FAIR USE AND ITS GLOBAL PARADIGM EVOLUTION

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This Article closely examines the transplant of the fair use model in U.S. copyright law on to foreign soil. It begins by reviewing the literature concerning paradigm shift, in particular Thomas Kuhn's seminal work. The Article then documents a growing trend toward the worldwide adoption of the U.S. fair use model and a countertrend toward the retention of the status quo. The juxtaposition of these two trends explain why jurisdictions that set out to transplant U.S.-style fair use ended up adopting a hybrid model. The second half of this Article interrogates the different primary causes behind such a paradigm evolution. While many possible factors exist within and outside the legal system, the discussion focuses on those relating to intellectual property law, international and comparative law, and the legislative process. The Article concludes with recommendations concerning future efforts to broaden copyright limitations and exceptions in the United States and across the world. Specifically, it outlines six courses of action that seek to improve these reform efforts. It further identifies three modalities of evolution that can help tailor the transplanted fair use paradigm to local needs, interests, conditions, and priorities.

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TABLE OF CONTENTS

I. INTRODUCTION 112
II. PARADIGM SHIFT 118
A. *Theory* 118
B. *Crisis* 120
C. *Old Paradigm* 124
D. *New Paradigm* 127
III. PARADIGM EVOLUTION 128
A. *Trend Toward a Paradigm Shift* 128
1. *Common Law Jurisdictions* 128
2. *Civil Law Jurisdictions* 133
3. *Summary* 137
B. *Countertrend Toward the Retention of the Status Quo* 137
IV. PRIMARY CAUSES 141
A. *Intellectual Property Law* 142
B. *International and Comparative Law* 144
C. *Legislative Process* 148
D. *Summary* 155
V. RECOMMENDATIONS 155
A. *Courses of Action* 156
B. *Modalities* 160
1. *Standardizing Rules* 160
2. *Rulifying Standards* 164
3. *Institutionalizing Hybrids* 166
VI. CONCLUSION 168

I. INTRODUCTION

Legal paradigms shift in response to political, economic, social, cultural, and technological conditions.[1] Oftentimes, this shift is endogenous, with developments driven by such forces as changes in local conditions or active lobbying by domestic, or even foreign, industries.[2] At other times, however, the shift is

1. *See generally* Monroe E. Price, *The Newness of New Technology*, 22 CARDOZO L. REV. 1885 (2001) (discussing the conceptualization, evaluation, and manifestation of technological change in the process of reshaping laws and institutions).

2. *See generally* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) [hereinafter LESSIG, FREE CULTURE] (articulating the needs for developing a free culture movement); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001) (lamenting how the expansion of intellectual property laws has stifled creativity and innovation); JESSICA LITMAN, DIGITAL COPYRIGHT (2001) (detailing the expansion of copyright laws in the United States in the past two centuries); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001) (describing how the increasing corporate control over the use of software, digital music, images, films, books, and academic materials has steered copyright law away from its historical design to promote creativity and cultural vibran-

exogenous, largely a result of what comparative law scholars have widely referred to as "legal transplant"[3]—the process by which legal paradigms, rules, norms, practices, or values are being "imported" from abroad.[4]

At the global level, power asymmetry has caused legal paradigms to diffuse from developed to developing countries. In the intellectual property area, the most widely cited example is the effort by the European Union, Japan, and the United States to transplant high intellectual property standards on to developing countries through the Agreement on Trade-Related Aspects of Intellectual Property Rights[5] ("TRIPS Agreement") of the World Trade Organization ("WTO").[6] A more recent example is the developed countries' aggressive use of bilateral, regional, and plurilateral trade agreements to push for even higher intellectual property standards in developing countries.[7] Among the more controversial examples are the Anti-Counterfeiting Trade Agreement[8] ("ACTA"),

cy); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) [hereinafter Litman, *Copyright, Compromise*] (discussing the public choice problems in the copyright lawmaking process).

3. For discussions of legal transplant, see generally ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993); Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, *in* GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 20 (Nari Lee et al. eds., 2016) [hereinafter Yu, *Transplant and Transformation*]; Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199 (1994); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 INTELL. PROP. J. 175 (2014) [hereinafter Yu, *Canadian UGC Exception*]; Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693 (2010) [hereinafter Yu, *Digital Copyright Reform*].

4. *See* Geller, *supra* note 3, at 199 (defining "legal transplant" as "any legal notion or rule which, after being developed in a 'source' body of law, is . . . introduced into another, 'host' body of law").

5. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

6. *See generally* DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 3–27 (3d ed. 2008) (describing the origins and development of the TRIPS Agreement); DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT (2002) (examining the role of intellectual property industries in the TRIPS negotiations); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 96–120 (2003) (recounting the trilateral intellectual property discussions among the United States, the European Union, and Japan); JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 11–47 (2001) (recounting the negotiation process for the TRIPS Agreement); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371–79 (2006) [hereinafter Yu, *TRIPS and Its Discontents*] (examining four different accounts of origins of the TRIPS Agreement).

7. *See generally* INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (collecting essays that discuss free trade agreements in the intellectual property context); Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.–Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL'Y 259 (criticizing the Australia–United States Free Trade Agreement); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 392–400 (2004) [hereinafter Yu, *Currents and Crosscurrents*] (discussing the growing use of bilateral and regional trade agreements to push for higher intellectual property standards).

8. Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 I.L.M. 243 (2011). For the Author's discussions of ACTA, see generally Peter K. Yu, *The ACTA/TPP Country Clubs*, *in* ACCESS TO INFORMATION AND KNOWLEDGE: 21ST CENTURY CHALLENGES IN INTELLECTUAL PROPERTY AND KNOWLEDGE GOVERNANCE 258 (Dana Beldiman ed., 2014) [hereinafter Yu, *ACTA/TPP Country Clubs*]; Peter K. Yu, *ACTA*

the Trans-Pacific Partnership ("TPP")[9]—now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP")[10]—and the proposed Regional Comprehensive Economic Partnership ("RCEP").[11]

Thus far, legal paradigms have moved from developed to developing countries, but rarely in the opposite direction.[12] Such one-sided diffusion is understandable. As Thomas Kuhn stated in the postscript of his seminal work, *The Structure of Scientific Revolutions*,[13] paradigms are "exemplars."[14] Because developing countries have limited geopolitical power, economic resources, and

and Its Complex Politics, 3 WIPO J. 1 (2011); Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA 239 (2012); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011) [hereinafter Yu, *Six Secret Fears*].

9. Trans-Pacific Partnership Agreement, Feb. 4, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text. For the Author's discussions of the TPP, see generally Yu, *ACTA/TPP Country Clubs*, *supra* note 8; Peter K. Yu, *TPP, RCEP, and the Crossvergence of Asian Intellectual Property Standards*, *in* GOVERNING SCIENCE AND TECHNOLOGY UNDER THE INTERNATIONAL ECONOMIC ORDER: REGULATORY DIVERGENCE AND CONVERGENCE IN THE AGE OF MEGAREGIONALS 277 (Peng Shin-yi et al. eds., 2018) [hereinafter Yu, *TPP, RCEP, and Crossvergence*]; Peter K. Yu, *TPP, RCEP and the Future of Copyright Norm-setting in the Asian Pacific*, *in* MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC: JUXTAPOSING HARMONISATION WITH FLEXIBILITY 19 (Susan Corbett & Jessica C. Lai eds., 2018) [hereinafter Yu, *TPP, RCEP and Copyright Norm-setting*]; Peter K. Yu, *Thinking About the Trans-Pacific Partnership (and a Mega-Regional Agreement on Life Support)*, 20 SMU SCI. & TECH. L. REV. 97 (2017) [hereinafter Yu, *Thinking About TPP*]; Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L.J. 1129 (2014).

10. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, https://www.
mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text; *see also CPTPP v. TPP*, N.Z. MINISTRY FOREIGN AFF. & TRADE, https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/cptpp-2/tpp-and-cptpp-the-differences-explained/ (last visited Nov. 10, 2018) (explaining the differences between the TPP and the CPTPP); Yu, *Thinking About TPP*, *supra* note 9, at 104–06 (discussing the CPTPP).

11. *See* ASEAN Plus Six, *Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership* (Nov. 20, 2012), https://dfat.gov.au/trade/agreements/negotiations/rcep/news/Documents/joint-declaration-on-the-launch-of-negotiations-for-the-regional-comprehensive-economic-partnership
.pdf (launching the RCEP negotiations). For the Author's analysis of the RCEP, see generally Yu, *TPP, RCEP, and Crossvergence*, *supra* note 9; Yu, *TPP, RCEP and Copyright Norm-setting*, *supra* note 9; Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT'L L. 673 (2017).

12. See sources cited *supra* note 3.

13. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 187 (3d ed. 1996). This postscript did not appear in the original edition, but was added a few years later in the second edition. *See* Cathleen C. Loving & William W. Cobern, *Invoking Thomas Kuhn: What Citation Analysis Reveals About Science Education*, 9 SCI. & EDUC. 187, 188 (2000) (recalling "there is the original 1962 edition, the revised 1970 edition with postscript, and a 1996 third edition with an index added").

14. As he elaborated:

> Because the term has assumed a life of its own, . . . I shall here substitute "exemplars." By it I mean, initially, the concrete problem-solutions that students encounter from the start of their scientific education, whether in laboratories, on examinations, or at the ends of chapters in science texts. To these shared examples should, however, be added at least some of the technical problem-solutions found in the periodical literature that scientists encounter during their post-educational research careers and that also show them by example how their job is to be done. More than other sorts of components of the disciplinary matrix, differences between sets of exemplars provide the community fine-structure of science.

KUHN, *supra* note 13, at 187; *see also id.* at 23 ("Paradigms gain their status because they are more successful than their competitors in solving a few problems that the group of practitioners has come to recognize as acute.").

legal capabilities, they rarely succeed in developing exemplar models or best practices that attract the attention of developed countries, not to mention their eventual adoption.[15]

Nevertheless, some transplants from developed countries do involve legal paradigms that align well with the needs, interests, conditions, and priorities of developing countries. A case in point is the transplant of the fair use model in U.S. copyright law, which has attracted considerable debate, research, and policy attention in the past few decades.[16] At the time of writing, Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka, and Taiwan have adopted the fair use regime or its close variants.[17] Australia, Hong Kong, and Ireland have also explored whether they should follow suit.[18] In addition, there

15. The closest example is what some commentators have referred to as the "Beijing Consensus." For discussions of the Beijing Consensus, see generally THE BEIJING CONSENSUS?: HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT (Chen Weitseng ed., 2017); STEFAN A. HALPER, THE BEIJING CONSENSUS: HOW CHINA'S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY (2010); JOSHUA COOPER RAMO, THE BEIJING CONSENSUS (2004). Nevertheless, China's unique conditions have made the country not an ideal example. Even though it is still a developing country and has a low gross domestic product per capita, it has the world's second largest, or largest, aggregate economy, depending on one's metrics or methodology. *See* Joseph E. Stiglitz, *The Chinese Century*, VANITY FAIR (Jan. 2015), https://www.vanityfair.com/news/2015/01/china-worlds-largest-economy ("2014 was the last year in which the United States could claim to be the world's largest economic power. China enters 2015 in the top position, where it will likely remain for a very long time, if not forever."). Policy-makers and commentators have also continued to debate what constitutes the Beijing Consensus, which is not as well defined as the Washington Consensus. As I noted in an earlier article:

> The defining feature of the Chinese model—or what some commentators have described as the "Beijing Consensus" or, more modestly, the "Beijing Proposal"—is not a definitive formula of success. Rather, it is the Chinese leaders' pragmatic approach in "groping for stones to cross the river" (*mozhe shitou guohe*) and their willingness to consider a wide variety of options.

Peter K. Yu, *Five Oft-repeated Questions About China's Recent Rise as a Patent Power*, 2013 CARDOZO L. REV. DE NOVO 78, 99 (footnotes omitted); *see also* John Williamson, *What Washington Means by Policy Reform*, *in* LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 7, 7–20 (John Williamson ed., 1990) (coining the term "Washington Consensus" to cover recommendations on fiscal deficits, public expenditure priorities, tax reform, interest rates, the exchange rate, trade policy, foreign direct investment, privatization, deregulation, and property rights).

16. *See* 17 U.S.C. § 107 (2018) (codifying fair use).

17. *See* JONATHAN BAND & JONATHAN GERAFI, THE FAIR USE/FAIR DEALING HANDBOOK 30, 35–38, 46, 55–57, 60–62, 64 (2013), http://ssrn.com/abstract=2333863 (listing the fair use provisions in Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka, and Taiwan). This Article uses the phrase "close variants" because Malaysia and Singapore technically have a fair dealing regime that functions like a fair use regime. *See* Peter K. Yu, *Customizing Fair Use Transplants*, 7 LAWS 9, at 5–7 (2018), http://www.mdpi.com/2075-471X/7/1/9 [hereinafter Yu, *Customizing Fair Use Transplants*].

18. *See* AUSTL. LAW REFORM COMM'N [ALRC], COPYRIGHT AND THE DIGITAL ECONOMY: FINAL REPORT 123–60 (2013) [hereinafter ALRC FINAL REPORT] (recommending the introduction of a fair use exception); COPYRIGHT REVIEW COMM., MODERNISING COPYRIGHT 93–94 (2013) (Ir.) [hereinafter CRC FINAL REPORT] (recommending the introduction of the fair use exception as a new Section 49A of the Irish Copyright and Related Rights Act); LEGISLATIVE COUNCIL, AMENDMENTS TO BE MOVED BY THE HONOURABLE CHAN KAM-LAM, SBS, JP 4 (2015) (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/papers/cm20151209cb3-219-e.pdf (LC Paper No. CB(3) 219/15-16) [hereinafter BILLS COMMITTEE'S AMENDMENTS] (providing the text of the fair use proposal that was tabled for legislative debate in Hong Kong).

are remarkable similarities between the fair dealing regime in Canada and the fair use regime in the United States.[19]

Because legal literature has thus far under-analyzed the transplant of the U.S. fair use model,[20] this Article focuses its analysis on fair use transplants. Such a focus is important for four reasons. First, the analysis enables us to develop a deeper understanding of the U.S. copyright system and its success in promoting innovation and technological development.[21] Such an understanding will be highly valuable if the U.S. copyright system is to undertake major reform in the near future.[22] Second, the analysis provides a nice contrast to the existing literature on the transplant of U.S. models via TRIPS-plus bilateral, regional, and plurilateral trade agreements. While most of this literature has been highly critical of U.S. transplants,[23] the comparative analysis in this Article allows us to explore further whether the problems originate from the legal trans-

19. *See* Michael Geist, *Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use*, *in* THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 157, 176 (Michael Geist ed., 2013) [hereinafter COPYRIGHT PENTALOGY] ("Fair dealing in Canada still requires a two-stage analysis, yet the cumulative effect of legislative reform and the Supreme Court decisions is that the first stage has become so easy to meet that Canada has a fair use provision in everything but name only."); Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada*, *in* COPYRIGHT PENTALOGY, *supra*, at 93, 95 ("[D]espite abundant contemporary literature that highlights a seeming dichotomy between the open-ended US-style fair use, and the supposedly close-ended fair dealing, this dichotomy is false." (footnote omitted)).

