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LIMITATIONS AND EXCEPTIONS IN THE DIGITAL ERA

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ABSTRACT

*Ideological polarization has hijacked copyright debates, drowning out the question: how do we get our copyright laws to do what we want them to do? The term “limitations and exceptions” assumes that the ability to control all unauthorized uses is the norm. This special comment asserts that private rights should never trump public interest, and that our copyright laws must reflect this principle. Copyright law must be grounded in current technological and market conditions in order to accomplish its lofty objectives. Even as changes wrought by digital technology are at the core of most debates over copyright, there is a failure to grasp the profundity of these changes and the challenges they pose. We need dynamic laws in order to encourage creativity on the internet. Properly structured copyright laws would enable desirable behaviour in a world that technology is changing faster than ever before. It is argued that guiding principles such as fair use should be the bases for adjudication and not statutory straitjackets, as is already the case in legal regimes supporting the most advanced technology sectors, in India and the U.S.A. Though legislative and judicial understandings are not always at par in their level of progression, even judicial interpretation in light of broad principles as opposed to a closed list is a step in the right direction because we need transformative laws to regulate the transformative world we live in.*

Copyright debates around the world have been hampered by polarizing ideological debates, losing sight of the only relevant question: how do we get our copyright laws to do what we want them to do? We should figure out how we want our copyright laws to work, stripped of rhetoric that tries to shape the end result before we have even begun.

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The term “limitations and exceptions” is just such a rhetorical device, although it seems innocuous enough at first glance. The term assumes a natural state of affairs where the ability to control all unauthorized uses is the norm: limitations and exceptions are limitations and exceptions *from* something after all, and that something is believed to be a world in which exclusive rights are the unfettered ability to exclude others from using the copyrighted work, no matter the social utility of the use.

Of course, all copyright systems allow some unauthorized uses, but the point is that the ‘limitations and exceptions’ rhetoric attempts to restrict such uses to the minimum and to place a heavy burden on the passage of new ones. Harvard Law School professor Joseph Singer noted this phenomenon in connection with property claims:

[W]e imagine those limits to be exceptions to the general rule that owners can do whatever they want with their property. The burden is always on others (meaning non-owners or the state) to explain why the owner’s rights should be limited, and in today’s political climate that burden is heavy.<sup>1</sup>

If ownership means presumptive control by an owner, and if the existence of ownership rights is a good thing, then limitations on the rights of the owner must be justified by sufficiently strong presumptions of legitimacy.<sup>2</sup>

In copyright law, we see this approach in statements that limitations and exceptions will be allowed, only if “there is a public interest ... that justifies overriding the private rights of authors in their works in ... particular circumstances.”<sup>3</sup> Private rights should never trump the public interest, and nor should a heavy burden be necessary to enact laws that further the public interest. Laws exist only to further the public interest.

While private rights thoughtfully crafted can be important and further public interest, there is no such thing as copyright rights privately created and privately enforced. Copyright is created by public officials in the government for public

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<sup>1</sup> Joseph Singer, ENTITLEMENT: THE PARADOXES OF PROPERTY 3 (2000).

<sup>2</sup> *Id* at 4.

reasons and is enforced by public laws and by public judges. Copyright laws are created as an entire fabric consisting of certain entitlements given to copyright owners, and certain entitlements given to the public. There is no support for treating any one entitlement as more privileged or important than another.

Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit in Manhattan made this point in talking about the important role of transformative, unlicensed fair uses in furthering the goals of creativity: “Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.”<sup>4</sup> The Canadian Supreme Court took the same approach in *CCH Canadian Ltd. v. Law Society of Upper Canada*,<sup>5</sup> where Chief Justice McLachlin wrote:

Before reviewing the scope of the fair dealing exception under the Copyright Act, it is important to clarify some general considerations 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. As Professor Vaver, *supra*, has explained at p. 171: “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”<sup>6</sup>

