 276, at 1483. In their attempt to eliminate uncertainty in fair use, Parchomovsky and Goldman recommend bright-line quantitative safe harbors for certain types of appropriation. For example, they argue that "for any literary work consisting of at least one hundred words, the lesser of fifteen percent or three hundred words may be copied without the permission of the copyright holder." *Id.* at 1511.

295. See Parchomovsky & Weiser, *supra* note 7, at 95 (claiming that "the fair use doctrine must be supplemented with a system of . . . 'use privileges' or 'user privileges'—i.e., privileges that will dramatically increase the range of permissible uses of copyrighted content in digital media").

296. See Mazzone, *supra* note 279, at 395.

297. See GOWERS REVIEW OF INTELLECTUAL PROPERTY, *supra* note 113; see also Sookman & Glover, *supra* note 271, at 29.

298. Reaching international recognition, D'Agostino remarks, is unlikely to be too difficult: "While Canada and the United Kingdom appear to have a rigid 'fair dealing' framework, and the United States appears to have a more flexible structure in fair use, the legal outcomes in the three jurisdictions have been for the most part similar." D'Agostino, *supra* note 145, at 356.

299. Hick, *supra* note 228, at 500.

search for definitive answers and, as Jeremy Waldron observes, make serious attempts to

determine a precise prescriptive meaning for legal and constitutional provisions. Our urge is to get into a position where we can always answer the question, "Well, *is* this prohibited or is it not?" However, sometimes the point of a legal provision may be to start a discussion rather than settle it³⁰⁰

Legal outcomes are created in a social and cultural context. In modern and free societies, legal principles are not detached from social reality. In other words, "[i]n any decent legal system there is a fairly clear answer to the question 'What is regulated?,' but lesser clarity will meet us when trying to answer the question "What ought to be regulated?"³⁰¹ Fair use is an open-ended doctrine. Due to its vagueness, it suffers from conceptual vulnerability.³⁰² However, it is a platform grounded in law to start a discussion, not a definitive prescription structured to guide a set of anticipated behaviors. In this lies one of its greatest economic and social advantages that will protect the durability and consistency of its development.³⁰³

Concepts that are open in character, such as fair use, are generally "essentially contested."³⁰⁴ They provide a wider scope for the development of different and competing conceptions. Gallie coined the term "essentially contested concepts," according to which there are certain concepts, such as art, democracy, and property,³⁰⁵ "the proper use of which inevitably involves endless disputes about their proper

300. Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 539 (1994).

301. ENDICOTT, *supra* note 289, at 196 (emphasis added).

302. See, e.g., Parchamovsky & Goldman, *supra* note 276, at 1496 ("[I]t is now virtually impossible to predict the outcome of fair use cases.").

303. It is not highly unlikely that the fair use standard will be replaced again in the future with an even wider provision. Perhaps, when the new Act will celebrate its jubilee, research examining fair use in Israeli courts will reach a conclusion that § 19(b) could have been drafted as a one-sentence provision similar to the U.S. 1965 draft version: "Notwithstanding the provisions of § 106, the fair use of a copyrighted work is not an infringement of copyright." H.R. 11947, H.R. 12345, S. 3008, 88th Cong. (1964). Then the legislature—given the anticipation of extending even further the imbalance between technological developments, social needs, and legal reform—might consider replacing the fair use model with this one-sentence provision.

304. W. B. Gallie, *Essentially Contested Concepts*, in 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 167 (1956). See also Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1 (1973); Waldron, *supra* note 300, at 509; Lior Zemer, *The Conceptual Game in Copyright*, 28 HASTINGS COMM. & ENT. L.J. 409 (2006).