20. For rare discussions of the transplant of the U.S. fair use model, see generally Michael Birnhack, *Judicial Snapshots and Fair Use Theory*, 5 QUEEN MARY J. INTELL. PROP. 264 (2015); Yu, *Customizing Fair Use Transplants*, *supra* note 17; Justyna Zygmunt, *Legal Transplant of the U.S. Fair Use Clause—A Surgery That Cannot Go Wrong? Some Remarks on Using the Theory of Legal Transplants*, 4 INTERNETOWY PRZEGLĄD PRAWNICZY TBSP UJ [INTERNET L. REV. ASS'N L. STUDENTS' LIBR. JAGIELLONIAN U.] 141 (2016) (Pol.).

21. *See* ALRC FINAL REPORT, *supra* note 18, at 104–08 (discussing how fair use can assist innovation); CRC FINAL REPORT, *supra* note 18, at 93 (noting that the adoption of the proposed fair use doctrine "will send important signals about the nature of the Irish innovation ecosystem, . . . provide the Irish economy with a competitive advantage in Europe, and . . . give Irish law a leadership position in EU copyright debates"); IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 44 (2011) (noting the contribution of fair use to "creating a positive environment . . . for innovation and investment in innovation").

22. *See generally* INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013) [hereinafter U.S. GREEN PAPER] (assessing current policy relating to copyright and the Internet and identifying issues that are being addressed by courts and are ripe for further discussion or development of solutions); INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES: COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2016) [hereinafter U.S. WHITE PAPER] (recommending legislative fixes concerning the award of statutory damages, but refraining from proposing changes to the treatment of remixes and exhaustion of rights); Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) (calling for a comprehensive review and revision of U.S. copyright law); Peter K. Yu, *The Next Great Copyright Act Should Be Flexible and Forward-Looking*, THE CONVERSATION (Nov. 6, 2014, 4:49 AM), https://theconversation.com/the-next-great-copyright-act-should-be-flexible-and-forward-looking-32782 (calling for forward-looking copyright reform).

23. *See generally* Burrell & Weatherall, *supra* note 7 (criticizing the copyright provisions of the U.S.–Australia Free Trade Agreement); Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 866–70 (2007) [hereinafter Yu, *The International Enclosure Movement*] (discussing the enclosure of policy space through the introduction of TRIPS-plus bilateral, regional, and plurilateral trade agreements); Yu, *Six Secret Fears*, *supra* note 8, at 1028–44 (discussing how the Anti-Counterfeiting Trade Agreement could transplant higher yet potentially harmful intellectual property standards onto the soils of developing countries).

plant process or from the uncustomized transplants that do not fit the diverging local conditions. Third, the analysis of fair use transplants brings together a variety of fair use models. Discussing these different models in a single article will help promote comparative research in this area. Such discussion will also allow us to evaluate the strengths and weaknesses of each model. Fourth, the analysis drives us to think more deeply about the overall law reform process—at both the domestic and global levels. It invites us to not only critically examine the benefits and drawbacks of legal transplants, but also explore the considerable complexities within the law reform process.

Part II of this Article reviews the literature concerning paradigm shift, in particular Thomas Kuhn's seminal work.[24] It discusses the specific insights the literature has provided to the study of fair use transplants. The focus on paradigm shift is particularly instructive considering that the term has been widely and repeatedly used in jurisdictions that have introduced the U.S. fair use model to replace their existing system of copyright limitations and exceptions.[25]

Part III documents a growing trend toward the worldwide adoption of the U.S. fair use model and therefore a slowly emerging paradigm shift in international copyright norms. This Part also identifies a countertrend toward the retention of the status quo. The juxtaposition of these two trends explain why jurisdictions that set out to transplant U.S.-style fair use ended up adopting a hybrid model. Thus, instead of a paradigm shift, the transplants in these jurisdictions facilitated a paradigm evolution.[26]

Part IV interrogates the different primary causes behind such an evolution. While many possible factors exist within and outside the legal system, this Part focuses on those relating to intellectual property law, international and comparative law, and the legislative process. The discussion underscores the tremendous difficulty in pinpointing the causes behind a paradigm evolution and predicting when and at what pace a paradigm will evolve. Even when we single out causes within the legal system, contributing factors can come from many different areas of the law.[27]

Part V concludes with recommendations concerning future efforts to broaden copyright limitations and exceptions in the United States and across the world. This Part outlines six courses of action that seek to improve these reform efforts. It then identifies three modalities of evolution that can help tailor the transplanted fair use paradigm to local needs, interests, conditions, and priorities. Such tailoring will enlarge the flexibilities available in the copyright system while fostering a more appropriate balance between access and proprie-

24. *See infra* Section II.A.

25. *See, e.g.*, BILLS COMM. ON COPYRIGHT (AMENDMENT) BILL 2014, PAPER FOR THE HOUSE COMMITTEE MEETING ON 13 NOVEMBER 2015, at 14 (2015) (H.K.), http://www.legco.gov.hk/yr15-16/english/hc/papers/hc20151113cb4-199-e.pdf (LC Paper No. CB(4)199/15-16) [hereinafter BILLS COMMITTEE'S REPORT] ("A shift to fair use would represent a fundamental revamp of our copyright regime and must be carefully considered in the light of a proper consultation exercise, and is beyond the scope of the current round of legislative update.").

26. Thanks to Lydia Loren for pushing the Author to focus on paradigm evolution.

27. *See infra* Section IV.A.

tary control. Because the modalities discussed in this Part focus on ways to combine rules, standards, and institutions, the analysis will be relevant to not only copyright reform, but also legal reform in other areas of the law.

II. PARADIGM SHIFT

A. Theory

As far as paradigm shifts are concerned, the logical starting point is *The Structure of Scientific Revolutions*, which Thomas Kuhn published in 1962.[28] This classic is important to not only scientists, but also those researching in law and other disciplines.[29] Of particular interest is the book's description of the process of change that leads to the development of new paradigms.[30]

As the book describes at length, the process begins with a crisis.[31] Until that point, most anomalies are usually ignored, due to the fact that they do not fit well with the prevailing paradigm.[32] As anomalies continue to build up, however, scientists start to question whether the existing paradigm remains valid, provoking "a period of pronounced professional insecurity."[33] As more and more scientists conduct research to address this crisis, challenge the preexisting paradigm, and consider alternatives, a new paradigm begins to emerge.[34] At some point, the old paradigm shifts to the new paradigm.[35] With that change, stability begins to be built around the latter,[36] and the revolution is complete.

28. KUHN, *supra* note 13.

29. As Russell Pearce observed:

> Kuhn and other commentators have not limited this analysis to scientific communities. Any definable community can possess a paradigm. While asserting the uniqueness of scientific communities, Kuhn acknowledged the utility of his approach for analyzing change in music, art, literature, and political development. Many legal scholars have similarly applied Kuhn's analysis in areas as diverse as legal history, legal theory, economics, constitutional law, and civil procedure.

Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1236–37 (1995) (footnotes omitted).

30. *See generally* KUHN, *supra* note 13.

31. *See id.* at 67 (providing illustrations of scientific fields that were "in a state of growing crisis").

32. *See id.* at 64 ("In science, . . . novelty emerges only with difficulty, manifested by resistance, against a background provided by expectation. Initially only the anticipated and usual are experienced even under circumstances where anomaly is later observed.").

33. As Kuhn wrote:

> [T]he emergence of new theories is generally preceded by a period of pronounced professional insecurity. As one might expect, that insecurity is generated by the persistent failure of the puzzles of normal science to come out as they should. Failure of existing rules is the prelude to a search for new ones.

Id. at 67–68.

34. *See id.* at 77–91 (discussing how scientists respond to anomalies and crises).

35. *See id.* at 77 ("The decision to reject one paradigm is always simultaneously the decision to accept another, and the judgment leading to that decision involves the comparison of both paradigms with nature *and* with each other."); *see also id*. at 79 ("To reject one paradigm without simultaneously substituting another is to reject science itself."). *But see* NIVA ELKIN-KOREN & ELI M. SALZBERGER, THE LAW AND ECONOMICS OF INTELLECTUAL PROPERTY IN THE DIGITAL AGE: THE LIMITS OF ANALYSIS 15 (2015) ("[I]n legal research, and in the social sciences more generally, different paradigms can coexist in parallel.").

36. *See* KUHN, *supra* note 13, at 77 ("[O]nce it has achieved the status of paradigm, a scientific theory is declared invalid only if an alternate candidate is available to take its place.").

Using Kuhn's terminology and applying his paradigm shift to the growing transformation of law practice, Russell Pearce described this process of change as follows:

> Kuhn finds that scientific communities use paradigms to organize their problem-solving efforts. In what Kuhn describes as "normal science," practitioners who "have undergone similar educations and professional initiations" use their shared paradigm as the determinant of "legitimate methods, problems, and standards of solution." In normal science, the community rejects ideas inconsistent with the paradigm, often without even evaluating their significance.
>
> At the same time that a paradigm constrains discourse, its problem-solving nature ensures the paradigm's eventual demise. The task of problem-solving will inevitably result in identification of a problem that is not susceptible to problem-solving efforts under the paradigm. That problem becomes an "anomaly" that provokes a crisis. A time of crisis is one of "extraordinary science" where the paradigm itself comes into question. In this "period of pronounced professional insecurity," consensus regarding the constitution of the governing paradigm disintegrates, proposals for new paradigms proliferate, and the community "turns" to philosophy as it revisits first principles.
>
> When the scientific community cannot resolve the crisis by solving the problem under the paradigm or bracketing the problem for the future, it replaces the old paradigm with a new one in what Kuhn calls a revolution. The new paradigm proposes to "solve the problems that have led the old one to a crisis." Whether the new paradigm succeeds in a revolution depends more on the power of conversion than logical argument. No "logical" choice is available between competing paradigms that "disagree about what is a problem and what a solution." Newer members of the community tend to be more open to new paradigms and more senior members tend to be more resistant.[37]

To be sure, Kuhn's paradigm shift focuses on science[38]—something that can be proved or disproved objectively. Among the shifts illustrated in his book are those "major turning points in scientific development associated with the names of Copernicus, Newton, Lavoisier, and Einstein."[39] Although legal debates cannot be resolved in a similar fashion,[40] a quick search on the LexisNexis or Westlaw database or via Google reveals a growing number of law review

37. Pearce, *supra* note 29, at 1234–36.

38. *See* KUHN, *supra* note 13, at xi (noting Kuhn's "decision to deal . . . exclusively with" physical science).

39. *Id.* at 6.

40. *See* Ubaldus de Vries, *Kuhn and Legal Research: A Reflexive Paradigmatic View on Legal Research*, 3 RECHT EN METHODE IN ONDERZOEK EN ONDERWIJS [LAW & METHOD] 7, 11 (2013) (Neth.) ("[The theories in] social scientific research or research in the humanities . . . are descriptive and evaluative rather than verifiable by means of established instruments of verification: testing, experiments, etc. And, indeed, modern law is configured through power relations, considering its main author: the state.").

articles focusing on paradigm shifts.[41] Indeed, a number of them have provided extended discussions of Kuhn's theory and follow-up writings,[42] which have been widely studied and will not be repeated in this Article.

The framework by which paradigms shift and settle in response to crises also finds strong support in existing legal literature. For instance, the evolutionary path dependence theory, which draws on the literature concerning biological evolution and "punctuated equilibrium,"[43] shows that legal "change occurs in fits and starts rather than in slow and steady gradual steps."[44] As Oona Hathaway explained:

> In the punctuated equilibrium model, . . . the ultimate outcome of a process of change is usually indeterminate because punctuated equilibria are marked by "contingency": "the inability of the theory to predict or explain, either deterministically or probabilistically, the occurrence of a specific outcome." A contingent event is not necessarily random, but it cannot be explained by the variables available to theorists. For example, biologists would treat a cold winter as contingent because it is outside the explanatory framework of biological theories. Because it is marked by contingency, the punctuated equilibria model is unable to predict the arrival of periods of rapid change in advance. Once a period of change has occurred, however, the theory specifies that a new period of stability shaped by the changes that occurred during the most recent punctuation will follow.[45]

B. Crisis

The previous Section provides a brief overview of Kuhn's theory. The next three Sections focus on its application to the intellectual property area. Section B discusses the crisis that has occurred in this area, and Sections C and D introduce the old and new paradigms. The last two Sections also explore the appropriateness of using the term "paradigm shift" to describe the change from the old model to the new model.

41. *See* Google Scholar, http://scholar.google.com (search in search bar for the word "legal" and the phrase "paradigm shift" in quotation marks) (last visited Nov. 10, 2018); LexisNexis, https://advance.lexis.com/ (follow "Secondary Materials" hyperlink; then search in search bar for "paradigm shift" in quotation marks) (last visited Nov. 10, 2018); Westlaw, https://1.next.westlaw.com (follow "Secondary Sources" hyperlink; then search in search bar for "paradigm shift" in quotation marks) (last visited Nov. 10, 2018).

42. *See generally* de Vries, *supra* note 40 (arguing that a better understanding of the Kuhnian structure of scientific research is useful in understanding modern legal research); Pearce, *supra* note 29 (using paradigm shifts to explore the growing transformation of law practice from a profession to a business); Nigel Stobbs, *The Nature of Juristic Paradigms Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence*, 4 WASH. U. JURIS. REV. 97 (2011) (exploring whether the adversarial paradigm among mainstream judges has been, and can be, shifted to one embracing "therapeutic" and "problem solving" practices).

43. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 607 (2001).

44. *Id.*

45. *Id*. at 615–16 (footnote omitted) (quoting James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY & SOC'Y 507, 513 (2000)).

In the intellectual property area, the crisis that helps precipitate a potential paradigm shift in international copyright norms come in three distinct directions. The first crisis-contributing development concerns the advent of new technologies. Commentators have widely noted the unprecedented changes brought about by the Internet and new communication technologies.[46] Indeed, the past twenty years have seen voluminous literature covering the law's interaction with those technologies,[47] raising questions about whether legal scholars should devote their attention to study cyberlaw.[48]

Nevertheless, the communications revolution brought about by the Internet is only the tip of the iceberg. The past few years alone have seen a rapid proliferation of other new technologies, such as those relating to Big Data, the Internet of Things, 3D printing, artificial intelligence, robotics, autonomous vehicles, nanotechnology, and synthetic biology. These new technologies threaten to transform our daily life and have thereby raised many important and exciting questions in the intellectual property field. As Mark Lemley described:

> 3D printers can manufacture physical goods based on any digital design. While home 3D printers are so far quite limited in size and materials, there are tens of thousands of printing designs available on the Internet already, and larger commercial-scale printers can print anything from circuit boards to rocket engines to human organs on site for the cost of the raw materials and some electricity. Synthetic biology has automated the manufacture of copies of not just existing genetic sequences, but also any custom-made gene sequence, allowing anyone who wants to create a gene sequence of their own to upload the sequence to a company that will "print" it using the basic building blocks of genetics. And advances in robotics generalize the principle beyond goods, offering the prospect that many of the services humans now supply will be provided free of charge by general-purpose machines that can be programmed to perform a variety of complex functions.[49]

The second crisis-contributing development relates to the emergence of new intellectual property norms, thanks to the increasing efforts to establish higher intellectual property standards through TRIPS-plus bilateral, regional, and plurilateral trade agreements.[50] While the TRIPS Agreement has already raised the standards in many developing countries, the new TRIPS-plus stand-

46. *See generally* COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE (2000) (discussing the challenges digital technology has posed to the copyright regime).

47. For select pioneering works in this area, see generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1st ed. 1999); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998).

48. *See generally* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (questioning the need to study cyberlaw as a distinct legal subject); Lawrence Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 HARV. L. REV. 501 (1999) (responding to Judge Easterbrook).

49. Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 461–66 (2015) (footnote omitted).