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<sup>3</sup> Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright Related Rights in the Digital Environment, Standing Committee on Copyright and Related Rights, 9th Sess., Geneva, June 23 to June 27, 2003, SCCR/9/7 (Apr. 5, 2003). It should be noted that Professor Ricketson was referring principally to the civil law tradition. Professor Ricketson’s view was challenged by a number of prominent European experts in a July 17, 2008 declaration. Max Planck Institute for Intellectual Property and Competition Law, *A Balanced Interpretation of the ‘Three-Step’ Test in Copyright Law*, available at [http://www.ip.mpg.de/ww/en/pub/news/declaration\\_on\\_the\\_three\\_step\\_cfm](http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_cfm). (last visited Jul. 24, 2011).

<sup>4</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

<sup>5</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

<sup>6</sup> *Id.* at ¶ 48.

If we had only authorized creativity, we would live in a very sterile world: few government figures and few copyright owners are fond of others satirizing them. Few businesses are willing to let competitors thrive rather than try to eliminate them through any means possible, including through misuse of the copyright laws.

At one level asking what we want copyright to do and how to do that in practice sounds silly, since we all know what we want copyright laws to accomplish: to promote creativity and innovation, provide the public access to work and create jobs, to name the major objectives usually cited. These are lofty goals and we should all endorse them as they represent positive contributions to society. However, their loftiness disguises significant flaws: we rarely, if ever, take the time before drafting particular copyright laws to see whether they are capable of accomplishing what we want them to do, and we rarely check after we have passed those laws to see if they lived up to their promise. Instead, we simply pass new laws. Want more works? Extend the term of copyright. Want to stop people from copying? Add more penalties. We don't sit down before and examine whether a term of protection of life of the author plus 70 years will really cause a single work to be created beyond what a term of life of the author, plus 50 years, would not. We do not sit down before and examine whether putting someone in prison for 10 years will cause them not to copy, whereas 5 years in prison would not make them stop. Our laws need to be based on evidence, not rhetoric or ideology.

Part of grounding our laws in evidence is grounding them in current technological and market conditions. Much of the Indian copyright law is 50 years old, although there were amendments in 1994 and 1999.<sup>7</sup> Many of the foundational elements in all of the world's copyright laws are centuries old, and have proven to be highly resistant to adaptation. The biggest failure of adaptation has been in the failure to realize the profound changes wrought by digital technology, even as those challenges are at the core of most current debates over copyright.

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<sup>7</sup> Indian Copyright Act, 1957, amended by the Copyright (Amendment) Act, 1994 and the Copyright (Amendment) Act, 1999. The Copyright (Amendment) Bill, 2010 has not yet been passed by the Rajya Sabha.

Unlike the analog world of scarcity where the costs of production and distribution of hard copy led to control over copyrighted works by a few, we now live in a world of digital abundance. Laws made for the world of analog scarcity cannot effectively regulate a world of digital abundance. It makes no sense to retain laws written to regulate the turn of the 18<sup>th</sup> century London book trade, for 21<sup>st</sup> century global markets. The differences begin with the change in the role of consumers. The passive role formerly assigned to consumers in the analog world no longer holds: at the production level, authors and performers have the opportunity to create a finished product and reach audiences directly, outside of the control of the traditional gatekeepers. Millions of other people around the world can act as their own creators, producers and distributors (via websites and social networks). We live in a world of unparalleled democratic creativity.

Copyright is meant to encourage creativity. You cannot encourage creativity, though, if you have to first ask permission before you make any reference to another's work, or if you have to first pay lawyers to decide whether you need to ask permission. Internet search engines provide one example of how copyright laws have to adapt to permit conduct we should all agree is desirable. The ability to search for lawfully made images, video, music, and textual content involves making a copy of that content. Search engines crawl the web constantly and make copies of the entire web (unless individual sites are password protected or blocked through the use of simple, readily available software code such as robots.txt.). These pages are then analyzed and ranked; links are provided to a user in response to a query. Search engines often provide a snippet from relevant websites so that users can decide which sites to access, including thumbnails of images. These snippets are similar to library card catalogues and should be exempt under fair use, fair dealing, code-based exemption provisions, or doctrines such as implied consent. The back-end copying of the web – necessary for indexing – must be exempt too in order for consumers to be able to see the snippets in response to their queries. Without that back-end copying, search – which relies on indexing – is impossible.