305. See, e.g., Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138, 147–48 (1999) ("Property is an essentially contested concept that is open to competing interpretations and permutations."); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1688 (1988) (treating property as an essentially contested concept).

uses on the part of their users.”³⁰⁶ For Gallie, “essential” means three things. First, it indicates contestation-to-the-core of the concept: the concept is embedded with anomalies and disagreements which generate conceptual patterns that stagger the very heart of the concept. Second, it requires contestedness to serve part of the very definition of the concept under scrutiny. And third, in the absence of the component “essential,” the concept may lack sufficient contestability and may lose its “open” character. The ample disagreements on how to approach fair use—both ideologically and legally—and the aggressive criticism directed towards the doctrine’s wide interpretive boundaries, all show that fair use, as a concept, presents contestation-to-the-core. This allows conceptual and doctrinal inventions in fair use to maintain their diverse and open character.³⁰⁷

I agree that fair use controversies are not all resolvable, and it seems that scholars will—especially in the wake of new digital technologies or debates on whether “fair use is dead”³⁰⁸—continue to disagree on a preferred conception of fair use. Still, the argument of “void for vagueness” with regards to fair use is misleading and normatively wrong. Fair use is a doctrinal concept open in character. Not all legal principles and doctrines ought be determinative. The open nature of a legal provision is not a flaw. H.L.A. Hart once remarked that “[i]t is a feature of the human predicament . . . the impossibility of foreseeing all possible combinations of circumstances that the future may bring. . . . This means that all legal rules and concepts are ‘open’. . . .”³⁰⁹ Flexible legal rules then are desirable.³¹⁰ The open

306. Gallie, *supra* note 304, at 169.

307. The nature of fairness as an essentially contested concept is best explained by Ronald Dworkin, who takes fairness as an example of a concept and explains,

The difference is a difference not just in the *detail* of the instructions given but in the *kind* of instructions given. When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it.

RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 135 (1977).

308. See Gordon, *supra* note 274, at 909 (challenging the argument that “fair use is dead” and remarking that “[w]hile fair use is in danger from the DMCA and developments in contract law, I am not yet prepared to pronounce fair use to be dead”).

309. H.L.A. HART, *Jhering’s Heaven of Concepts and Modern Analytical Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 265, 269–70 (1983).

310. As discussed above, an integrated philosophy of copyright is also desired. We should not confine openness to legal provisions only. Contestation with regard to the underlying theory of copyright has many advantages. In that respect, Madhavi Sunder wrote,

We should not fear the rise of new theoretical justifications for creating intellectual property rights—or for limiting them. There is much to be gained from articulating competing descriptive and normative visions of intellectual property, particularly those

character and contestable nature of the fair use doctrine *will* ensure future improvements of the concept of fair use and its capacity to meet unpredictable social and cultural challenges. The Israeli legislature enacted the judicially transplanted fair use doctrine exactly for these reasons—to avoid freezing the copyright system. Put simply, the nature of fair use—its essential contestability—makes it a better concept. Contestability, as Gray remarks, intends to “enrich intellectual life and to promote tolerance within it”³¹¹ as well as to highlight misconceptions and flaws that would otherwise be left untouched. In Gallie’s words, “Recognition of a given concept as essentially contested implies recognition of rival uses of it” and “[o]ne very desirable consequence of the required recognition in any proper instance of essential contestedness might therefore be expected to be a marked raising of the level of quality of arguments in the disputes of the contestant parties.”³¹²

The argument against wrong assessment and categorization of fair use has been recently developed by Pamela Samuelson. She invited both commentators and judges to “stop wringing their hands about how troublesome fair use law is and look instead for common patterns in the fair use caselaw.”³¹³ True, fair use is not free of defects. However, despite these defects, fair use, she poignantly shows, does not lack the certainty and predictability for which it was heavily criticized:

[F]air use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns, or what [her article calls] policy-relevant clusters. The policies underlying modern fair use law include promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and privacy and autonomy interests of users. If one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair.³¹⁴

Unbundling fair uses into the proposed policy-relevant clusters is not an immediate cure to all the defects associated with a general con-

that challenge the historical distribution of the power to make and control cultural meaning.

Sunder, *supra* note 2, at 332.

311. John Gray, *On Liberty, Liberalism and Essential Contestability*, 8 *BRIT. J. POL. SCI.* 385, 389 (1978). See also John N. Gray, *On the Essential Contestability of Social and Political Concepts*, 5 *POL. THEORY* 331 (1977).