50. See sources cited *supra* note 7.

ards will raise those standards even further.[51] For those developing countries that continue to struggle with TRIPS standards and that have been working hard to extend their transition periods, the arrival of these TRIPS-plus standards foretells even greater challenges ahead.[52] The public health pandemics in Sub-Sahara Africa, which have been caused by a lack of access to essential medicines, also call into question the legitimacy of the international intellectual property regime.[53]

The final crisis-contributing development pertains to the arrival of new ideas. The past two decades have seen rapid developments in the free software, open source,[54] free culture,[55] and access to knowledge movements.[56] In the past few years alone, there has been a growing volume of "intellectual production without intellectual property" literature.[57] While the exploration of alternative

51. *See* Yu, *The International Enclosure Movement*, *supra* note 23, at 855–70 (discussing the enclosure of policy space through the introduction of the TRIPS Agreement and TRIPS-plus bilateral, regional, and plurilateral trade agreements).

52. *See* Peter K. Yu, *Virotech Patents, Viropiracy, and Viral Sovereignty*, 45 ARIZ. ST. L.J. 1563, 1568 (2013) (discussing the developing countries' push for extending the transition periods under the TRIPS Agreement).

53. *See id.* at 1627 ("[B]ecause the high TRIPS standards often ignore the needs, interests, conditions, and priorities of the latter group of countries, the legitimacy of the TRIPS Agreement, and by extension the WTO, have now been called into question."); SELL, *supra* note 6, at 173 ("The shaky foundations of [the TRIPS] regime raise important concerns about accountability and legitimacy."); Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1024 (2009) ("[T]he TRIPS Agreement is now in a deepening crisis. Its legitimacy has been called into question by the high standards of protection and enforcement that ignore the needs, interests, and goals of the less-developed member states.").

54. As Adrian Johns observed:

> Claims for a new economics of creativity center overtly on the phenomenon of open-source software, which exploits properties of digital networks for which there is allegedly no precedent. But they also draw support from deeper conviction about how knowledge is properly generated, distributed, and preserved. The mid-century insistence that openness was a guiding norm of true scientific research took on new force in the context of molecular biology and biotechnology.

ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 509 (2009).

55. *See generally* LESSIG, FREE CULTURE, *supra* note 2 (articulating the needs for developing a free culture movement).

56. For discussions of the access to knowledge debate, see generally ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY (Gaëlle Krikorian & Amy Kapczynski eds., 2010); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008). In the past decades, there has been considerable activism in the intellectual property area. As Amy Kapczynski observed:

> Who would have thought, a decade or two ago, that college students would speak of the need to change copyright law with "something like the reverence that earlier generations displayed in talking about social or racial equality"? Or that advocates of "farmers' rights" could mobilize hundreds of thousands of people to protest seed patents and an [intellectual property] treaty? Or that AIDS activists would engage in civil disobedience to challenge patents on medicines? Or that programmers would descend upon the European Parliament to protest software patents?

Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. POCKET PART 262, 263 (2008).

57. As Amy Kapczynski recently observed:

> [Intellectual property] scholarship has for decades been centered on a simple account: [intellectual property] is necessary to achieve the information production that we as a society desire. But over the last few years, the field has come to recognize that [intellectual property] as an approach has both significant costs and substantial limits. In response, an important new scholarly literature on "intellectual production without intellectual property," or "IP without IP" has emerged.

approaches to incentivize creativity and innovation is both important and exciting and should be carefully addressed in the intellectual property debate, their arrival comes at a time when the younger generation actively questions the basic premises of the intellectual property system.[58] The growing emphasis away from this system has therefore made it even more difficult for the system to maintain its traditional support.

In light of these three crisis-contributing developments, policy-makers and commentators have questioned whether the time is ripe for a Kuhnian paradigm shift. As Adrian Johns noted provocatively in his latest book, *Piracy*, crisis in the creative area could lead to a "profound shift in the relation between creativity and commerce."[59] The book showed convincingly that the history of copyright and creativity is filled with this type of shift:

> Such turning points have happened before—about once every century, in fact, since the end of the Middle Ages. The last major one occurred at the height of the industrial age, and catalyzed the invention of intellectual property. Before that, another took place in the Enlightenment, when it led to the emergence of the first modern copyright system and the first modern patents regime. And before that, there was the creation of piracy in the 1660s–1680s. By extrapolation, we are already overdue to experience another revolution of the same magnitude. If it does happen in the near future, it may well bring down the curtain on what will then, in retrospect, come to be seen as a coherent epoch of about 150 years: the era of intellectual property.[60]

If the existing intellectual property system is to survive the ongoing crisis,[61] so as to avoid what Professor Johns referred to as "a reformation of crea-

Amy Kapczynski, *Order Without Intellectual Property Law: Open Science in Influenza*, 102 CORNELL L. REV. 1539, 1542–43 (2017) (footnotes omitted). For scholarship in this area, see generally KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION (2012); Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, *in* LAW AND MAGIC: A COLLECTION OF ESSAYS 123 (Christine A. Corcos ed., 2010); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437 (2010); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

58. *See* Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 938 (2011) ("Many members of [the younger] generation do not share the norms reflected in existing copyright law. Many of them also do not understand copyright law or see the benefits of complying with it."); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 756–63 (2005) (articulating the view that the ongoing "copyright wars" can be seen as a transitional clash between the copyright-abiding generation and Generation Y).

59. JOHNS, *supra* note 54, at 498.

60. *Id.* at 508.

61. Interestingly, Professor Johns brought up Kuhn's work:

> [I]t is no coincidence that the problem facing intellectual property coincides with a period of deep unease about the practices that society entrusts with discovering and imparting formal knowledge in general. The foundations and status of the academic disciplines are in question, no less than those of intellectual property. But the modern disciplinary system and the modern principle of intellectual property are achievements of the era culminating in the late nineteenth century, and the same departure of creative authorship

tive rights, responsibilities, and privileges,"[62] it will have to be reshaped through a number of drastic measures. Considering that the U.S. fair use model has been widely extolled for its ability to provide what the United States Supreme Court has described as "breathing space,"[63] one has to wonder whether the transplant of the U.S. fair use model across the world could help avoid this potential radical paradigm shift in the area of copyright and creativity.

C. Old Paradigm

To examine whether a paradigm shift in international copyright norms has occurred, it is important to identify both the old and new paradigms. Although questions will arise as to whether the models discussed in this Article are paradigms in the Kuhnian sense, strong evidence supports the use of paradigmatic language to describe these two models. As Kuhn defined, a paradigm shift involves not only a dramatic change in the path of scientific research but also in the worldview subscribed by scientists.[64] To provide supporting evidence, this and the next Section explore the strong resemblance between a Kuhnian paradigm shift and the ongoing effort to reform the existing system of copyright limitations and exceptions. This Section discusses the old fair dealing paradigm, and the next Section discusses the new fair use paradigm.

The fair dealing paradigm traces its origin to the traditional English common law doctrine of fair abridgement.[65] Although efforts were made to introduce fair dealing provisions into the U.K. Copyright Law 1842,[66] its place in

> to new projects and identities underlines the anxieties of each. In each case new realms of creative work *can* be accommodated into the existing system, but doing so involves ad hoc compromises and creates increasingly stark inconsistencies. At some point the resulting contraption comes to resemble too clearly for comfort Thomas Kuhn's famous portrayal of a "crisis" state in the sciences.

Id. at 516–17.

62. *See id.* at 517 ("A reformation of creative rights, responsibilities, and privileges could . . . occur in reaction to a crisis in intellectual property.").

63. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (noting "the fair use doctrine's guarantee of breathing space within the confines of copyright"); *see also* William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT L.J. 667, 668 (1993) ("[F]air use is a critical safety valve of copyright."). *See generally* Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429 (2007) (proposing modifications to existing copyright law that would create breathing space in copyright cases that raise free speech interests).

64. *See* KUHN, *supra* note 13, at 111 ("[P]aradigm changes do cause scientists to see the world of their research-engagement differently. In so far as their only recourse to that world is through what they see and do, we may want to say that after a revolution scientists are responding to a different world."); *see also* Stobbs, *supra* note 42, at 107 ("A paradigm is more than just the currently dominant set of exemplars underpinning a discipline—it is a reflection of a particular worldview within which that exemplary framework connects to other disciplines and other types of human experience—from which it draws its normative force.").

65. *See* Joseph J. Beard, *Everything Old Is New Again: Dickens to Digital*, 38 LOY. L.A. L. REV. 19, 24–26 (2004) (discussing the traditional English doctrine of fair abridgement); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1379–93 (2011) (discussing this doctrine).

66. As Giuseppina D'Agostino observed:

> The copyright doctrine of fair dealing could have made its first statutory appearance as early as 1842. It was 1842 when a fair dealing facsimile was introduced for debate in Parliament in the United Kingdom. . . . However, this provision was eventually deleted before the bill arrived to the House of Lords . . . .

copyright law was not solidified until the doctrine's codification in the U.K. Copyright Act 1911,[67] or what some commentators have referred to as the "Imperial Copyright Act."[68] Considered as an "exemplar," in the Kuhnian sense,[69] this model has since been transplanted from the United Kingdom to British colonies across the world. These colonies included Australia, Hong Kong, Malaysia, Singapore, and Sri Lanka, jurisdictions that have now adopted or proposed to adopt fair use.[70]

The paradigmatic nature of the U.K. Copyright Act 1911 became even more obvious when one considers the statute's transformative impact. As Ariel Katz observed, no apparent distinction between fair dealing and fair use existed before the codification of the fair dealing doctrine in the 1911 Act.[71] That many former British colonies now have a standardized fair dealing regime was partly the legacy of this highly influential statute.[72]

Like fair use, which will be discussed in greater detail below, fair dealing allows for an unauthorized use of a copyrighted work.[73] Unlike fair use, however, it promotes a closed system of copyright limitations and exceptions.[74]

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, 312 (2008).

67. Copyright Act 1911, 1 & 2 Geo. 5, c. 46 (Eng.).

68. *See generally* A SHIFTING EMPIRE: 100 YEARS OF THE COPYRIGHT ACT 1911 (Uma Suthersanen & Ysolde Gendreau eds., 2013) (providing a collection of essays on the 1911 Copyright Act).

69. *See* KUHN, *supra* note 13, at 187.

70. *See* ALRC FINAL REPORT, *supra* note 18, at 123 ("The [Australian Law Reform Commission] recommends a fair use exception with a non-exhaustive list of four fairness factors to be considered in assessing whether use of another's copyright material is fair and a non-exhaustive list of eleven illustrative purposes."); BAND & GERAFI, *supra* note 17, at 38, 55–57, 60–62 (listing the fair use provisions in Malaysia, Singapore, and Sri Lanka); BILLS COMMITTEE'S AMENDMENTS, *supra* note 18, at 4 (providing the text of the fair use proposal in Hong Kong).

71. As he observed:

> The common terminology in English copyright law prior to 1911 was often "fair use", just like the American terminology, but it was also common to use the term "fair" as an adjective to describe specific activities, such as "fair quotation", "fair criticism", "fair refutation", and, in the earlier cases, "fair abridgement". Sometimes courts would not use the term "fair" but its synonyms, such as "bona fide imitations, translations and abridgements." The switch to "fair dealing" in Commonwealth jurisdictions seems to simply follow a terminology adopted when the doctrine was codified in 1911, but . . . there is no evidence that the switch from "use" to "dealing" was intended to reflect any change in the law or its direction.

Katz, *supra* note 19, at 101–02.

72. As Ariel Katz continued:

> A century ago, on 16 December 1911, the UK Copyright Act, 1911 received royal assent, and for the first time fair dealing was explicitly recognized in the imperial copyright legislation. Ten years later, the same fair dealing provision would appear in the Canadian Copyright Act, 1921 and would remain the basis of the current fair dealing provisions.

Id. at 93; *see* Robert Burrell, *Reining in Copyright Law: Is Fair Use the Answer?*, 4 INTELL. PROP. Q. 361, 362 (2001) ("Although most former colonies have now had their own copyright legislation for a considerable number of years, for the most part this legislation has tended to follow the Imperial model developed in 1911."); Niva Elkin-Koren, *The New Frontiers of User Rights*, 32 AM. U. INT'L L. REV. 1, 18 (2016) ("The 2007 [Israeli] Copyright Act replaced the old British Copyright Act of 1911, which was in force ever since the establishment of the State of Israel in 1948.").

73. *See* Copyright, Designs and Patents Act 1988, c. 48, §§ 29, 30, 30A (Eng.) (including fair dealing provisions under Chapter III of the statute, which covers "acts permitted in relation to copyright works").

74. *See* Peter K. Yu, *The Quest for a User-Friendly Copyright Regime in Hong Kong*, 32 AM. U. INT'L L. REV. 283, 327 (2016) [hereinafter Yu, *Quest for User-Friendly Copyright*] ("[A] better way to distinguish be-

Each fair dealing provision is drafted with a specific purpose, or a set of related purposes.[75] Unless the user's conduct falls within a specified purpose, the use will not be permissible under copyright law.[76]

A case in point is Section 30(2) of the U.K. Copyright, Designs and Patents Act 1988,[77] which provides a specific copyright exception for reporting current events. Specifically, the provision states that "[f]air dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that . . . it is accompanied by a sufficient acknowledgement."[78] Although British judges have since interpreted this provision by incorporating factors that have been widely used in a U.S. fair use analysis,[79] the provision only applies to conduct that fits within the specified purpose—that is, reporting current events.[80] If the conduct at issue involves another purpose, such as criticism or review, courts will not deem it permissible unless they can find another relevant fair dealing provision.[81]

In short, the fair dealing regime requires governments or legislatures to identify all the different permissible conduct *ex ante*.[82] Because rapid technological change has made it very difficult, if not impossible, for the anticipation of all of the permissible uses and for the quick introduction of limitations and exceptions to address new uses, the purpose-based fair dealing paradigm has been heavily criticized for being outdated and unresponsive to technological change.[83] Those advocating the introduction of fair use has therefore called for a paradigm shift.[84]

tween fair dealing and fair use is to describe the former as a closed-ended, purpose-based regime and the latter as an open-ended, flexible regime.").

75. *See id.* at 331 ("In the case of Hong Kong, the Copyright Ordinance states that fair dealing is available for research and private study (Section 38); criticism, review and news reporting (Section 39); giving or receiving instruction (Section 41A); and public administration (Section 54A).").

76. *See* Copyright, Designs and Patents Act 1988, c. 48, § 28 (Eng.) (providing the introductory provisions concerning the acts permitted in relation to copyright works).

77. *Id.* § 30(2).

78. *Id.*

79. *See* Ashdown v. Telegraph Grp. Ltd., [2002] EWCA (Civ) 1142 [20] (Eng.) (interpreting Section 30(2) through the introduction of fairness factors, such as whether the original work is published, the amount and importance of that work, and whether the infringing work commercially competes with the protected work).

80. *See* Copyright, Designs and Patents Act 1988, c. 48, § 30(2) (Eng.) (covering fair dealing with a copyrighted work for the purpose of reporting current events).

81. *See id.* § 30(1) (covering fair dealing with a copyrighted work for the purpose of criticism or review).

82. *See* ALRC FINAL REPORT, *supra* note 18, at 97 (stating that a major shortcoming of the fair dealing model is that it requires the government or the legislature "to identify and define ex ante all of the precise circumstances in which an exception should be available" (quoting a submission from Robert Burrell, Michael Handler, Emily Hudson, and Kimberlee Weatherall)); *see also* CRC FINAL REPORT, *supra* note 18, at 93 ("It is simply not possible to predict the direction in which cloud computing and 3D printing are going to go, and it is therefore impossible to craft appropriate ex ante legal responses.").