When you view a webpage, your browser needs to make a local copy of the page on your computer. In order to transfer data across the Internet, data “packets” are sent between Internet service providers' routers. In effect, this

means that the router makes and sends a copy of the “packet” to the next router in the chain, and so on until it reaches its recipient. Email servers must make copies of messages in order to transfer them from sender to recipient. Video streaming sites must temporarily store (cache) and buffer copies or portions of the audiovisual works being streamed in order to present an uninterrupted viewing experience.

These are all socially desirable uses, that not only do not harm the market for copyrighted works, but increase their market by connecting potential purchasers to rights holders. It does not matter whether one calls such uses fair uses, fair dealing, or anything else: what matters is that we identify the behavior we wish to encourage and then enact laws that enable that behavior. Everything else is a distraction: whether the reproduction right, the making available right, the performance right or any other right, is “implicated,” should be a non – issue. Whether this technology or that technology is used, should be irrelevant. Law is an end to a means, not an objective in itself, and copyright laws are similarly situated. They are not an end in themselves, but rather a means to socially desirable behavior. Focusing on behavior, not rights, not entitlements, and not technologies will go a long way toward making our copyright laws effective. Adopting dynamic legal doctrines like fair use, that can quickly respond to changes in behavior, rather than waiting for governments to legislate permitted innovation, is also critical. Static legal rules cannot further dynamic, creative and technological markets.

If our goal is to encourage creativity, we must adapt copyright laws to the actual ways people create now, and to the actual markets now for that creativity. Technology, and the market changes brought by technology, are creating new paths, and require new business models. Dr. Francis Gurry, Director General of the World Intellectual Property Organization, has argued that successful copyright policy has to be based on neutrality to technology and to business models, and should not “preserve business models established under obsolete or moribund technologies.”<sup>8</sup>

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<sup>8</sup> Dr. Francis Gurry, *The Future of Copyright*, Speech Delivered at the WIPO Blue Sky Conference on Future Directions in Copyright Law, Sydney, Australia (Feb. 25, 2011) available at [http://www.wipo.int/about-wipo/en/dgo/speeches/dg\\_blueskyconf\\_11.html](http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html) (last visited Jul. 18, 2011).

Yet, ordinary people, using the Internet and digital applications in ordinary ways, are unwittingly engaging in massive copying on a daily basis simply because of the way those technologies function. For good reason, the Internet has been called a giant copying machine, copying, of necessity, every step we take.<sup>9</sup> Copyright laws that make such ordinary, everyday things, acts of infringement, make no sense.

At the same time, and paradoxically, we are fast approaching an era when there will be copyright laws *without* copying. The increasing streaming of works to consumers rather than selling physical media like DVDs or CDs, as well as accessing works stored in the cloud (on someone else's computer servers) rather than owning your own copy, represent significant changes to consumer habits, and open up the possibility for a true global distribution of culture, since streaming and cloud computing are not dependent upon physical stores or national boundaries. They also represent a way for copyright owners to significantly reduce costs of production and distribution and to reach much larger audiences.

In order to make possible the broad, social goals of copyright, we need laws that give courts guiding principles to decide disputes, rather than statutory straitjackets. Straitjackets consist of narrow lists, drawn up by government officials, of which types of (unlicensed) creativity are permitted. The idea that government officials can effectively formulate and execute a creativity – centralized command system in which all permitted uses can be carefully spelled out in advance, is to believe that the Soviet planned economies were a rousing success.

A top – down copyright regime in which creative acts are limited to those few acts the government has by regulation permitted, inhibits, rather than maximizes, cultural democracy. This regrettable approach is, however, the approach currently taken in many countries of the world. Raising the specter of an allegedly dangerous approach, the ominous “U.S. – style fair use”, defends the straitjacket, government – approved approach to creativity.