312. Gallie, *supra* note 304, at 193.

313. Samuelson, *supra* note 7, at 2621.

314. *Id.* at 2541–42.

cept invented to guide society's authorial behavior. But, such "unbundling will provide courts with a more useful and nuanced tool kit for dealing with the plethora of plausible fair uses."³¹⁵ Fair use doctrines are flexible. They allow courts to protect the constant evolution of the public interest and adapt to other social needs in the wake of new digital platforms that invent new markets and opportunities.³¹⁶

The generality of fair use has another advantage in a state such as Israel. As a relatively young and demographically small state that is still developing its legal system, judicial guidance is critical for the design of a copyright system commensurate with the realities of Israel as a culturally heterogeneous polity and the need to preserve the values that define the state's democratic ideals. The 2005 Explanatory Memorandum to the Copyright Bill indicates that the transplantation of the fair use doctrine was intended to avoid stagnation in copyright and fair use by providing courts greater interpretive freedom to resolve unforeseen uses.³¹⁷ Moreover, as opposed to other parts of the British Empire, the Israeli legislature was very late in its response to copyright changes. It took the Israeli legislature six decades to enact a new copyright law, despite debating it for half of that period. Late responses by legislatures create gaps in legal systems. These gaps impose adverse detrimental effects on rapidly changing markets, such as the market for intellectual properties. The Israeli Supreme Court's experience in filling in these gaps proves that it is the appropriate public organ to ensure adequate application of the fair use model "in the context of a recognized social or cultural pattern."³¹⁸

The Israeli Supreme Court delivered decisions on fair use in only a handful of cases. Despite this, the fair use jurisprudence of the court

315. *Id.* at 2543.

316. See, e.g., Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. INTELL. PROP. L. 49 (1993).

317. Family and Entertainment Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (codified at 17 U.S.C. § 101 (2006)). Similarly, the legislative history of the 1976 U.S. Copyright Act also indicates that Congress did not want to produce an Act that would freeze the law of fair use. The House Report provides,

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.

H.R. REP. NO. 94-1476, at 66 (1976). See also Samuelson, *supra* note 7, at 2602-15.

318. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1623 (2004). Lloyd Weinreb also suggested that societal acceptance of what is fair use should inform fair use analysis. See Lloyd L. Weinreb, *Fair Use*, 67 FORDHAM L. REV. 1291, 1296, 1301, 1306-10 (1999); see also Weinreb, *supra* note 284, at 1138-40, 1150-53.

shows that it did not remain indifferent towards the need to develop standards of fairness in copyright and draw benefits from the nature of the doctrine as essentially contestable. The court did not apply the fair use formula transplanted in *Geva* as—in the words of Judge Posner—“an algorithm that enables decisions to be ground out mechanically.”³¹⁹ This judicial attitude is best captured by the words of the former President of the Israeli Supreme Court, Aharon Barak, addressing his vision of the two primary concerns of every supreme court: “bridging the gap between law and society, and protecting democracy.”³²⁰ Given the importance of copyright to democratic discourses and processes in every civil society,³²¹ courts are expected to develop norms and principles that will be as precise as possible, yet flexible, in order to guide—and where relevant, adjust and change—copyright behavior.

B. Ideology and Adjudication

On the one hand, contemporary debates on the success of fair use doctrines criticize the effectiveness of the courts’ interpretations and applications in guiding or changing the behavior of copyright communities. On the other hand, if we look at fair use from the lens of policy-clusters, the strength of the criticism becomes questionable. Whichever view one supports, one of the main reasons for these conflicting views and ongoing debates regarding the success of the present formulation of the doctrine is the fact that, unlike other legal fields,³²² interpretations of fair use do not involve as much ideology in legal rulings as one would expect.³²³ In a recent study, Barton Beebe raises the following question: “Is copyright fair use . . . a non-ideological or

319. *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003).

320. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 28 (2002).

321. See Netanel, *supra* note 89, at 288 (defining copyright as “in essence a state measure that uses market institutions to enhance the democratic character of civil society”).