83. As I noted in an earlier article:

> In a rapidly evolving digital environment, anticipating all of these circumstances is simply impossible. Even if the government or the legislature is eager to quickly rectify the situation, the lengthy time needed to adopt new fair dealing provisions will precipitate a highly undesirable catch-and-mouse chase between these provisions and new digital technology. The resulting frustration illustrates why an open-ended, adaptive, and flexible fair use regime is particularly appealing in a rapidly evolving digital environment.

D. New Paradigm

Fair use, the new paradigm for the purposes of this Article, holds a central place in U.S. copyright law.[85] This doctrine "permits courts to avoid rigid application of the copyright statute when . . . it would stifle the very creativity which that law is designed to foster."[86] Although fair use was not codified until the passage of the 1976 Copyright Act,[87] judges, practitioners, and legal commentators have traced the doctrine back to the 1841 case of *Folsom v. Marsh*,[88] which concerned the unauthorized reproduction of President George Washington's writings, official documents, and private letters that were extracted from a twelve-volume book set.

Codified in Section 107 of the U.S. Copyright Act, the fair use doctrine provides:

> [T]he 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 non-profit 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.[89]

Although this provision offers six examples of permissible conduct, mentioning explicitly "criticism, comment, news reporting, teaching (including multiple

Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 337 (footnote omitted).

84. *See supra* Section II.A (discussing the emergent trend toward the worldwide adoption of the U.S. fair use model).

85. *See* U.S. GREEN PAPER, *supra* note 22, at 21 ("The fair use doctrine, developed by the courts and codified in the 1976 Copyright Act, is a fundamental linchpin of the U.S. copyright system."); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990) ("Fair use should be perceived . . . as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law."); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 11 (2006) (stating that "the safeguard of fair use constitutes a vital and indispensable part of our copyright laws"); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2618 (2009) ("Fair use is an essential doctrine in U.S. copyright law that counterbalances what would otherwise be an unreasonably broad grant of rights to authors and an unduly narrow set of negotiated exceptions and limitations.").

86. Iowa State Univ. Research Found., Inc. v. ABC, 621 F.2d 57, 60 (2d Cir. 1980).

87. 17 U.S.C. § 107 (2018).

88. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

89. 17 U.S.C. § 107.

copies for classroom use), scholarship, or research,"[90] it does not limit the user's conduct to the delineated purposes, like a fair dealing provision. Instead, Section 107 calls on judges to undertake a case-by-case balancing using multiple "fairness factors," most notably the four nonexhaustive factors listed in the provision.[91]

The U.S. fair use provision has therefore created an open system of copyright limitations and exceptions. Such open-endedness is especially attractive for "creating a positive environment . . . for innovation and investment in innovation."[92] Many policy-makers and commentators have also credited the provision for the success of U.S. technology companies.[93] Notable examples include Google, Amazon, Facebook, and Apple, which some Europeans have lumped together as "GAFA."[94] Given the benefits provided by the fair use model, it is understandable why policy-makers and commentators have called for a paradigm shift to that model.[95] Indeed, Australia, Hong Kong, Ireland, Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka, and Taiwan have already adopted or proposed to adopt the fair use regime or its close variants.[96]

III. PARADIGM EVOLUTION

A. Trend Toward a Paradigm Shift

1. Common Law Jurisdictions

In the past few years, jurisdictions from across the world, especially those in the common law world, have been busy exploring or undertaking major copyright reforms.[97] In June 2012, Canada became the first major player in the international copyright community to complete the reform process by adopting

90. *Id.*

91. The list is nonexhaustive because "[t]he terms 'including' and 'such as' are illustrative and not limitative." *Id.* § 101.

92. HARGREAVES, *supra* note 21, at 44.

93. *See id.* (discussing the benefits of fair use to U.S. technology companies); *see also* ALRC FINAL REPORT, *supra* note 18, at 104–08 (discussing how fair use can assist innovation); CRC FINAL REPORT, *supra* note 18, at 93 (noting that the adoption of the proposed fair use doctrine "will send important signals about the nature of the Irish innovation ecosystem, . . . provide the Irish economy with a competitive advantage in Europe, and . . . give Irish law a leadership position in EU copyright debates").

94. *See* Joe Nocera, *Europe's Google Problem*, N.Y. TIMES, Apr. 28, 2015, at A27 (noting the use of the term in Europe).

95. *See supra* Section II.A (discussing the emergent trend toward the worldwide adoption of the U.S. fair use model).

96. See sources cited *supra* notes 17–18.

97. For reports on consultations that have been undertaken worldwide to examine the copyright system and to advance law and policy recommendations, see generally ALRC FINAL REPORT, *supra* note 18 (Australia); U.S. GREEN PAPER, *supra* note 22; CRC FINAL REPORT, *supra* note 18 (Ireland); DIRECTORATE GENERAL INTERNAL MARKET & SERVS., EUROPEAN COMM'N, REPORT ON THE RESPONSES TO THE PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT RULES (2014) (European Union); ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY (2006) (United Kingdom); HARGREAVES, *supra* note 21 (United Kingdom); U.S. WHITE PAPER, *supra* note 22 (United States).

the Copyright Modernization Act.[98] Two years later, the United Kingdom also adopted half a dozen regulations to facilitate the more flexible use of copyrighted works.[99] These regulations built on recommendations advanced by the *Gowers Review of Intellectual Property*[100] and the *Hargreaves Review of Intellectual Property and Growth*[101] ("*Hargreaves Review*"), two highly influential reports commissioned by the U.K. government.

In addition, the Australian Law Reform Commission ("ALRC") and the Irish Copyright Review Committee ("CRC") have both published the final reports of their copyright reform consultations.[102] More recently, the Australian Productivity Commission released an independent final report supporting the ALRC's recommendation to introduce fair use.[103] Hong Kong, a former British colony that is now part of China, also considered two copyright amendment bills, submitted by the Hong Kong government in June 2011[104] and June 2014, respectively.[105]

One area that has garnered considerable attention—or controversy, depending on one's perspective—in all of these reform or consultation efforts concerns the limitations and exceptions in the copyright system.[106] To strengthen these limitations and exceptions, policy-makers and commentators have called for the introduction of a broad fair use standard, similar to the one found in the United States.[107] Indeed, the U.S. model has been particularly attractive

98. Copyright Modernization Act, S.C. 2011, c. 22 (Can.).

99. In chronological order, these regulations included The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372 (Eng.); The Copyright and Rights in Performances (Disability) Regulations 2014, SI 2014/1384 (Eng.); The Copyright (Public Administration) Regulations 2014, SI 2014/1385 (Eng.); The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356 (Eng.); The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, S.I. 2014/2588 (Eng.); The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861 (Eng.).

100. GOWERS, *supra* note 97.

101. HARGREAVES, *supra* note 21.

102. ALRC FINAL REPORT, *supra* note 18; CRC FINAL REPORT, *supra* note 18.

103. *See* PRODUCTIVITY COMM'N, No. 78, INTELLECTUAL PROPERTY ARRANGEMENTS: PRODUCTIVITY COMMISSION INQUIRY REPORT 184–85 (2016) (Austl.) ("[T]here are firm grounds now, and even stronger grounds looking to the future, for amending the Copyright Act to replace Australia's current exceptions with a broader fair use exception.").

104. The Copyright (Amendment) Bill 2011 (H.K.), http://www.legco.gov.hk/yr10-11/english/bills/b201106033.pdf.

105. The Copyright (Amendment) Bill 2014 (H.K.), http://www.gld.gov.hk/egazette/pdf/20141824/es32014182421.pdf [hereinafter 2014 Bill].

106. *See generally* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth L. Okediji ed., 2017) [hereinafter AGE OF LIMITATIONS AND EXCEPTIONS] (collecting articles that discuss the limitations and exceptions in the copyright system); P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT: FINAL REPORT (2008) (exploring the benefits and feasibility of the development of a multilateral instrument on limitations and exceptions to copyright).

107. *See* Yu, *Customizing Fair Use Transplants*, *supra* note 17, at 3–10 (discussing the efforts on the part of Australia, Hong Kong, Ireland, Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka, and Taiwan to transplant fair use).

to those jurisdictions that have already introduced fair dealing.[108] As shown in the previous Parts, both models aim to provide flexibility within the copyright regime even though the fair dealing regime calls for the development of a closed system of copyright limitations and exceptions while the fair use regime facilitates the development of an open system.[109]

In Australia, the ALRC recommended the introduction of a fair use exception,[110] similar to what is available in the United States.[111] The proposed exception will include not only the fairness factors that have already been codified in the American statute, but also a nonexhaustive list of eleven illustrative purposes, such as those covered by existing fair dealing exceptions.[112] Should the fair use proposal be rejected, the ALRC also advanced a backup proposal calling for an expansion of the existing fair dealing exceptions.[113]

In September 2016, the ALRC's fair use proposal earned the support of the Australian Productivity Commission, which undertook its own evaluation.[114] As the Commission declared:

> The Commission considers there are firm grounds now, and even stronger grounds looking to the future, for amending the Copyright Act to replace Australia's current exceptions with a broader fair use exception. The key policy question for Government should be how to design exceptions that maximise the net benefit to the community.
>
> Importantly, fair use would not replace payment for copyright works that are commercially available to users, but reinforces that user interests should also be recognised by Australia's copyright system. Adopting fair use would benefit follow on creators and innovators, Australian consumers, schools, other education institutions, libraries and archives.[115]

Like Australia, Ireland has been eager to broaden its copyright limitations and exceptions. In its report providing a wholesale examination of the copy-

108. *See* ALRC FINAL REPORT, *supra* note 18, at 93–94 (discussing how the fair use proposal in Australia builds on the country's fair dealing tradition).

109. *See supra* Sections II.C and II.D (discussing the fair dealing and fair use regimes).

110. *See* ALRC FINAL REPORT, *supra* note 18, at 123 ("The ALRC recommends a fair use exception with a non-exhaustive list of four fairness factors to be considered in assessing whether use of another's copyright material is fair and a non-exhaustive list of eleven illustrative purposes.").

111. *See id.* ("The structure and interpretation of s 107 of the United States Copyright Act 1976 provides an appropriate model for an Australian fair use exception, in providing a broad, flexible standard based on fairness factors.").

112. *See id.* at 144 ("The fair use exception should contain a non-exhaustive list of illustrative uses or purposes. . . . The ALRC's recommended list of illustrative purposes would be specifically Australian, but has parallels to those listed in other jurisdictions' statutes."); *id*. at 149 ("The ALRC recommends eleven illustrative purposes.").

113. *See id.* at 161 (recommending the introduction of "a 'new fair dealing exception' that consolidates the existing fair dealing exceptions in the Copyright Act and introduces new purposes . . . if fair use is not enacted").

114. *See* PRODUCTIVITY COMM'N, *supra* note 103, at 9 ("Australia's narrow purpose-based exceptions should be replaced with a principles-based, fair use exception, similar to the well-established system operating in the US and other countries."); *id*. at 33 (advancing Recommendation 6.1 that "[t]he Australian Government should accept and implement the Australian Law Reform Commission's final recommendations regarding a fair use exception in Australia").

115. *Id.* at 184–85.

right system, the CRC called for the introduction of a meticulously drafted fair use exception as Section 49A of the Irish Copyright and Related Rights Act.[116] The proposed provision calls on courts to consider eight nonexhaustive factors.[117] To show its commitment to innovation, the CRC further proposed a "tightly-drafted and balanced exception for innovation."[118] Proposed as Section 106E of the Irish Copyright and Related Rights Act, this novel provision is drafted based on the Committee's recommendation that "it should not be an infringement of copyright to derive an original work which either substantially differs from, or substantially transforms, the initial work."[119] Although this provision does not yet have a parallel in the United States or other parts of the world, it is arguably similar to the copyright exception for noncommercial user-generated content in Section 29.21 of the Canadian Copyright Modernization Act[120] and a more limited version of the U.S. transformative use doctrine.[121]

116. *See* CRC FINAL REPORT, *supra* note 18, at 93–94.

117. *See id.* at 11 (recommending that "the question of whether a use is fair on any given set of facts turns on the application of up to eight separate factors"). These eight factors are as follows:

> (a) the extent to which the use in question is analogically similar or related to the other acts permitted by this Part,
>
> (b) the purpose and character of the use in question, including in particular whether
>
> (i) it is incidental, non-commercial, non-consumptive, personal or transformative in nature, or
>
> (ii) if the use were not a fair use within the meaning of the section, it would otherwise have constituted a secondary infringement of the right conferred by this Part.
>
> (c) the nature of the work, including in particular whether there is a public benefit or interest in its dissemination through the use in question,
>
> (d) the amount and substantiality of the portion used, quantitatively and qualitatively, in relation to the work as a whole,
>
> (e) the impact of the use upon the normal commercial exploitation of the work, having regard to matters such as its age, value and potential market,
>
> (f) the possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case,
>
> (g) whether the legitimate interests of the owner of the rights in the work are unreasonably prejudiced by the use in question, and
>
> (h) whether the use in question is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise.

Id. at 94.

118. *Id.* at 73. Section 106E(1) provides, "[i]t is not an infringement of the rights conferred by this Part [of the Irish Copyright and Related Rights Act] if the owner or lawful user of a work (the initial work) derives from it an innovative work." *Id*.

119. *Id.* at 10.

120. Copyright Modernization Act, S.C. 2012, c. 20, § 29.21 (Can.). For discussions of this provision, see generally *infra* Subsection IV.B.1; Teresa Scassa, *Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law*, *in* COPYRIGHT PENTALOGY, *supra* note 19, at 431; Yu, *Canadian UGC Exception*, *supra* note 3.

121. The transformative use doctrine originated in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–85 (1994). Before *Campbell*, distinguished appellate judge Pierre Leval outlined this doctrine in a highly influential article:

> I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, 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—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Like Australia and Ireland, Hong Kong introduced a fair use proposal during its latest round of copyright reform.[122] Because the copyright amendment bill advanced by the government in June 2014 did not include sufficient limitations and exceptions to address the needs and concerns of Internet users,[123] a fair use proposal was introduced as a committee stage amendment alongside two other amendments—one on the copyright exception for predominantly noncommercial user-generated content and a provision to prevent copyright holders from contracting out of the fair dealing exceptions.[124] Although the fair use proposal included statutory language that was taken verbatim from the U.S. fair use provision,[125] that proposal was designed to supplement, not replace, the existing or newly proposed fair dealing provisions.[126] Sadly, this promising

> Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.

Leval, *supra* note 85, at 1111.

122. For the Author's discussions of copyright reform in Hong Kong, see generally Yu, *Canadian UGC Exception*, *supra* note 3; Peter K. Yu, *The Confuzzling Rhetoric Against New Copyright Exceptions*, *in* 1 KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY 278 (Peter Drahos et al. eds., 2015) [hereinafter Yu, *Confuzzling Rhetoric*]; Yu, *Digital Copyright Reform*, *supra* note 3; Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 327.

123. As the specific committee for the copyright amendment bill stated:

> The Bills Committee notes the view of some deputations that the proposed copyright exceptions under the 2014 Bill would not provide adequate protection for users of copyright works who are engaged in online dissemination of user-generated content . . . such as altered pictures/videos, mash-up works, video clips of cover versions of songs or songs with rewritten lyrics, fan-made videos and streaming of video game playing, etc.