The fair use privilege was originally created in the 18<sup>th</sup> century by English common law judges, but now has its most well – known home in Section 107

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9 See “Better Than Free,” THE TECHNIUM (Jan. 31, 2008), [http://www.kk.org/thetechnium/archives/2008/01/better\\_than\\_fre.php](http://www.kk.org/thetechnium/archives/2008/01/better_than_fre.php) (last visited Jul. 18, 2011).

of the U.S. Copyright Act.<sup>10</sup> Section 52(1) of the Indian Copyright Act has a similar, although somewhat more limited provision. Israel's fair use provision is the closest to that found in the U.S.

Fair use consists of principles, not rules, and its goal is to ensure that creativity flourishes in the face of overly exuberant exclusive rights. Fair use is not a blank ticket for all unauthorized uses, though; it is instead, a tool to further socially beneficial behavior. Sometimes this means that a plaintiff bringing an infringement claim against an unauthorized user wins and gets to stop that use because fair use is rejected. Sometimes this means that the unauthorized user wins and gets to continue his or her use without permission and without payment because fair use is found. The public always wins.

Fair use determinations are always made on a case – by – case basis because creativity does not come in cookie – cutter forms; creativity is messy and unless the law takes that messiness into account, the law will stifle creativity. Over the centuries, four factors have come to be seen as important to the fair use analysis, but not exclusively so and not all four are always important in every case. The first fair use factor is the nature and purpose of defendant's use. This factor examines how and why the copyrighted work was used. This inquiry helpfully goes beyond the mere fact that a use is unauthorized, and instead drills down into the reasons for the use. The second factor examines the nature of the copyrighted work. Is the plaintiff's work a factual work and of a kind it is typical to quote from or adapt? This factor is relatively unimportant because it is common for factual works to quote from other factual works and for non-factual works (like musical works) to copy from other non-factual works. It is uncommon for a song to copy scientific descriptions from a journal article, but it is common for one musical composition to copy from another musical composition. The third factor looks at how much of the copyrighted work was copied. Did the defendant take only enough of the work to suit his or her legitimate purpose, or did the defendant pig out and take as much as he or she wanted out of laziness?

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<sup>10</sup> The general distinction between an exemption and a privilege is that with an exemption if you fall into a class of people covered by the exemption you are entitled to its benefits. With privileges, there is no class-based entitlement; rather, each person must prove their entitlement on an ad hoc basis. The distinction does not hold in all cases, though.

The fourth fair use factor is concerned with the effect of defendant's work on plaintiff's market for its work. This factor attempts to evaluate whether the use is of a type we wish copyright owners to control. Parody, satire, book reviews, and many educational uses fall outside of areas we want copyright owners to control. Verbatim copying that acts as a substitute for the original is the type of use we want copyright owners to be able to stop, if they choose.

Fair use, with its ability to flexibly adapt to changes in technologies and markets, has permitted innovative companies to offer products and services that would not have been possible in other countries. It is not accidental that U.S. and India (which has a fair use regime as well) are home to the world's most advanced Internet technologies and skilled tech sector employees. Those who speak of encouraging innovation and job creation but insist on "strong" intellectual property laws miss this obvious reality: it is not strong intellectual property laws that have made possible these innovative services, but the opposite: fair use and other legal doctrines (such as implied license) that have been flexibly applied in order to allow technological sector companies to operate effectively.

Critics of the fair use doctrine point to the alleged "open-ended" nature of fair use and assert that it lacks certainty. The term open-ended is used here as a derogatory synonym, as without boundaries or without any guidance; the term open-ended is used to conjure up fears that one simply never knows what a U.S. court might do. Those who take this position do not point to any particular decisions of U.S. courts as going "off the deep-end", as having come to a decision that was reached only because U.S. courts allegedly have unfettered rights to do whatever they want. Instead, the claims are theoretical: "a U.S. court *could* go crazy", a claim that could apply to all courts.