322. See, e.g., Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court’s Criminal Docket*, 104 MICH. L. REV. 67 (2005); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices’ Decision Making*, 29 J. LEGAL STUD. 721 (2000); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

323. See Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence from the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 522 (2008). On the role of ideology in judicial reasoning, see, for example, Barak, *supra* note 320, at 19; Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005); Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

at least 'ideologically ambiguous' area of American law?"³²⁴ Some would expect judges, when dealing with fair use claims, to involve in their rulings a greater ideological flavor or their partisan preferences. However, empirical findings have brought Beebe to conclude that "copyright fair use is not an area of the law in which judicial ideology appears to influence adjudication . . . [and] copyright fair use is an exception to [scholars'] more general findings that judicial ideology affects intellectual property outcomes, at least before the [U.S.] Supreme Court."³²⁵

More than a decade ago, James Boyle highlighted the need to create "politics of intellectual property" in order to "prevent the formation and rigidification of a set of rules crafted by and for the largest intellectual property holders."³²⁶ Ideology in copyright means many things, such as preferences and political visions, the accumulated wisdom of general theories affecting cultural exchange, social productivity, liberty, free speech and democratic values. We saw that the Israeli Supreme Court is attentive to these values and open towards consideration of various philosophical approaches. So far, however, this attention was limited and less successful than hoped for in creating a solid Israeli "intellectual property politics" that more adequately protects the rights of the public and its members.

If we take copyright seriously and consider fair use a mediating norm between private and public interests and between obstacles to democratic dialogue, human expression, and property rights, then Beebe's findings are indeed disturbing. True,

[i]t may be encouraging to learn that copyright fair use is not an area of the law in which judicial ideology appears to influence adjudication Yet, one might tentatively observe that there is also something disturbing about these results. They are disturbing because copyright fair use *should* be ideological. . . . Fair use outcomes define the contours of the private and public domains of human expression and, in doing so, directly impact our capability for human flourishing. Fair use is far more than an economic area of the law calling for the post-ideological balancing of costs and benefits; it goes to the core of what constitutes a good society.³²⁷

The 2007 Israeli Copyright Act, Hanoch Dagan contends, renewed the property institution of copyright, an institution that serves a multiplicity of competing interests and values, an institution that aims to

324. Beebe, *supra* note 323, at 519.

325. *Id.* at 522.

326. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 113 (1997).

327. Beebe, *supra* note 323, at 522.

advance the fundamental public interest of allowing members of the public to be exposed to and consume copyrighted cultural and social commodities while securing protection for private and personal aspirations of creative laborers.³²⁸ The success of this renewed institution is dependent on the ability of copyright systems to depart and emancipate society from the chains of rigid principles of property and ownership and from the dogmatic application of legislative doctrines. The success of this renewed institution requires courts to invite ideological reasoning to their interpretation of fair use.

The lack of sufficient judicial and ideological involvement in the development of clear fair use doctrines perhaps explains why, to date, only thirty-three cases in Israeli courts have dealt with fair use and why the defense was allowed in only five of these cases.³²⁹ It is only when courts will accept that “[a]uthorship as embedded in copyright law is an ideology, first and foremost, in the basic sense of this term,”³³⁰ and not primarily an economic tool signifying the proprietary ambitions of creative individuals, that they will be able to revisit fair use in light of the objectives and values that triggered its invention. The 2007 Copyright Act provides Israeli courts with a powerful and socially oriented legislative tool, with which they can, and should, develop a stronger social and ethically balanced agenda for the copyright community.

X. FAIR USE AND GLOBAL JUDICIAL SIGNALING

A. Judicial Signaling

When courts transplant foreign copyright standards, they project something in addition to the message sent to legislatures for their lack of action. Courts signal to the local and international communities their social and legal commitment to adjust ill-defined laws. The early court-made fair use standard in the *Geva* case³³¹ in Israel and the departure from the natural law approach as a justification to copyright³³² is an example of judicial signaling. Judges use signaling to show their involvement in shaping the system’s cultural and legal identity,³³³ the

328. Hanoch Dagan, *A Property-Based Reading: The Renewed Property Institution of Copyright*, in *AUTHORING RIGHTS: READINGS IN COPYRIGHT LAW*, *supra* note 66, at 39 (Heb.).