BILLS COMMITTEE'S REPORT, *supra* note 25, at 23.

124. *See* BILLS COMMITTEE'S AMENDMENTS, *supra* note 18 (providing the text of these proposals); *see also* Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 301–19 (discussing the proposal for a copyright exception for predominantly noncommercial user-generated content).

125. *Compare* BILLS COMMITTEE'S AMENDMENTS, *supra* note 18, at 4, *with* 17 U.S.C. § 107 (2018). The proposed amendment reads as follows:

> 39B. Fair use
>
> Notwithstanding the provisions of sections 22, 89, 92 and 96, the fair use of a copyright work, including such use by reproduction or distribution in copies or communication by any other means, for purposes such as criticism, review, quotation, reporting and commenting on current events, parody, satire, caricature, pastiche, education (including multiple copies for educational establishment 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 must include—
>
> (a) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit-making purposes;
>
> (b) the nature of the copyright work;
>
> (c) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
>
> (d) the effect of the use upon the potential market for or value of the copyright work.
>
> The fact that a work is unpublished must not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

BILLS COMMITTEE'S AMENDMENTS, *supra* note 18, at 4.

126. As I noted in an earlier article:

> Although this amendment sought to introduce fair use into Hong Kong, it did not call for either the repeal of the existing fair dealing provisions or the replacement of those new ones proposed in the 2014 Bill. Instead, it supplemented all of these provisions by adding an open-ended, catch-all provision—something different from Section 107 of the U.S. Copyright Act.

Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 296.

proposal, along with the two other amendment proposals, died when the bill lapsed at the end of the legislative term in July 2016.[127]

Even in the United Kingdom—the birthplace of the old fair dealing paradigm[128]—the *Hargreaves Review* extolled the benefits of fair use and described it as "the big once and for all fix of the UK."[129] Despite these benefits, the *Review* refrained from recommending the introduction of fair use because "importing [it] wholesale was unlikely to be legally feasible in Europe."[130] It will be interesting to see if the United Kingdom will finally introduce fair use following Brexit.[131] Regardless of this possibility and the reservation expressed in the *Hargreaves Review*, it is worth recalling that the earlier *Gowers Review* proposed a solution that would have addressed the concern raised by the *Hargreaves Review*.[132] Recommendation 11 of the *Gowers Review* specifically called for amending Article 5 of the EU Information Society Directive[133] "to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test."[134]

2. Civil Law Jurisdictions

Thus far, this Section has discussed only developments in common law jurisdictions. Civil law jurisdictions, however, have an equally strong interest in introducing an open list of copyright limitations and exceptions. A notable example is China. In its latest draft of the Third Amendment to the Chinese Copyright Law, the proposed Article 43 calls for the addition of a new category of "other circumstances" at the end of the enumerated list of circumstances in which a copyrighted work may be used without authorization or remunera-

127. *Id.* at 285.

128. *See infra* Section I.C (discussing this paradigm).

129. HARGREAVES, *supra* note 21, at 52.

130. *Id.* at 5; *see also* Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society art. 5, 2001 O.J. (L 167) 10, 16–17 [hereinafter EU InfoSoc Directive] (providing an exhaustive list of limitations and exceptions). The CRC, however, disagreed:

> There is scope under EU law for member states to adopt a fair use doctrine as a matter of national law, and that EUCD [EU Copyright Directive] does not necessarily preclude it (not least because, in our view, EUCD has not harmonized the adaptation right). In particular, . . . while EU law accords a high protection to intellectual property rights such as copyright under the EUCD, case law in both the [Court of Justice of the European Union] and the [European Court of Human Rights] is increasingly stressing that these rights must be balanced against the protection of other fundamental rights. Our tentative draft fair use exception was an attempt to weigh up these issues and achieve an appropriate balance consistent with general principles of EU law.

CRC FINAL REPORT, *supra* note 18, at 91.

131. *See* Steven Erlanger, *Britain Votes to Leave E.U.; Cameron Plans to Step Down*, N.Y. TIMES (June 24, 2016), https://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html (reporting the Brexit vote).

132. *See* HARGREAVES, *supra* note 21, at 5 (expressing skepticism about the legal feasibility of importing fair use wholesale into the United Kingdom).

133. *See* EU InfoSoc Directive, *supra* note 130, art. 5 (providing for copyright limitations and exceptions).

134. GOWERS, *supra* note 97, at 68.

tion.[135] This proposed provision will replace Article 22 of the current statute, which includes twelve permissible circumstances, covering activities such as personal study, research, or appreciation; news reporting; and classroom teaching or scientific research.[136]

The addition of the open-ended category of "other circumstances" is highly important because it will transform the list of permissible circumstances from a closed list to an open one.[137] More importantly, because China is a civil law country, such addition will pave the way for similar reforms in other civil law jurisdictions.[138] Within Asia, South Korea[139] and Taiwan,[140] both civil law jurisdictions, have already adopted fair use. In Japan, another civil law jurisdiction, the debate on the introduction of fair use has been on and off in the past decade.[141]

Even in continental Europe, which has hitherto shown a vocal and persistent resistance to the introduction of an open list of copyright limitations and exceptions,[142] a growing number of European commentators have advanced proposals on how the copyright system in the region can be adjusted to accommodate such a list. For instance, Marie-Christine Janssens declared:

> [T]he choice of a closed list should be abandoned and such a list should be replaced by a more flexible system that will allow a more rapid response to new business models, novel uses or urgent situations that will continue to arise, undoubtedly, in the dynamic information society. . . . I would propose a system that combines a list of mandatory exceptions,

135. *See* Copyright Law of People's Republic of China (Third Revised Draft), art. 43(13) (2014), images.chinalaw.gov.cn/www/201406/20140606135600054.doc (in Chinese).

136. *See* Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Oct. 27, 2001), art. 22(1–12) (providing an enumerated list of circumstances in which a copyrighted work may be used without authorization or remuneration).

137. *See* Third Revised Draft, *supra* note 135, art. 43(13) (adding a new category of "other circumstances" to the enumerated list of circumstances in which a copyrighted work may be used without authorization or remuneration).

138. *See* Yu, *Customizing Fair Use Transplants*, *supra* note 17, at 10.

139. Copyright Act, Act No. 432, Jan. 28, 1957, *amended by* Act No. 14,083, Mar. 22, 2016, art. 35-3 (S. Kor.), *translated in* Korea Copyright Commission, https://www.copyright.or.kr/eng/laws-and-treaties/copyright-law/chapter02/section04.do (last visited Nov. 10, 2018); *see also* Sang Jo Jong, *Fair Use in Korea*, INFOJUSTICE.ORG (Feb. 27, 2017), http://infojustice.org/archives/37819 (offering a brief discussion of the origin and operation of the fair use provision in South Korea).

140. Copyright Act 2016 art. 65, *translated in* Intellectual Property Office, https://www.tipo.gov.tw/public/data/61221027271.pdf (Taiwan).

141. *See* Yoshiyuki Tamura, *Rethinking the Copyright Institution for the Digital Age*, 1 WIPO J. 63, 70 (2009) (noting that "the division of roles between the legislature and the judiciary through a distinction between rules and standards . . . has lately been raised by arguments in support of the introduction of a fair use clause in the Japanese copyright law"); Tatsuhiro Ueno, *Rethinking the Provisions on Limitations of Rights in the Japanese Copyright Act—Toward a Japanese-Style "Fair Use" Clause*, 34 AIPPI J. 159 (2009) (examining the possibility of adding a "general saving clause" to the end of the existing provisions on limitations of rights in Japanese copyright law).

142. *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 115–21 (2000) [hereinafter Okediji, *International Fair Use Doctrine*] (discussing the requests for clarification of the fair use doctrine within the framework of the TRIPS Council Review of Legislation).

> some of which are given imperative character, with an exhaustive list of optional provisions coupled to a "window provision."[143]

In addition, Martin Senftleben discussed how to expand copyright limitations and exceptions by reinterpreting the three-step test used in the TRIPS Agreement[144] and the WIPO Copyright Treaty.[145] As he observed:

> [T]he time seems ripe to turn to a productive use of the three-step test. Instead of employing the test as a straitjacket of copyright limitations, modern copyright legislation should seek to encourage its use as are fined proportionality test that allows both the restriction and the broadening of limitations in accordance with the individual circumstances of a given case.[146]

He and Bernt Hugenholtz further advanced recommendations to "introduce a measure of flexibility alongside the existing structure of limitations and exceptions, and thus combine the advantages of enhanced flexibility with legal security and technological neutrality."[147]

In July 2008, the Max Planck Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law was adopted in Munich, Germany to advance a new interpretation of the three-step test to support "open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable."[148] The Wittem Group,[149] a collective of distin-

143. Marie-Christine Janssens, *The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation*, *in* RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 317, 337 (Estelle Derclaye ed., 2009) (footnotes omitted).

144. *See* TRIPS Agreement, *supra* note 5, art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.").

145. Article 10(1) of the WIPO Copyright Treaty provides:

> Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

WIPO Copyright Treaty art. 10(1), Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [hereinafter WCT].

146. Martin Senftleben, *Fair Use in the Netherlands—A Renaissance?*, 33 TIJDSCHRIFT VOOR AUTEURS, MEDIA EN INFORMATIERECHT [J. FOR AUTHORS, MEDIA & INFO. L.] 1, 7 (2009) (Neth.) (footnote omitted); *see also* Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, 1 J. INTELL. PROP. INFO. TECH. & ELECTRONIC COM. L. 67, 76 (2010) ("[A]n EC fair use doctrine can be established on the basis of the three-step test embodied in Article 5(5) of the Copyright Directive."); Martin Senftleben, *The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions*, 33 AM. U. INT'L L. REV. 231 (2017) (dispelling the myth that civil law judges cannot adequately and consistently apply open-ended fair use norms).

147. Bernt Hugenholtz & Martin R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities* 2 (Institute for Information Law, University of Amsterdam, Research Paper No. 2012-33, 2012), https://ssrn.com/abstract=2013239.

148. MAX PLANCK INST. FOR INTELLECTUAL PROP. & COMPETITION LAW, DECLARATION ON A BALANCED INTERPRETATION OF THE "THREE-STEP TEST" IN COPYRIGHT LAW ¶ 3(a) (2008), https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf [hereinafter MAX PLANCK DECLARATION]; *see also* Monika Ermert, *IP Experts Sign Declaration Seeking Balanced Copyright Three-Step Test*, INTELL. PROP. WATCH (July 24, 2008), https://www.ip-watch.org/2008/07/24/ip-experts-sign-declaration-against-unbalanced-copyright-three-step-test/ (reporting the adoption of the declaration).

guished European copyright scholars, also developed the model European Copyright Code. This code included Article 5.5, which Jonathan Griffiths described as "an open 'meta-exception.'"[150] Entitling "further limitations," this provision states:

> Any other use that is comparable to the uses enumerated . . . is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.[151]

Finally, at the international level, the Global Network on Copyright Users' Rights,[152] a network of copyright scholars from different parts of the world, drafted a model flexible copyright exception to help countries update their copyright systems in response to rapid economic, social, cultural, and technological change.[153] Notably, the scholars involved come from both common law and

149. As Bernt Hugenholtz, a leader of the Wittem Project and a member of the drafting committee of the Wittem Code, explained:

> From 2002 to 2010, a group of European scholars united in the "Wittem Group" collaborated on drafting model provisions of a *European Copyright Code*. The members of the Wittem Group share a concern that the process of copyright law-making at the European level lacks transparency and that the voice of academia too often remains unheard. The Group believes that a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level. Published in April 2010, the Code provides model provisions on the core elements of any copyright law: subject matter of copyright, authorship and ownership, moral rights, economic rights and limitations.

Bernt Hugenholtz, *The Wittem Group's European Copyright Code*, *in* CODIFICATION OF EUROPEAN COPYRIGHT LAW: CHALLENGES AND PERSPECTIVES 339, 339 (Tatiana-Eleni Synodinou ed., 2012) (footnote omitted).

150. Jonathan Griffiths, *Unsticking the Centre-Piece—The Liberation of European Copyright Law?*, 1 J. INTELL. PROP. INFO. TECH. & ELECTRONIC COM. 87, 89 (2010).

151. THE WITTEM PROJECT, EUROPEAN COPYRIGHT CODE art. 5.5 (2010). As Professor Hugenholtz explained:

> Article 5.5 extends the scope of the itemized limitations by permitting other uses that are "comparable to" the uses mentioned in Articles 5.1 through 5.4, subject to the operation of the three-step test. [Articles 5.1 to 5.4 cover, respectively, uses with minimal economic significance, uses for the purpose of freedom of expression and information, uses permitted to promote social, political and cultural objectives, and uses for the purpose of enhancing competition.] This half-open structure of copyright limitations is perhaps the most innovative aspect of the entire Wittem Code. It combines the advantage of legal security and predictability associated with the "closed list" approach of limitations and exceptions under the author's right tradition with the flexibility and adaptability to technological change of the American *fair use* doctrine. Adding to this flexibility is the way the limitations are shaped; exempted uses are not defined with direct reference to economic rights (e.g., right of reproduction or right of communication to the public), but actually refer to *uses*. As a consequence, a limitation may on occasion exempt acts that affect multiple economic rights concurrently.

Hugenholtz, *supra* note 149, at 349–50 (footnotes omitted). Notably, the code "does not allow new limitations by blending the criteria of articles 5.1 to 5.3." THE WITTEM PROJECT, *supra*, art. 5.5 n.55.

152. *See generally Global Network on Copyright Users' Rights*, INFOJUSTICE.ORG, http://infojustice.org/flexible-use (last visited Nov. 10, 2018) (providing information about this network). The Author is a founding member of this network.

153. *See* Global Network on Copyright Users' Rights, Model Flexible Copyright Exception 4.0 (2012), http://infojustice.org/wp-content/uploads/2012/12/Model-Flexible-Copyright-Exception-Version-4.0.pdf (providing the exception).

civil law jurisdictions.[154] The network's membership therefore signals the possibility for developing a global paradigm with built-in flexibilities that suit different types of jurisdictions.

3. Summary

Regardless of whether the jurisdiction has a common law or civil law tradition, there have been quite a number of important and exciting developments concerning the efforts to introduce fair use into the copyright system. If we combine all of these developments with those concerning jurisdictions that have already adopted a fair use regime or its close variants—namely, Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka, and Taiwan[155]—one may notice an emergent trend toward the worldwide adoption of fair use. This trend is particularly important considering that more than forty jurisdictions "in all regions of the world and at all levels of development" have already adopted either the fair dealing or fair use model.[156] If more of these jurisdictions were making a switch from fair dealing to fair use, the latter would likely affect at least a sizeable portion of the world's population. This switch, in turn, would spark a paradigm shift in international copyright norms.

B. Countertrend Toward the Retention of the Status Quo

Although it is tempting to claim the existence of an emergent trend toward the worldwide adoption of fair use and a slowly emerging paradigm shift in international copyright norms, a close scrutiny of the actual developments on the ground does not support this claim. There is an undeniable trend toward the introduction of an open list of copyright limitations and exceptions.[157] Nevertheless, those jurisdictions that helped set this trend did not adopt the U.S. fair use model.[158] Instead, they retained, or proposed to retain, a considerable part of the status quo.[159] A hybrid model emerged as a result.

To illustrate how these jurisdictions have introduced fair use while retaining part of the status quo, consider again the "fair use" proposals explored in the previous Section—namely, those advanced in Australia, Ireland, and Hong Kong.[160] In Australia, even though the ALRC called for the introduction of an

154. *See Global Network on Copyright Users' Rights*, *supra* note 152 (providing a list of Global Expert Network Founding Members).