Describing the fair use regime as open – ended in the sense of "anything goes" is inaccurate. As an initial matter, the description ignores that the essentials of copyright infringement actions in all countries – even those vehemently opposed to fair use are equally open – ended. Whether something is unprotectable fact or protectable expression is open-ended in this same sense. Whether one movie or novel infringes another is based on whether the two works are substantially similar, also an open – ended inquiry. Whether the two works are substantially similar in expression depends on how much copyrighted expression

was taken. How much copyrighted expression was taken involves both quantitative and qualitative assessments. Whether an artist's honor or reputation has been harmed by an unauthorized use is as open-ended an inquiry as exists in copyright law, yet European policy makers and copyright owners passionately argue in favor of such inquiries. Fair use inquiries are of exactly the same nature and usually involve the same questions as those open-ended inquiries that routinely take place under European copyright laws. The third fair use factor examines how much of the copyrighted work was taken. This is the exact same inquiry undertaken in the basic infringement analysis. The fourth fair use factor examines the impact of the use on the market for the copyright owner's work. This is the same inquiry undertaken at the damages phase of an infringement analysis. The first fair use factor examines the purpose of the use, which is also relevant for defenses such as parody or satire. The second fair use factor examines the nature of the copyrighted work, which is also relevant in the infringement analysis for determining what protectable expression is and what is not. The differences between the basic infringement analysis and fair use analysis, where they exist at all, are a matter of degree and not kind.

Nor are judges free to do whatever they wish in making fair use determinations. The fair use analysis in Section 107 of the U.S. Copyright Act merely recognizes in the statute the common law fair use doctrine. Section 52(1) of the Indian Copyright Act is to the same effect (even though the statute refers to fair dealing, the Indian courts have used the terms fair dealing and fair use interchangeably, unlike U.K. courts). The common law doctrine of fair use has developed over two centuries of case law, over the course of which it has given rise to a coherent set of principles, found in a number of other national statutes. In practice, U.S. and Indian courts, like all common law courts, are governed by precedent. Hierarchically, decisions of the U.S. Supreme Court govern all lower courts, and decisions of the circuit courts of appeal govern all decisions of trial courts within that circuit. The U.S. Supreme Court has heard a number of fair use cases. I am unaware of a single complaint about how the *results* reached in those cases would be incompatible with international law.<sup>11</sup> The same holds true for decisions of the lower courts.

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<sup>11</sup> Professor Ruth Okedjii has argued that the indeterminacy and breadth of fair use are inconsistent with the Berne Convention and the TRIPS Agreement in Ruth Okedjii, *Toward an International Fair Use Doctrine* 39 COLUM. J. TRANSNAT'L L. 75, 117 (2000). However, I do not share this view nor does the reputed Berne scholar Professor Sam Ricketson.

Criticizing a legal doctrine because in some dispute in the future, some court *might* reach a result that some *might* disagree with, misapprehends the rule of law, and is equally a problem in countries that have closed lists, i.e., enumerated lists of permitted uses. Uses not on the list are infringing. Closed lists are defended in part by claiming they provide certainty. The claim of certainty, however, is a myth. Having a closed list is no guarantee that a correct decision will be reached in construing whether a particular use qualifies or not. There is no guarantee that a court in Australia, Canada, or the U.K. interpreting fair dealing statutes will not adopt an interpretation that is too restrictive or too liberal from the standpoint of the legislators who enacted them.

There are a number of other problems with closed lists of permitted uses. First is the inherent problem of legal indeterminacy: lists of enumerated uses require words to specify which uses are permitted. It is very difficult to select words that have the necessary precision so that courts need not interpret and reinterpret them; and potential litigants can easily determine their meaning *before* engaging in desired conduct. Here is an example of a permitted use from a closed list that is ambiguous: “research.” Does “research” encompass both commercial and non-commercial research? Does it permit the copying of entire works or only parts, and if the latter, how do you know how much you can copy? Does the exemption apply when the copyright owner has established a market for the work(s) in question, or only when there is no such market? Does the existence of a potential license constitute such a market, and regardless of the terms of the license? Can a party who is entitled to the research privilege hire a third party to do the copying for them? These are only a few of the ambiguities.