329. See Elkin-Koren, *supra* note 151, at 354.

330. Bracha, *supra* note 2, at 266.

331. PLA 2687/92 *Geva v. Walt Disney Co.* 48(1) IsrSC 251 [1993] (Isr.).

332. See *supra* notes 147–51 and accompanying text; see also *supra* Part VI.

333. Signaling is used by judges to convey not only their ideological preferences but also the outcome of future cases in order to actively shape their dockets. See, e.g., VANESSA A. BAIRD, *SHAPING THE JUDICIAL AGENDA: JUSTICES’ PRIORITIES AND LITIGANT STRATEGIES* (2006);

system's affiliation with a particular ideology, and the system's willingness to cooperate and establish a long-term³³⁴ dialogue with certain norm-donors. In addition to the courts, many legal systems communicate in this way and signal their willingness to accept different norms in exchange for protecting the rights of their own people. Courts take part in achieving these goals. For example, Japan passed tobacco-control laws to signal its conformity with Western norms and to project its "civilized" nature,³³⁵ the U.S. Congress adopted the European term protection in copyright under the CTEA in order for American authors and artists to receive similar terms of protection as their European counterparts.³³⁶ The latter is an example of global judicial signaling where the Supreme Court approved the constitutionality of the CTEA, signaling the U.S. commitment to consider and follow norms of copyright of other legal systems.³³⁷

As with every legal system that adheres to the norms of another system, signaling is also a culturally risky act. It can be seen as either a pure act of legal transplantation demonstrating the system's openness towards foreign standards, but it may *also* be perceived as an act of weakness, showing the system's inability to create its own legal culture.³³⁸ In the early days of the independent State of Israel, the eclectic and heterogeneous nature of Israeli law was a cause of concern. The system was a hybrid of Islamic, French, and English norms³³⁹—a system with "a degree of multiple influences rarely encountered in any other legal system . . . [;] an extremely heterogeneous system wherein enactments from different worlds are to be found in the same statute book" with hardly any evidence of "organic affinity or connection."³⁴⁰ The young state was aware of conveying the wrong impres-

Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1 (2008).

334. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 5 (2000).

335. See, e.g., Eric A. Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan*, 27 MICH. J. INT'L L. 743 (2006); David Nelken, Comment, *Signaling Conformity: Changing Norms in Japan and China*, 27 MICH. J. INT'L L. 933 (2006).

336. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

337. *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Here Justice Ginsburg found that the Congress acted within its powers and that "[b]y extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts." *Id.* at 204–08.

338. As Assaf Likhovski remarked, "A nation that mimics the laws of another nation is usually seen as being at a lower stage of cultural development." Likhovski, *supra* note 148, at 648.

339. See, e.g., ASSAF LIKHOVSKI, *LAW AND IDENTITY IN MANDATE PALESTINE* (2006).

340. David M. Sassoon, Comment, *The Israel Legal System*, 16 AM. J. COMP. L. 405, 405 (1968). See also Uri Yadin, *Sources and Tendencies of Israel Law*, 99 U. PA. L. REV. 561, 564 (1951).

sion of “self-denying ability”³⁴¹ to legislate and create its own legal culture. Consequently, the preferred way was a piecemeal method of legislation and judicial transplantation alongside the development of local norms and standards—namely, of “laboriously comparing texts and solutions, picking and choosing, and occasionally adding altogether new elements.”³⁴²

Choosing a method of borrowing from other legal systems is another way for young states to signal their intention to join in the global community in a given field. It took Israel six decades to change Imperial copyright laws inherited from the British Mandate. Courts were entrusted with the job of adjusting copyright law, signaling to the international community Israel’s recognition of prevailing—and controversial³⁴³—copyright norms, and its preference to be affiliated with a particular school of thought—the American utilitarian approach to copyright and its fair use model.³⁴⁴ The active role of courts in Israel in shaping and refining copyright laws shows that young democratic countries have much to share with systems possessing a well-established historic legal tradition.