155. *See* BAND & GERAFI, *supra* note 17, at 30, 35–38, 46, 55–57, 60–62, 64 (listing the fair use provisions in Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka, and Taiwan); *see also* Yu, *Customizing Fair Use Transplants*, *supra* note 17, at 3–10 (discussing the efforts on the part of these jurisdictions to transplant fair use).

156. BAND & GERAFI, *supra* note 17, at 1.

157. *See id.* at 2 ("In recent years, the copyright law developments across the world have shown a growing willingness on the part of both developed and developing countries to adopt fair use or its close variants.").

158. *See id.* at 6–10 (discussing those jurisdictions that transplanted, or sought to transplant, fair use without introducing a verbatim or substantially verbatim transplant).

159. *See id.*

160. See sources cited *supra* note 18.

open-ended fair use exception, its final report recommended the creation of a nonexhaustive list of illustrative purposes.[161] This list includes the following purposes:

(a) research or study;
(b) criticism or review;
(c) parody or satire;
(d) reporting news;
(e) professional advice;
(f) quotation;
(g) non-commercial private use;
(h) incidental or technical use;
(i) library or archive use;
(j) education; and
(k) access for people with disability.[162]

The ALRC's final report further recommended the continued codification of the fairness factors,[163] thereby expanding the use of these factors beyond the purpose of research or study.[164] With respect to the latter, the current Australian copyright law allows courts to consider the following factors in determining whether a dealing with a copyrighted work is fair:

(a) the purpose and character of the dealing;
(b) the nature of the work or adaptation;
(c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
(d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
(e) in a case where only part of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.[165]

Four of these factors are substantially similar to the U.S. fair use factors.[166] The third one, however, is not included in the U.S. statute, although courts have considered it in cases such as *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[167] *Princeton University Press v. Michigan Document Services, Inc.*,[168]

161. *See* ALRC FINAL REPORT, *supra* note 18, at 150–51 (providing Recommendation 5–3).

162. *Id.*

163. *See id.* at 144 (providing Recommendation 5–2).

164. *See Copyright Act 1968* (Cth) s 40 (Austl.) (providing the fair dealing exception for the purpose of research or study).

165. *Id.*

166. *See* 17 U.S.C. § 107 (2018) (listing the four nonexhaustive fair use factors).

167. 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

168. 99 F.3d 1381, 1403 (6th Cir. 1996) ("[T]he significant question in the first factor's inquiry into the purpose and character of the use is whether the copyrighted material is being *exploited* for profit without paying the customary price.").

and *American Geophysical Union v. Texaco Inc.*[169] For its recommendation, the ALRC has chosen only those four factors that have been included in the U.S. fair use provision.[170]

In addition to the fairness factors, the Commission's proposal called for the establishment of a nonexhaustive list of illustrative purposes.[171] As the ALRC explained, there are good reasons to combine the fairness factors with this nonexhaustive list:

> Professor Kathy Bowrey considered that the fairness factors and illustrative purposes would be mutually supportive: "The former primarily serve to better elucidate motivational factors related to the creation of the defendant's work and allow for critical reflection on the significance of that evidence, in view of current cultural and economic practices. The nonexhaustive list of illustrative purposes document established cultural practices that might generally be indicative of fair use, where the fairness factors are also met."
>
> In her view, the advantage of this approach is that, by separating out the fairness factors from the illustrative purposes, it is "easier for the public to identify the normative factors they need to consider to determine the legitimacy of their use, regardless of any idiosyncrasies associated with their individual practice."[172]

Another illustration is Ireland. Even though the CRC pushed for the adoption of an open-ended fair use regime, its recommendation supplements that new regime with preexisting fair dealing provisions.[173] Unlike the fair use provision in the United States or the one recommended by the ALRC, the proposed Section 49A(2) of the Irish Copyright and Related Rights Act includes the following language: "The other acts permitted by this Part shall be regarded as examples of fair use, and, in any particular case, the court shall not consider

169. As Chief Judge Jon Newman declared:

> [I]t is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. . . . [I]t is sensible that a particular unauthorized use should be considered "more fair" when there is no ready market or means to pay for the use, while such an unauthorized use should be considered "less fair" when there is a ready market or means to pay for the use.

60 F.3d 913, 930–31 (2d Cir. 1994).

170. *See* ALRC FINAL REPORT, *supra* note 18, at 141–43 (explaining why the ALRC has decided against including the factor concerning "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price"). Judge Pierre Leval concurred:

> Th[e] test [regarding "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price"] is circular. Whether there is a "customary price" depends, of course, on whether the secondary use is a fair use or an infringement. Measuring the hypothetically lost royalties serves no purpose unless we have learned from other factors whether the copyright owner was entitled to charge for the use.

Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1460 (1997).

171. *See* ALRC FINAL REPORT, *supra* note 18, at 124 (including in the exception three elements: (1) "an express statement that a fair use of another's copyright material does not infringe copyright"; (2) "a nonexhaustive list of four fairness factors to be considered in determining whether use of that copyright material is fair"; and (3) "a non-exhaustive list of illustrative uses or purposes").

172. *Id.*

173. *See* CRC FINAL REPORT, *supra* note 18, at 93–94.

whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by this Part."[174]

Based on this unique language, the CRC, in effect, proposed a regime that allows fair use to cover unforeseen circumstances but requires courts to first consider whether the statute includes an exception that already covers the implicated use of a copyrighted work.[175] As the Committee explained:

> The Report acknowledges that fair use is a controversial topic, with powerful views expressed both for and against it. It does not recommend the introduction of . . . "the US style 'fair use' doctrine" which it considered under its terms of reference, but rather a specifically Irish version.
>
> It recommends the introduction of a new [Copyright and Related Rights Act] section allowing for fair use, but tying it very closely to existing exceptions and making it clear that these exceptions should be exhausted before any claim to fair use should be considered. The exceptions should be regarded as examples of fair use so as to allow workable analogies to be developed[] and sets out the criteria for the court to take into account in determining whether or not a matter amounts to fair use.[176]

A third illustration is Hong Kong. While the proposed amendment to the Copyright (Amendment) Bill 2014 added a U.S.-style fair use provision to the existing list of limitations and exceptions,[177] that provision did not intend to replace the existing fair dealing provisions in the Hong Kong Copyright Ordinance—those covering research and private study; criticism, review, and news reporting; giving or receiving instruction; and public administration.[178] The new fair use provision would also not prejudice the three new fair dealing provisions introduced through the copyright amendment bill—those covering quotation; commenting on current events; and parody, satire, caricature, and pastiche.[179] Instead, the provision would serve mostly as a general saving clause or a supplemental catch-all provision.[180]

In sum, although a number of jurisdictions have been actively pushing for the introduction of fair use into their copyright systems, they have made a conscious choice to retain a considerable part of the status quo, including preexist-

174. *Id.* at 93.

175. *See id.*

176. *Id.* at 176–77.

177. *See* BILLS COMMITTEE'S AMENDMENTS, *supra* note 18, at 4 (providing the text of the fair use proposal).

178. *See* Hong Kong Copyright Ordinance, (1997) Cap. 528, § 38 (H.K.) (research and private study); *id.* § 39 (criticism, review, and news reporting); *id.* § 41A (giving or receiving instruction); *id.* § 54A (public administration).

179. *See* 2014 Bill, *supra* note 105, at C2989 (amending Section 39 of the Hong Kong Copyright Ordinance by introducing new copyright exceptions for quotation and for commenting on current events); *id.* at C2993 (adding a new Section 39A to create a copyright exception for parody, satire, caricature, and pastiche).

180. *See* Yu, *Customizing Fair Use Transplants*, *supra* note 17, at 9–10 (discussing the introduction of a general saving clause or a supplemental catch-all provision as a modality of transplantation); Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 327–30 (discussing the difference between a standalone fair use provision and a supplemental catch-all fair use provision).

ing fair dealing arrangements. These jurisdictions therefore did not shift the paradigm, but rather facilitated its evolution.

The preferences of these jurisdictions are understandable considering that policy-makers and legislators tend to be reluctant to introduce wholesale changes that would disrupt the preexisting legal system, especially in an area that is so intertwined with business, technology, and society.[181] Nevertheless, the jurisdictions' continued and express preferences for a hybrid model have casted serious doubt about the existence of an emergent trend toward the worldwide adoption of fair use and a slowly emerging paradigm shift in international copyright norms.[182] The lack of such a trend invites us to explore what it means to have a paradigm evolution, as opposed to a paradigm shift. It also provokes us to think more deeply about not only the efforts to reform copyright limitations and exceptions based on the U.S. fair use model, but also the expediency, effectiveness, and sustainability of global law reform in the American image.

IV. PRIMARY CAUSES

Part III has shown that, despite the eagerness of many jurisdictions to introduce the fair use model, these jurisdictions made a conscious choice to retain a considerable part of the status quo—either by incorporating preexisting copyright limitations and exceptions into the new fair use regime or by transforming the regime with an added list of illustrative purposes. In light of this conscious choice, one cannot help but wonder why policy-makers and legislators have preferred a paradigm evolution to a paradigm shift. After all, it is these people who perceived the crisis early and called for a paradigm shift in the first place.[183]

Although there are many possible contributing factors within and outside the legal system, this Part focuses on factors residing within. Specifically, this Part examines factors relating to intellectual property law, international and comparative law, and the legislative process. This Part underscores the inherent difficulty in pinpointing the primary causes behind a paradigm shift, especially under the punctuated equilibrium model when there is no easy way to predict when that equilibrium will be reached.[184] This Part also points out that, even when we single out causes within the legal system, contributing factors can

181. *See infra* text accompanying notes 253–55 (discussing legislative inertia).

182. See sources cited *supra* note 18.

183. *See, e.g.*, GOWERS, *supra* note 97, at 68 (calling for an amendment to the EU Information Society Directive to provide for "an exception for creative, transformative or derivative works"); HARGREAVES, *supra* note 21, at 52 (calling for the introduction of fair use as "the big once and for all fix of the UK").

184. As Oona Hathaway explained:

> In the punctuated equilibrium model, as in the increasing returns path dependence model, the ultimate outcome of a process of change is usually indeterminate because punctuated equilibria are marked by "contingency": "the inability of the theory to predict or explain, either deterministically or probabilistically, the occurrence of a specific outcome."

Hathaway, *supra* note 43, at 615–16 (quoting Mahoney, *supra* note 45, at 513).

come from many directions.[185] As the intellectual property system continues to expand—at both the domestic and global levels—this system will likely implicate many other areas of the law.[186]

A. Intellectual Property Law

To begin this inquiry, it is important to fully evaluate the U.S. fair use model, which provides many jurisdictions with a new paradigm for developing new international copyright norms. In its systematic comparison between the fair dealing and fair use models—the old and new paradigms for the purposes of this Article—the ALRC's final report provided a careful evaluation of their respective strengths and weaknesses.[187]

To build the case for fair use, this report identified the following strengths:

- Fair use is flexible and technology-neutral.
- Fair use promotes public interest and transformative uses.
- Fair use assists innovation.
- Fair use better aligns with reasonable consumer expectations.
- Fair use helps protect rights holders' markets.
- Fair use is sufficiently certain and predictable.
- Fair use is compatible with moral rights and international law.[188]

Although the ALRC was eager to emphasize the strengths of the fair use model and ended up recommending the model's adoption, its final report and the preceding discussion paper devoted considerable analysis to the model's continuous criticisms and related policy concerns.[189] Specifically, the report noted some of the weaknesses identified earlier in the review process:

- [fair use] is unnecessary and no case is made out for it;
- [fair use] would create uncertainty and expense;
- [fair use] originated in a different legal environment; and
- [fair use] may not comply with the three-step test.[190]

185. *See* discussion *infra* Sections IV.A (discussing intellectual property law), IV.B (discussing international and comparative law), IV.C (discussing the legislative process).

186. *See* Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 940 (2008) (noting that "the 'law and . . .' movement has finally spread to international intellectual property law, and the subject has become increasingly multidisciplinary"). As I noted in an earlier article:

> [B]ecause of the ever-expanding scope of intellectual property rights and the ability for these rights to spill over into other areas of international regulation, intellectual property training and educational programs should feature inter- and multi-disciplinary perspectives. Many of the existing programs focus primarily on the legal aspects of intellectual property. However, it is increasingly important to consider other aspects of intellectual property, such as political, economic, social, and cultural.

Peter K. Yu, *Intellectual Property Training and Education for Development*, 28 AM. U. INT'L L. REV. 311, 328 (2012) (footnote omitted).

187. *See* ALRC FINAL REPORT, *supra* note 18, at 87–122.

188. *Id.* at 21.

189. *See id.* at 87–122; ALRC, COPYRIGHT AND THE DIGITAL ECONOMY: DISCUSSION PAPER 59–98, 131–54 (2013) [hereinafter ALRC DISCUSSION PAPER].

190. ALRC DISCUSSION PAPER, *supra* note 189, at 71.

The ALRC's final report is used in this Part because it is representative of extant comparative studies on the distinctions between fair dealing and fair use. More importantly, this comprehensive, systematic, and carefully written report illustrates the many strengths and weaknesses of the fair use model. The model's documented weaknesses help explain why many jurisdictions seeking to introduce fair use ended up adopting a hybrid model.

After all, it is not unusual for policy-makers and legislators to push for innovation in the legal system while at the same time demanding the retention of what they consider as the strengths of current law or what they perceive as an important local tradition.[191] By combining the strengths of both the old and new paradigms to form a hybrid model, these policy-makers and legislators have managed to achieve the best of both worlds.[192]

The eagerness to achieve such a win-win outcome is understandable considering that a hybrid model can provide many strengths of the fair use model. Indeed, the introduction of an open list of copyright limitations and exceptions can retain virtually all of the strengths identified by the ALRC in regard to the fair use model.[193] It does not matter much whether the model ultimately adopted is fair use or a hybrid if the goal of this new model is to promote the public interest, advance innovation, or meet consumer expectations. Any open model will provide sufficient flexibility for courts and law enforcement personnel to address unforeseen situations.[194] While a standalone fair use provision, similar to the one found in the United States,[195] may be more efficient in resolving copyright disputes in some situations, a hybrid model with an open list of copyright limitations and exceptions can be more efficient in other situations, such as those already covered by preexisting fair dealing exceptions.

Consider more specifically the proposals advanced by the ALRC and the CRC. To address the criticism that fair use lacks precision and clarity,[196] the ALRC's proposal coupled the newly introduced fair use provision with a nonexhaustive list of illustrative purposes.[197] Likewise, the CRC recommended the inclusion of all existing limitations and exceptions "as examples of fair use" and a new requirement that courts should give priority consideration to those

191. *See* Yu, *Digital Copyright Reform*, *supra* note 3, at 718–19 (discussing how the proposal for establishing statutory or pre-established damages does not fit well within the Hong Kong legal tradition).

192. *See* Griffiths, *supra* note 150, at 93 (describing "a factor-based, fair use provision for Europe . . . [as] the 'best of both worlds'"); Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 330 ("[C]ountries may seek to achieve the best of both worlds by adopting a hybrid model that includes some features of fair dealing and some features of fair use.").

193. *See* ALRC FINAL REPORT, *supra* note 18, at 21 (identifying the strengths of a flexible fair use exception).

194. *Cf.* Hugenholtz & Senftleben, *supra* note 147, at 2 (noting that "a semi-open norm" can be "almost as flexible as the fair use rule of the United States").