The answers to those ambiguities cannot be answered merely by pointing to the presence or absence of “research” on a closed, exhaustive list of privileges. The answers will be given according to other principles, principles not found in the list, but which rather animate all copyright laws: is the use in the broad, social interest? The alleged sharp divide between the approach found closed lists and fair use does not exist when it comes to the type of inquiry judges are required to undertake.

There is, however, a very sharp divide between the flexibility found in fair use and the top-down approach imposed by European Union directives. That

divide greatly inhibits creativity and innovation in the European Union and therefore gives U.S. companies a distinct advantage. As British Prime Minister David Cameron observed in November 2010, while referring to U.S. law and calling for a review of English copyright law: “Over there, they have what are called ‘fair-use’ provisions, which some people believe gives companies more breathing space to create new products and service... I want to encourage the sort of creative innovation that exists in America”<sup>12</sup> (he could have added India and Israel as well). The irony of course is that fair use was a British invention.

Closed lists must be regularly updated on the penalty of crushing technological or market innovations: no legislature, no matter how careful or insightful, can think of all current uses, much less think of uses, technologies, or markets that are not yet in existence. In the past, technologies and therefore business models, changed slowly. This is no longer the case. The rapid pace of technological innovation brought about by the Internet and digital tools has radically collapsed the time lines for businesses to adapt and therefore for laws that seek to regulate business issues arising on the Internet. Static laws that attempt to establish for all time the rules governing technological and market innovation will impede that innovation. This does not mean the Internet should be without regulation, but it does mean that the nature of the Internet must be taken into account when framing regulations for it.

A principal attribute of the Internet is its unplanned, distributed nature, with distributed here meaning multiple autonomous computers and software interacting without a central command. The lack of a central plan and command has made the spectacular growth of the Internet possible, and it is what makes the creativity on the Internet so exciting too: creativity is now something we all can engage in, without regard to borders and without having to go through gatekeepers. Creativity is no longer a central command activity; it is dynamic. Being dynamic, if we want to encourage the new creativity, we need dynamic, flexible laws.

The flexibility of fair use is particularly suited for inherently dynamic situations. Closed lists are particularly suited for static situations. We should

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<sup>12</sup> “UK Copyright Laws to be Reviewed, Announces Cameron”, BBC, <http://www.bbc.co.uk/news/uk-politics-11695416> (last visited Jul. 18, 2011).

not choose between these two approaches since they address very different fact situations. We need fair use because there are many situations that are dynamic. You cannot legislate detailed rules to decide dynamic situations; you can only set forth guiding principles. Fair use is precisely such a set of principles, principles that have been tested in the forge of thousands of court cases and opinions. Fair use works in dynamic situations because dynamic situations require dynamic legal principles.

Culture is usually dynamic; we may have established, canonical works, but at one time they were not canonical: they were the new works on the block. All new works either build on works of the past or are understood in context with the present and the past in a dynamic relationship. If we want to further culture, we need dynamic laws. Dynamic laws tailored to the dynamic nature of creativity do not mean an absence of guidelines. First of all, there are some fairly static situations, situations with identifiable fact patterns. For example, where a consumer buys a lawfully made hard copy of a book, the consumer should be able to subsequently give away or sell that copy. Or, where a newspaper is reviewing a book, the reviewer should be able to quote from the book to explain points made in the review. In such situations, concrete exemptions, whether contained on a list or otherwise, are desirable. Where we can identify recurring problems, we should provide specific guidance.