341. Benjamin Akzin, *Codification in a New State: A Case Study of Israel*, 5 AM. J. COMP. L. 44, 53 (1956).

342. *Id.* at 66. See also S. Ginossar, *Israel Law: Components and Trends*, 1 ISR. L. REV. 380, 395 (1966) (arguing that Israeli law aimed to become “[f]ree from the bias of narrow-minded nationalism”).

343. See CC 11646/08 *The Football Association Premier League v. John Doe Tak* (3)09 (Dist TA) 8372 [2009] (Isr.).

344. American influences on Israeli law are not confined to legal reforms only. Law schools in Israel largely resemble their American counterparts. See, e.g., Lahav, *supra* note 26, at 653. This practice produces a legal profession that finds American law the most reliable and approachable foreign source. Given this reliance it is anticipated that the transplantation of American legal principles and departure from Continental principles in Israeli law will only increase. Indeed, a pioneering research study found that the Israeli Supreme Court consistently applies foreign sources. While civil law and international law accounted for a marginal part of citations (on average 0.5% and 0.1% respectively), common law sources accounted for an average of 20.9% of the total cases examined. Yoram Shachar, Ron Harris & Meron Gross, *Citation Practices of the Supreme Court: Quantitative Analysis*, 27 MISHPATIM/HEB. U. L. REV. 119, 152, tbl. 10 (1996) (Heb.). Similar trends were found in a later study. See Yoram Shachar, *The Reference Practices of the Israeli Supreme Court 1950-2004*, 50 HAPRAKLIT 29 (2008) (Heb.).

Binyamin Blum recently examined the Israeli departure from civil law as an inspirational source. Analyzing a landmark case, he remarked that “[t]he Court completely overlooked the experience of Continental European courts,” despite the fact that many civil law jurisdictions could serve a legitimate source because their laws address the legal problem under scrutiny. Blum, *supra* note 26, at 2152.

The Americanization of Israeli law and legal education are only two examples of the way Israeli society, politics, and culture rely on American visions. For further analysis, see, for example, TOM SEGEV, *ELVIS IN JERUSALEM: POST-ZIONISM AND THE AMERICANIZATION OF ISRAEL* (Haim Watzman trans., 2002); Uzi Rebhun & Chaim I. Waxman, *The “Americanization” of Israel: A Demographic, Cultural and Political Evaluation*, 5 ISR. STUD. 65 (2000).

A notable effect of judicial signaling, as Graeme Dinwoodie remarked, is the courts' explicit participation in the process of international norm-creation and enforcement. Courts invite, interpret, and enforce internationally recognized norms and obligations in their rulings,³⁴⁵ in addition to offering the "interpretations of the scope of their national laws that can easily extend their local norms into international space."³⁴⁶ National courts, in other words, provide great support to global efforts in harmonizing copyright law as well as in attracting other systems' interest to follow their doctrinal preferences that may turn into the beginning of global norm-creation.³⁴⁷

By embracing the fair use model and becoming one of the four countries in the world to do so, Israeli courts showed their openness towards foreign and international influences.³⁴⁸ In this way, Israeli courts contribute to the possible making of fair use a global copyright norm. Crafting a system embedded with values from different sources shaped to comply with the needs of a young country is *not* an act of weakness. It conveys social and political power, commitment to global values, and, in the words of Haim Cohn, "the long-range legislation needs of a young state ambitious to be one of the foremost torch-bearers of an enlightened and progressive world community."³⁴⁹

B. Identifying Good Signaling

The above discussion triggers several important questions. Should other jurisdictions learn from Israel? What are the incentives to follow Israel's example? Can Israel become a norm-donor and not only,

345. See, e.g., Graeme B. Dinwoodie, *Foreign and International Influences on National Copyright Policy: A Surprisingly Rich Picture*, in 6 *NEW DIRECTIONS IN COPYRIGHT LAW* 160 (Fiona Macmillan ed., 2007) (examining global changes in intellectual property lawmaking).

346. Graeme B. Dinwoodie, *The International Intellectual Property System: Treaties, Norms, National Courts, and Private Ordering*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA* 61, 100 (Daniel J. Gervais ed., 2007).