195. *See* 17 U.S.C. § 107 (2018) (codifying fair use).

196. *See* Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 331–34 (discussing the criticism that fair use lacks precision and clarity).

197. *See* ALRC FINAL REPORT, *supra* note 18, at 123–60 (recommending the introduction of a fair use exception).

limitations and exceptions.[198] In both jurisdictions, the proposed hybrid model manages to introduce select aspects of fair use while converting the list of copyright limitations and exceptions from a closed list to an open one.[199] Yet neither jurisdiction transplanted the fair use model verbatim or substantially verbatim from the United States.[200]

Viewed against the existing negotiation literature, the compromises made by Australian and Irish policy-makers made a lot of sense. Although these policy-makers introduced the fair use model to broaden copyright limitations and exceptions, they were well aware of the drastically different positions taken by different legislators and their respective constituents.[201] Against this complicated political background, the best compromise they could come up with is a hybrid option that includes a combination of both the old and new paradigms.[202]

As Professors Roger Fisher and William Ury noted in their seminal work, *Getting to Yes*, successful negotiators tend to create or enlarge value before dividing the pie.[203] The CRC's recommendation provides an excellent illustration of this value-creating approach.[204] Instead of opting for either the retention of the existing fair dealing regime or the introduction of a new fair use regime, the CRC's proposal enlarges the pie by ensuring that those who prefer the existing fair dealing provisions, and the clarity they provide, will be no worse off.[205] Meanwhile, it also facilitates the creation of new limitations and exceptions that are not previously found in the Irish Copyright and Related Rights Act.

B. International and Comparative Law

The second set of contributory factors concerns the legal transplant process. Modeled after Section 107 of the U.S. Copyright Act, the proposals to introduce fair use in many jurisdictions provide textbook illustrations of legal transplants.[206]

198. *See* CRC FINAL REPORT, *supra* note 18, at 89, 93–94 (recommending the introduction of the fair use exception as a new Section 49A of the Irish Copyright and Related Rights Act).

199. *See* ALRC FINAL REPORT, *supra* note 18, at 13–14 (advancing the proposal); CRC FINAL REPORT, *supra* note 18, at 93–94 (advancing the proposal).

200. *Compare* ALRC FINAL REPORT, *supra* note 18, at 13–14 (advancing the proposal); CRC FINAL REPORT, *supra* note 18, at 93–94 (advancing the proposal), *with* Yu, *Customizing Fair Use Transplants*, *supra* note 17, at 4–6 (discussing those jurisdictions that introduced a verbatim or substantially verbatim transplant).

201. *See* ALRC DISCUSSION PAPER, *supra* note 189, at 71–79 (identifying the arguments against the introduction of fair use in Australia); ALRC FINAL REPORT, *supra* note 18, at 112–13, 128 (noting the views of those stakeholders opposing such introduction); CRC FINAL REPORT, *supra* note 18, at 58 (noting the "difference of opinion, with some submissions questioning whether it would be wise to do so").

202. *See* ALRC FINAL REPORT, *supra* note 18, at 13–14 (advancing the proposal); CRC FINAL REPORT, *supra* note 18, at 93–94 (advancing the proposal).

203. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 56–80 (2d ed. 1991) (discussing ways to "invent options for mutual gains").

204. *See* CRC FINAL REPORT, *supra* note 18, at 93–94 (advancing the proposal).

205. *See id.*

206. *See* Yu, *Customizing Fair Use Transplants*, *supra* note 17, at 3–10 (discussing the different fair use transplants from across the world).

In the intellectual property field, legal transplants are very common. Since the adoption of the TRIPS Agreement, policy-makers and commentators, especially those concerned about its unintended consequences in developing countries, have criticized the agreement for transplanting inappropriate standards that fail to take account of local needs, national interests, technological capabilities, institutional capacities, and public health conditions.[207] In the past decade, these criticisms have become even louder and more serious, due largely to the developed countries' aggressive push for the establishment of TRIPS-plus bilateral, regional, and plurilateral agreements, such as ACTA, the TPP (now the CPTPP), and, to some extent, the RCEP.[208]

As these critics rightly pointed out, hastily transplanted laws can be both ineffective and insensitive to local conditions.[209] These transplants can also stifle local development while upsetting the existing local tradition.[210] In addition, they may bring problems from abroad, thus exacerbating the problems they seek to address.[211] They may even take away the valuable opportunities for experimentation with new regulatory and economic policies.[212]

207. *See* Peter K. Yu, *The Comparative Economics of International Intellectual Property Agreements*, *in* COMPARATIVE LAW AND ECONOMICS 282 (Theodore Eisenberg & Giovanni B. Ramello eds., 2016) (discussing the higher standards of intellectual property protection and enforcement imposed by the TRIPS Agreement); Yu, *The International Enclosure Movement*, *supra* note 23, at 858–62 (discussing the enclosure of the intellectual property policy space by the TRIPS Agreement); *see also* Yu, *TRIPs and Its Discontents*, *supra* note 6, at 373–75 (discussing the coercion narrative concerning the origins of the TRIPS Agreement).

208. *See* Yu, *The International Enclosure Movement*, *supra* note 23, at 855–70 (discussing the enclosure of policy space through the introduction of the TRIPS Agreement and TRIPS-plus bilateral, regional, and plurilateral trade agreements).

209. *See* ALRC DISCUSSION PAPER, *supra* note 189, at 76–77 (discussing the criticism that "fair use originated in a different legal environment"). As I noted in an earlier book chapter:

> A successful transplant is usually one that is sensitive to the local environment. In order for the transplanted laws to be effective, they may need to undergo a careful evaluation and rigorous adaptation process. When they do not undergo such a process[,] . . . the effectiveness and expediency of the transplanted laws are questionable.

Yu, *Transplant and Transformation*, *supra* note 3, at 38–39. Yu, *Digital Copyright Reform*, *supra* note 3, at 770 ("[If legal transplants] are hastily adopted without careful evaluation and adaptation, they may be both ineffective and insensitive to local conditions. They may also stifle local development while upsetting the existing local tradition.").

210. *See* Yu, *Digital Copyright Reform*, *supra* note 3, at 718–19 (discussing how the proposal for establishing statutory or pre-established damages does not fit well within the legal tradition in Hong Kong). *See generally* Birnhack, *supra* note 20 (documenting the problems of partial, slightly outdated fair use transplants).

211. As I noted in an earlier book chapter:

> [L]egal transplants—especially those involving controversial laws and policies—could bring to the recipient countries problems from the source countries. These tag-along problems are particularly troubling for developing countries because they have very limited expertise in assessing the potential problems and unintended consequences caused by the ill-advised transplants.

Yu, *Transplant and Transformation*, *supra* note 3, at 31.

212. *See* John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 707–09 (2002) (discussing how countries can develop legal systems by experimenting with new regulatory and economic policies).

Nevertheless, legal transplants can be quite beneficial, especially if they are carefully selected and appropriately customized.[213] In an earlier article, I noted the following benefits of legal transplants:

> [L]egal transplantation allows countries, especially those with limited resources, to take a free ride on the legislative efforts of other, usually more economically developed, countries. The process also provides laws that have served as time-tested solutions to similar problems, drawing on lessons learned from the experiences in the source countries—both positive and negative. Transplants may even help provide preemptory defenses to countries that face repeated and intense pressure from their more powerful trading partners, not to mention the strong likelihood that the laws in these powerful countries will eventually become international standards by virtue of the source countries' sheer economic and political might.[214]

To complicate matters, the transplant of the U.S. fair use model may be different from the transplants introduced by the TRIPS Agreement or TRIPS-plus bilateral, regional, or plurilateral trade agreements.[215] Not only is the underlying model very different, the ultimate objective of the transplant efforts varies considerably. Unlike TRIPS or TRIPS-plus transplants, which push for greater copyright protection, fair use transplants seek to enlarge the freedom of users in the copyright system while enhancing their access to copyrighted works.[216] Given the ongoing push for higher protection and enforcement standards, many policy-makers and commentators find these transplants highly appealing.[217] Some have also welcomed their potential ability to restore the balance in the copyright system.[218]

Notwithstanding these many benefits, fair use transplants have raised similar problems caused by TRIPS or TRIPS-plus transplants.[219] To avoid these

213. *See* Yu, *Transplant and Transformation*, *supra* note 3, at 10 (noting the potential benefits when legal transplants "are carefully selected and appropriately customized"); Yu, *Customizing Fair Use Transplants*, *supra* note 17, at 11 ("[R]egardless of whether a legal transplant is widely supported by the local populace or forced upon them from abroad, the transplanted law needs to be customized to local conditions if it is to be effective and if it is to receive wide public support.").

214. Yu, *Digital Copyright Reform*, *supra* note 3, at 754–55.

215. See sources cited *supra* note 23.

216. *See* ALRC FINAL REPORT, *supra* note 18, at 100–08 (discussing how fair use promotes the public interest, facilitates transformative uses, and assists innovation).

217. *See* ERNST & YOUNG, COST BENEFIT ANALYSIS OF CHANGES TO THE COPYRIGHT ACT 1968, at x (2016) ("Overall, our analysis of new fair dealing suggests that the ALRC's proposed recommendations should be beneficial, albeit not substantially in some areas. From the standpoint of an 'open-ended' (fair use) or 'closed-ended' (fair dealing) system of exceptions, the former is likely to have the largest net benefit."); Okediji, *International Fair Use Doctrine*, *supra* note 142 (calling for the development of an international fair use doctrine).

218. *See* ALRC DISCUSSION PAPER, *supra* note 189, at 69 (discussing how fair use can restore balance to the copyright system); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1495 (2007) ("Fair use is perhaps the most crucial policy tool for maintaining copyright's intended balance."); Samuelson, *supra* note 85, at 2618 ("Fair use is an essential doctrine in U.S. copyright law that counterbalances what would otherwise be an unreasonably broad grant of rights to authors and an unduly narrow set of negotiated exceptions and limitations.").

219. *See* Yu, *Transplant and Transformation*, *supra* note 3, at 29–32 (identifying the potential problems posed by TRIPS and TRIPS-plus transplants).

problems and to ensure their appropriateness and effectiveness, fair use transplants have to be customized based on local conditions.[220] As the late Alan Watson, father of the study of legal transplants, observed, "[t]ransplanting frequently, perhaps always, involves legal transformation."[221] Indeed, "a time of transplant is often a moment when reforms can be introduced."[222]

Part of the reason why many policy-makers and legislators embraced a hybrid model, as opposed to the U.S. fair use model, is that they wanted to better adapt the transplant to local conditions.[223] In their view, a model that preserves a considerable part of the status quo while introducing innovation in copyright law is more likely to take root and become effective.[224] During the copyright reform process, it is not unusual for the copyright industries to criticize the fair use model for being alien to local soil.[225]

Moreover, some jurisdictions have been cautious in transplanting the fair use model.[226] While legal transplants can help align transplanting jurisdictions with donor jurisdictions, thereby preempting potential challenges by the latter,[227] the donor jurisdiction in this area—the United States—has actively dis-

220. *See* Kahn-Freund, *supra* note 3, at 24 (noting that, because transplanted laws often bring with them foreign values, they may upset longstanding traditions in the recipient countries while at the same time undermining institutions that are "closely linked with the structure and organization of political power and social power in their own environment"); Yu, *Digital Copyright Reform*, *supra* note 3, at 770 ("[If legal transplants] are hastily adopted without careful evaluation and adaptation, they may be both ineffective and insensitive to local conditions. They may also stifle local development while upsetting the existing local tradition.").

221. WATSON, *supra* note 3, at 116.

222. *Id.* at 35.

223. As I noted in an earlier article:

> Because legal transplants have both strengths and drawbacks, whether they will become effective and successful will depend on the process by which they are transplanted. Before transplant, policymakers should identify what they seek to achieve through law reform. They should not just transplant laws for the sake of transplantation, or even harmonization. Instead, they should evaluate local conditions and select a model that would best fit these conditions. They should further explore whether adaptations are needed to make the transplanted law effective. Finally, after the law's adoption, they should determine if further adjustments are needed at the implementation stage to assimilate the law to local conditions. After all, "like the transplant of plants or human organs, the process requires a careful process of evaluation, selection, adaptation, and assimilation."

Yu, *Canadian UGC Exception*, *supra* note 3, at 182; *see also supra* note 213 (collecting articles that discuss the benefits of customizing legal transplants).

224. *See* Kahn-Freund, *supra* note 3, at 24 (noting that the potential for transplanted laws to "upset longstanding traditions in the recipient countries"); Yu, *Digital Copyright Reform*, *supra* note 3, at 770 (noting that hastily adopted legal transplants "may be both ineffective and insensitive to local conditions" and "may . . . stifle local development while upsetting the existing local tradition").

225. *See* Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 338–41 (discussing the criticism that fair use transplants contradict the local legal tradition while creating unintended consequences).

226. *See id.* at 286–300 (discussing the Hong Kong government's cautious approach to introducing fair use and other copyright reforms).

227. As I noted in an earlier chapter:

> [L]egal transplants may help provide pre-emptive defences to countries that face repeated or intense pressure from their more powerful trading partners, not to mention the strong likelihood that the laws in these powerful countries will eventually become international standards by virtue of the source countries' sheer economic and political might. It is no coincidence that many developing countries have adopted US standards in part to avoid the continuous pressure from US intellectual property industries and their supportive governments. Even if external pressure does not come from the United States—for example, when

couraged the adoption of fair use in international instruments or through domestic legislation. A case in point concerns the negotiations on the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.[228] During those negotiations, the U.S. State Department was caught issuing an embarrassing secret demarche to encourage the removal of references to fair use in the draft text of the treaty.[229]

C. Legislative Process

Interest group politics provides an ideal starting point for analyzing the legislative process. As we have learned from the literature on public choice theory, the legislative process—whether in the United States, Europe, or Asia—can be easily captured by special interests. Indeed, the copyright industries are notorious for their ability to capture the legislative process.[230] The lobbying by these industries was so intense that William Patry used the word "lobbynomics" to describe "the continual use of exaggerated (and often false) claims and crises as an excuse to pass laws that are unnecessary and many times harmful."[231]

In her pioneering work, Jessica Litman discussed in detail how the copyright lawmaking process has been set up in a way that would represent the multiple interests at the negotiation table.[232] As she explained:

> The legislative materials disclose a process of continuing negotiations among various industry representatives, designed and supervised by Congress and the Copyright Office and aimed at forging a modern copyright statute from a negotiated consensus. During more than twenty years of negotiations, the substantive content of the statute emerged as a series of interrelated and dependent compromises among industries with differing interests in copyright. The record demonstrates that members of Congress chose to enact compromises whose wisdom they doubted because of their

it comes from the European Union instead—having US standards in place could help deflate the pressure by transforming a one-sided battle into a more even-handed global dispute.

Yu, *Transplant and Transformation*, *supra* note 3, at 33–34 (footnote omitted); *see also* Yu, *Digital Copyright Reform*, *supra* note 3, at 755 ("Transplants may . . . help provide preemptory defenses to countries that face repeated and intense pressure from their more powerful trading partners, not to mention the strong likelihood that the laws in these powerful countries will eventually become international standards by virtue of the source countries' sheer economic and political might.").

228. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, June 27, 2013, 52 I.L.M. 1312. This treaty provides individuals with print disabilities with easy or ready access to copyright publications.

229. *See* James Love, *US Department of State Demarche Against Fair Use in WIPO Treaty for Blind*, KNOWLEDGE ECOLOGY INT'L (June 23, 2013), https://keionline.org/22253 (discussing the demarche).