But static fact patterns are not the norm in copyright because of the dynamic nature of creativity, technology and markets. At the same time that copyright is touted as leading to innovation – which is inherently dynamic – the uses necessary to allow such innovation are foreclosed by static, closed lists of permitted uses. It is not at all coincidental that vested rights holders interests favour closed lists while innovative Internet companies favour fair use. As Dr. Francis Gurry cautioned, “Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests.”<sup>13</sup>

The current provisions in Section 52(1) of the Indian Copyright Act provide a list of statutory defenses. As in the U.S., which has a fair use defense in Section 107, followed by a series of exemptions and statutory licenses in Sections 108

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<sup>13</sup> Gurry, *supra* note 8.

through 122, there are also numerous exemptions in the remainder of Section 52 and in Section 52A. Indian legislators have proposed amendments that seem positive. In particular, the proposal for a consolidated fair dealing provision, extending it to “any work”, rather than, as present, only to literary, dramatic, musical or artistic works, is indeed welcome, as is the liberalizing of the news reporting defense. At the same time, the Indian statute and proposals lack, in my opinion, the more flexible approach found in U.S. fair use and permitted by the Berne three-step test. In this respect, Indian courts appear to be ahead of U.S. courts, citing Judge Leval’s article on transformative uses.<sup>14</sup> For example, in *Chancellors, Masters and Scholars of Oxford University v. Narendera Publishing House*,<sup>15</sup> the High Court of Delhi wrote:

32. Copyright law is premised on the promotion of creativity through sufficient protection. On the other hand, various exemptions and doctrines in copyright law, whether statutorily embedded or judicially innovated, recognize the equally compelling need to promote creative activity and ensure that the privileges granted by copyright do not stifle dissemination of information. Two doctrines that could immediately be summoned are the idea-expression dichotomy and the doctrine of fair use or fair dealing. Public interest in the free flow of information is ensured through the idea-expression dichotomy, which ensures that no copyright is granted in ideas, facts or information. This creates a public pool of information and idea from which everyone can draw. At the same time, as Judge Leval observes, all creativity is in part derivative, in that, no creativity is completely original; each advance stands on building blocks fashioned by prior thinkers (Bernard Shaw expressed it by saying that Shakespeare was a tall man, but he (Shaw) was taller as he stood on Shakespeare’s shoulders). Judge Leval further observed that most important areas of intellectual creativity like philosophy, literature and sciences are referential, and require continuous re-examination of existing theses.

33. The doctrine of fair use then, legitimizes the reproduction of a copyrightable work. Coupled with a limited copyright term, it

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<sup>14</sup> Leval, *supra* note 4.

<sup>15</sup> *Chancellors, Masters and Scholars of Oxford University v. Narendera Publishing House* 2008 (106) D.R.J. 482.

guarantees not only a public pool of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. Fair use provisions, then must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain. Section 52 therefore cannot be interpreted to stifle creativity, and the same time must discourage blatant plagiarism. It, therefore, must receive a liberal construction in harmony with the objectives of copyright law. Section 52 of the Act only details the broad heads, use under which would not amount to infringement. Resort, must, therefore be made to the principles enunciated by the courts to identify fair use.

The judgment in *Narendera Publishing* is not an outlier, and in common law tradition, is built on previous Indian High Court decisions, including *Syndicate of the Press of the University of Cambridge v. B.D. Bhandari*,<sup>16</sup> *Civic Chandran v. Ammini Amma*,<sup>17</sup> and *Blackwood & Sons v. A N Parasuraman*.<sup>18</sup> These cases illustrate that it is not the name given to a provision, but rather its purpose and application.

The Parliament could further these developments by amending Section 52(1) by adding the following provision

(iv) other uses, including transformative uses, that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.

This provision would be consistent with India's international obligations, India's own case law, and the efforts of forward thinking judges like Judge Leval and Chief Justice McLachlin. We live in a transformative world and need transformative laws.

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<sup>16</sup> *Syndicate of the Press of the University of Cambridge v. B.D. Bhandari*, M.I.P.R. 2009 (2) 60.

<sup>17</sup> *Civic Chandran v. Ammini Amma*, 1996 (16) P.T.C. 670 (Kerala High Court).

<sup>18</sup> *Blackwood & Sons v. A N Parasuraman*, A.I.R. 1959 Mad 4.