347. See, e.g., Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 *U. PA. L. REV.* 469 (2000) (discussing both public and private creation of international copyright law and showing the active role of courts in the design of global norms).

348. As the former President of the Israeli Supreme Court, Aharon Barak once remarked, "I have found comparative law to be of great assistance in realising my role as a judge. The case law of the courts of the United States, Australia, Canada, the United Kingdom, and Germany have helped me significantly in finding the right path to follow." Aharon Barak, *Comparison in Public Law*, in *JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?*, *supra* note 237, at 287, 287. On the use of comparative law by Israeli courts, see Fania Oz-Salzberger & Eli Salzberger, *The Secret German Sources of the Israeli Supreme Court*, 3 *ISR. STUD.* 159 (1998); Renée Sanilevici, *The Use of Comparative Law by Israeli Courts*, in *THE USE OF COMPARATIVE LAW BY COURTS*, *supra* note 237, at 197, 197-98.

349. Haim H. Cohn, *An Introduction into the Law of Israel*, 5 *N.Y. L. FORUM* 1, 7 (1959).

as a young state, a norm-receiver?³⁵⁰ In *The Law of Other States*, Eric Posner and Cass Sunstein pose the question of “whether courts should consult the laws of ‘other states.’”³⁵¹ In particular, they defend the U.S. Supreme Court’s frequent practice of relying on foreign law in its efforts to provide novel interpretations of the Constitution. Applying the Condorcet Jury Theorem, they argue that “[i]f many people have (independently) decided that *X* is true, or that *Y* is good,” then the theory “gives us reason, under identifiable conditions, to believe that *X* is true and that *Y* is good.”³⁵² “Good” can also be used in the sense of reminding courts that better solutions exist elsewhere,³⁵³ or in the sense of acknowledging the normative value of foreign laws. As Justice Kennedy has said, “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”³⁵⁴

These remarks raise two interesting questions relating to fair use transplantation. First, does the fact that only four signatory states to the Berne Convention adopted the fair use system mean that is it not as good as fair dealing systems? Second, should “older” systems consult with the younger ones, such as Israel, with a relatively short experience? Posner and Sunstein correctly contend that “young states have more to learn, and old states have more entrenched practices that are harder to change.”³⁵⁵ However, national and regional movements for legislative and normative reforms in one relatively young system have the capacity to ignite changes in other systems. The change made to the standard of duration of copyrighted works—following the European term Directive³⁵⁶—in the majority of signatory states to international copyright treaties is an immediate good example. The European legal system is young. Leaders of the European Union celebrated its 50th anniversary in 2007. Although it is a union of older civilizations, the actual corpus of European legislation—the

350. See Likhovski, *supra* note 148, at 651.

351. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 131 (2007).

352. See Eric A. Posner & Cass R. Sunstein, *Response: On Learning from Others*, 59 STAN. L. REV. 1309, 1309–10 (2007). They elaborate on the application of the theorem in *The Law of Other States*. See Posner & Sunstein, *supra* note 351, at 138–46.

353. See generally Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

354. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

355. Posner & Sunstein, *supra* note 351, at 173. This is perhaps one of the reasons that U.S. courts relied on foreign law in the nineteenth century more than they do today. See Ulrich Drobnig, *Introduction*, in THE USE OF COMPARATIVE LAW BY COURTS, *supra* note 237, at 1, 21.

356. See Council Directive, 1993 O.J. (L 290) 93/98/EEC.

acquis—is younger than Israel. Nevertheless, it has already influenced the development and revision of international copyright norms.

Adopting legal principles such as fair use without further study is undesirable and, as Giuseppina D'Agostino asserted, “[o]ne must be very careful when importing legal devices from other jurisdictions.”³⁵⁷ Young legal systems cannot provide sufficient information for a comprehensive study regarding their experience. But this should not undervalue the contribution of younger states to influencing the evolution and progression of norms in older systems, as well as in the international arena. The fact that four countries adopted the U.S.-style fair use standard and the fact that the Israeli legislature left the impression that users’ rights form an integral part of the local copyright polity³⁵⁸ show the way in which young systems may convince other systems that adherence to certain norms is to the benefit of their copyright community. The Israeli judicial experience also lends support to scholarly debates that may eventually lead to wide legal revisions. For example, Rochelle Cooper Dreyfuss argues that users’ rights should be made part of the TRIPS Agreement.³⁵⁹ If more countries will embrace users’ rights, similar to Israel, as part of the very definition of copyright, the combination of the young country’s contribution and scholars’ theory can yield substantive results. Furthermore, accepting fair use as the standard while respecting international norms serves as a counterargument to those who criticize fair use doctrines for their violation of international obligations.

When young legal systems choose to follow an established doctrinal pattern borrowed from other systems, they do not put national interests behind a mask of international consensus. They expose “unobservable qualities”³⁶⁰ and disseminate information of alternative ways to follow.³⁶¹ In fact, they contribute to the process necessary for certain norms to become part of the global legal agenda of copyright. If other legal systems found that fair use is not a desirable tool, the fact that young systems did acknowledge its value may trigger global awareness to revisit these findings.

357. D’Agostino, *supra* note 145, at 359. The Singapore experience shows that the local copyright system suffered considerable problems because its courts demonstrate “a reluctance to embrace fully [U.S.] fair use at the risk of causing undue confusion.” *Id.*

358. See *CCH Canadian Ltd. v. Law Soc’y of Upper Can.* [2004] S.C.R. 339, 342 (Can.).

359. See generally Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21 (2004).

360. Likhovski, *supra* note 148, at 623.

361. Logic dictates that “states should consult comparative materials because of the information they convey, and the practices of some states are more likely to convey relevant information than the practices of others.” Posner & Sunstein, *supra* note 351, at 175.

XI. CONCLUSION

Imperial British copyright law universally ended in 2007, with Israel's final departure from the Imperial copyright model. It took Israel almost six decades to declare the end of the model inherited from the British Mandate. In the long absence of guidance from the legislature, courts in Israel were expected to imbue modern life into obsolete laws. Loaded with this task, Israeli courts kept redefining the ideological and legal boundaries of copyright. The judicial transplantation of the American fair use standard and departure from the British fair dealing doctrine is perhaps the court's greatest judicial achievement in copyright.

The examples discussed show that if the general case for copyright is an uneasy one,³⁶² the case for fair use is no different. Courts are expected to guide society's behavior, even when the legal tools chosen are flexible and unpredictable. These doctrinal qualities allow courts to address contemporary problems and maintain a balanced dialogue between authors and users. The enacted fair use model is also a signal to the international community that this model is desirable and commensurate with global obligations and values.

The new Israeli Copyright Act and the jurisprudence of the Israeli Supreme Court do not present an indigenous, home-grown copyright law. Foreign legal systems had a great impact on the evolution of Israeli copyright law. If one tries to purify Israeli copyright law, one is likely to reveal the many historical and ideological layers imported from foreign sources and grown in different constitutional climates. I began this inquiry with the assertion that the history of copyright can tell us many stories. The Israeli version of this story can serve as an illuminating example to other jurisdictions, regardless of their constitutional age or democratic maturity. Norman Bentwich, the High Commissioner to Palestine, wrote in 1924 that "in the sphere of . . . civil law, Palestine will for years to come offer an unexhausted field to the legislator and endless scope to the collector of legal problems."³⁶³ This prediction is aptly captured by the Israeli experience with the fair use doctrine. The Israeli experience exposed the difficulties within fair dealing systems. It highlights why states should not cling dogmatically to their fair dealing tradition, as well as the adverse results that such practice can yield.

362. See generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

363. Norman Bentwich, *The Law and the Courts of Palestine*, 2 CAMBRIDGE L.J. 37, 50 (1926).

Copyright and fair use reform in Israel, whether performed by the courts or the legislature, exemplify how history is a living phenomenon in contemporary copyright. The fair use model that was shaped and that matured in Israel since the inception of the state not only plays an important role in influencing the way we think of copyright law, but also clarifies the questions we ask about it, what we imagine is possible, and, consequently, what we demand of copyright on fair terms.