230. *See generally* MONICA HORTEN, A COPYRIGHT MASQUERADE: HOW CORPORATE LOBBYING THREATENS ONLINE FREEDOMS (2013) (discussing how legislative capture by the copyright industries has undermined online freedom); BRINK LINDSEY & STEVEN TELES, THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY 64–89 (2017) (discussing capture in the intellectual property area).

231. WILLIAM F. PATRY, HOW TO FIX COPYRIGHT 6 (2011).

232. *See generally* LITMAN, *supra* note 2 (discussing the copyright lawmaking process).

> belief that, in this area of law, the solution of compromise was the best solution.[233]

A case in point is the codification of the fair use doctrine in Section 107 of the U.S. Copyright Act, one of the statute's few limitations and exceptions on the general scope of copyright.[234] As Professor Litman observed:

> Representatives of copyright owners . . . preferred that the fair use doctrine represent the only flexibility principle in the statute's complex scheme of expansive rights and rigid exceptions. Educational organizations went along only on the condition that the statutory definition of fair use restrict the doctrine's unpredictability—the very feature that authors and publishers found attractive. Copyright owners had long claimed that much of what educational users were doing and wanted to continue doing, including most educational photocopying, was not within the fair use exception. Educational organizations were unwilling to accept a definition of fair use unless it were stretched to include educational photocopying and other common educational uses. The parties agreed to insert words here and there, in both the statutory provision and the House Committee Report, that appeared to stretch the fair use privilege enough to offer educators some minimal certainty. The language on which they

233. Litman, *Copyright, Compromise*, *supra* note 2, at 862. Later in her book, Professor Litman wrote:

> What we have [in the DMCA] is what a variety of different private parties were able to extract from each other in the course of an incredibly complicated four-year multiparty negotiation. Unsurprisingly, they paid for that with a lot of rent-seeking at the expense of new upstart industries and the public at large.

LITMAN, *supra* note 2, at 145; *see also* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 53 (1994) ("The only way that copyright laws get passed in [the United States] is for all the lawyers who represent the current stakeholders to get together . . . . This process has produced laws that are unworkable from the vantage point of people who were not among the negotiating parties." (footnote omitted)).

Professor Litman's observation was supported by the remarks made by former U.S. Register of Copyrights Abraham Kaminstein in his 1965 testimony to the Senate Subcommittee on Patents, Copyrights and Trademarks:

> In the hearings on this bill held before Subcommittee No. 3 of the House Judiciary Committee earlier this year a question was raised as to why, in view of the fast-evolving communications technology, there have not been more frequent revisions of the copyright law. If there is a single answer to this question, I believe it is that there are so many interrelated creator-user interests in the copyright field, and they present such sharp conflicts on individual issues, that the consensus necessary for any general revision is extremely difficult to achieve. Examples of this difficulty are found throughout the concentrated efforts to revise the 1909 act which went on continuously between 1924 and 1940 and which all ended in failure and futility. Realizing fully what copyright law revision is up against, Arthur Fisher, my predecessor as Register of Copyrights, planned a program that would be based on a thorough knowledge of all the issues and a painstaking effort to resolve as many disputes as possible before a bill reached the stage of congressional hearings. It took us 10 years, but the program he planned has been carried out to the best of our ability.

Litman, *Copyright, Compromise*, *supra* note 2, at 872–73.

234. As Professor Litman observed:

> In the midst of these expansively defined rights and rigid exemptions, the fair use doctrine became the statute's central source of flexibility. In the earliest versions of the bill, the beleaguered fair use provision offered the sole means of tempering the expansive scope of the copyright owner's exclusive rights. Fair use was also the sole safe harbor for interests that lacked the bargaining power to negotiate a specific exemption. In 1969, the Senate Subcommittee added a second provision limiting the general scope of copyright. This second limitation was the distinction between idea and expression, a fundamental principle of traditional copyright law codified in section 102(b) "in response to the great debate over computers. [The provision was] intended to disclaim any intention to protect a programmer's algorithms under the bill." These two provisions remained the only general limiting principles in the statute as enacted in 1976.

Litman, *Copyright, Compromise*, *supra* note 2, at 886 (footnotes omitted).

> compromised, however, was ambiguous, and intentionally so, because copyright owners and educational organizations never fully resolved their disputes. Both interests envisioned flexible application of the fair use doctrine, but they failed to reach a consensus as to the doctrine's scope.[235]

While the interest group politics generated by the entrenched copyright industries explain why policy-makers and legislators in support of these industries would work hard to frustrate efforts to introduce legislation based on the fair use model, it does not explain why many jurisdictions ended up adopting a hybrid model. Indeed, given the continuous strength of the copyright lobby in these jurisdictions,[236] one would expect the fair use model to be rejected, as opposed to emerging in a hybrid form. Given that the model prevailed to a large extent, interest group politics must have gone in the opposite direction.

Clearly, some policy-makers and legislators were eager to introduce legislative changes based on the fair use model to respond to economic, social, cultural, and technological change.[237] That is indeed why these policy-makers and legislators called for a paradigm shift. The transformative changes posed by the Internet and other new technologies speak for themselves. It is also understandable why many policy-makers and legislators, after undertaking an independent assessment, appreciated the need for new legislation that strikes a more appropriate balance between access and proprietary control in the copyright system.[238]

In addition, the popularization of the Internet and social media and the continued arrival of new technologies have brought to the legislative process new and increasingly powerful interests, which seek to capture the legislative process from the opposite direction.[239] Thus far, commentators and pundits

235. *Id.* at 887–88 (footnotes omitted).

236. *See* Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1376 (2010) (noting the success in pushing for graduated response system in France); Peter K. Yu, *Intellectual Property and Human Rights in the Nonmultilateral Era*, 64 FLA. L. REV. 1045, 1058 (2012) (noting that "Chile, France, South Korea, and Taiwan have adopted this system").

237. *See* ALRC FINAL REPORT, *supra* note 18, at 95 ("A technology-neutral open standard such as fair use has the dynamism or agility to respond to 'future technologies, economies and circumstances—that don't yet exist, or haven't yet been foreseen'.").

238. The economic picture about the incentives provided by the existing copyright system has been mixed. For economic literature relating to intellectual property, see generally ROGER D. BLAIR & THOMAS F. COTTER, INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES (2005); THOMAS F. COTTER, COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS (2013); CHRISTINE GREENHALGH & MARK ROGERS, INNOVATION, INTELLECTUAL PROPERTY, AND ECONOMIC GROWTH (2010); INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH (Carsten Fink & Keith E. Maskus eds., 2005); INTELLECTUAL PROPERTY, GROWTH AND TRADE (Keith E. Maskus ed., 2008); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003); KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (2000); KEITH E. MASKUS, PRIVATE RIGHTS AND PUBLIC PROBLEMS: THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY (2012); SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES (2004); WORLD INTELLECTUAL PROP. ORG., THE ECONOMICS OF INTELLECTUAL PROPERTY: SUGGESTIONS FOR FURTHER RESEARCH IN DEVELOPING COUNTRIES AND COUNTRIES WITH ECONOMIES IN TRANSITION (2009).

239. *See generally* EDWARD LEE, THE FIGHT FOR THE FUTURE: HOW PEOPLE DEFEATED HOLLYWOOD AND SAVED THE INTERNET—FOR NOW (2013) (discussing the grassroots movements involving the protests against the U.S. SOPA/PIPA legislation and the Anti-Counterfeiting Trade Agreement).

have widely criticized companies such as Google for pushing for positions that undermine the strong protection and enforcement standards in the copyright system.[240] Limitations and exceptions that have raised questions in this direction include the copyright exception for noncommercial user-generated content under Section 29.21 of the Canadian Copyright Modernization Act[241] and the proposed exception for innovation under Section 106E of the Irish Copyright and Related Rights Act.[242]

To appreciate the changing politics, one could also recall the time when Congress considered the SOPA/PIPA legislation.[243] On January 18, 2002, Wikipedia, Reddit, WordPress, and other Internet companies flexed their muscles by launching an Internet blackout, causing congressional representatives to quickly withdraw their support for the controversial bills.[244] This blackout caused ordinary citizens to bombard their legislators with requests to reject the proposed legislation.[245] As Senator Ron Wyden (D–Or.) rightly observed in a Senate Finance Committee hearing shortly after the blackout, "The norm changed on Jan. 18, 2012, when millions and millions of Americans said we will not accept being locked out of debates about Internet freedom."[246]

Thus, the adoption of hybrid models in many jurisdictions seeking to introduce fair use, to a large extent, has reflected the ongoing battle between the different interest groups that are to be impacted by copyright law reform. In the United States, a good analogy can be found in the battle between the different industries in the early 1990s when they pushed Congress to adopt a compromise bill known as the Audio Home Recording Act of 1992.[247] That statute was

240. *See* Annemarie Bridy & Aaron Perzanowski, *Has Google Paid Off an Army of Academic Researchers?*, L.A. TIMES (July 21, 2017, 4:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-bridy-perzanowski-google-tp-20170721-story.html (criticizing the flawed study conducted by the Campaign for Accountability on the funding Google has provided to academic research projects relating to antitrust, intellectual property, and other legal policy issues); Daniel Sanchez, *Is Google Behind the Recent Firing at the U.S. Copyrights Office?*, DIGITAL MUSIC NEWS (Oct. 24, 2016), https://www.digitalmusicnews.com/2016/10/24/pallante-dismissed-copyrights-office-google (noting questions regarding Google's role in the departure of the U.S. Register of Copyrights). Google seems to be the easy target in part because of the changes it has posed to the existing copyright system and in part to the raw power it has slowly acquired. *See generally* JOHNS, *supra* note 54, at 510–14 (discussing the challenge Google and its Library project has posed to the strong proprietary model underlying the copyright system).

241. Copyright Modernization Act, S.C. 2012, c. 20, § 29.21 (Can.).

242. CRC FINAL REPORT, *supra* note 18, at 73.

243. Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PIPA), S. 968, 112th Cong. (2011). For criticisms of SOPA and PIPA, see generally Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, DRAKE L. REV. DISCOURSE, June 2012, at 16, https://lawreviewdrake.files.wordpress.com/2015/01/yu-9-3.pdf [hereinafter Yu, *Alphabet Soup*].

244. *See* Jonathan Weisman, *In Fight over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES (Jan. 18, 2012), https://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html (reporting the blackout).

245. *See* Yu, *Alphabet Soup*, *supra* note 243, at 32–33. *See generally* LEE, *supra* note 239, at 55–78 (discussing the blackout and its aftermath).

246. Joseph J. Schatz, *Technology Groups Worry About Trade Pact*, CQ TODAY ONLINE NEWS (Mar. 13, 2012, 11:47 PM), http://public.cq.com/docs/news/news-000004045563.html?ref=corg.

247. 17 U.S.C. §§ 1001–1010 (2018).

largely a legal settlement between the recording and home electronics industries (with a carve-out for the computer hardware industry and the subsequent endorsement of music publishers, songwriters, and performing rights organizations).[248] As David Nimmer recounted:

> On July 28, 1989, in Athens, Greece, worldwide negotiations between record companies and hardware manufacturers culminated in an accord between those two factions. Other factions of the music industry nonetheless remained dissatisfied with that bilateral solution. Accordingly, further negotiations ensued among music publishers, songwriters, performing rights societies, and the groups that had previously reached agreement.[249]

While interest group politics provide very useful insights into why jurisdictions seeking to introduce fair use ended up adopting a hybrid model, this Section argues that public choice theory does not provide a complete picture. In fact, there are other explanations that help account for the legislatures' ultimate choice in retaining a considerable part of the status quo.

To begin with, legislators, especially those trained in the law, have a strong preference for maintaining the status quo.[250] In common law jurisdictions, stare decisis and the use of precedents form a key part of legal education. Lawyers in both common law and civil law jurisdictions have also learned to take a conservative approach to the law, which Guido Calabresi referred to as "retentionist bias."[251] Moreover, many legislatures have specific procedures supporting the retention of the status quo.[252] If the fair use model is to be introduced to replace the existing system of copyright limitations and exceptions, the legislation supporting this new model has to be able to earn the support of different constituencies.

248. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8B.01[C] (Perm. ed. 2016) (recounting the negotiations between record companies, hardware manufacturers, music publishers, songwriters, and performing rights societies).

249. *Id.*; *see also* Gary S. Lutzker, *Dat's All Folks:* Cahn v. Sony *and the Audio Home Recording Act of 1991—Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 164–74 (1992) (discussing the dispute leading to the adoption of the Audio Home Recording Act of 1992).

250. As Judge Richard Posner declared:

> Law is the most historically oriented, or if you like the most backward-looking, the most "past-dependent," of the professions. It venerates tradition, precedent, pedigree, ritual, custom, ancient practices, ancient texts, archaic terminology, maturity, wisdom, seniority, gerontocracy, and interpretation conceived of as a method of recovering history. It is suspicious of innovation, discontinuities, "paradigm shifts," and the energy and brashness of youth.

Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000); *see also* Clayton P. Gillette, *Lock-in Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998) (discussing the lock-in effects in law); Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1001 (1997) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

251. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 60 (1982).

252. As Judge Posner observed:

> By creating an essentially tricameral legislature (the Senate, the House, and the President with his veto power), the Constitution makes it difficult to enact statutory law; but once enacted, it is, by the same token, difficult to change, because the legislative procedures for amending an existing statute are the same as those for promulgating a brand new statute.

Posner, *supra* note 250, at 585.

When these preferences and infrastructures are combined together, they reflect what commentators have referred to as "legislative inertia."[253] As then-Dean Calabresi explained in the U.S. context, there are many obstacles militating against the adoption of a new law, such as "bicameral legislatures, federalism, executive authority, and . . . legislative committees."[254] In *The Ages of American Law*, Grant Gilmore also observed, "[o]ne of the facts of legislative life, at least in this country in [the twentieth] century, is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions."[255]

Moreover, in his examination of the gap between rhetoric and reality in copyright law, Stewart Sterk suggested that "the nation's elite, including its lawmakers, has a stake in believing and acting on copyright rhetoric. [Their] investment in the status quo reinforces the power of the interest groups who have fueled copyright expansion."[256] Citing the work of Friedrich Hayek,[257] he observed:

> One explanation for the general failure to question copyright rhetoric is that participants in the lawmaking process—not only legislators and judges, but also lawyers, opinionmakers, and persons with wealth and political influence—have a self-interest in widespread acceptance of the proposition that authors deserve to benefit from their work. Rejecting the argument that authors deserve returns from their labors also would undermine the claim that prosperous members of society deserve their prosperity.[258]

If what Professor Sterk suggested indeed explains the behavior of some legislators, it is understandable why they were eager to push for a hybrid model that helped retain a considerable part of the existing copyright system.

Regardless of the reasons behind these legislative choices, the paradigm evolution that has taken place in the copyright area reflects what commentators have referred to as path dependence.[259] Without the influence of the old fair

253. CALABRESI, *supra* note 251, at 11; *see also* Posner, *supra* note 250, at 585 ("Legislators are not constrained by precedent, but their ability to innovate is limited by the inertia built into the legislative process, especially at the federal level in the United States.").

254. CALABRESI, *supra* note 251, at 4.

255. GRANT GILMORE, THE AGES OF AMERICAN LAW 86 (2d ed. 1977).

256. Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1198 (1996).

257. *See* 2 F.A. HAYEK, LEGISLATION AND LIBERTY 73–74 (1976) (discussing the belief in the justice of rewards).

258. Sterk, *supra* note 256, at 1247.

259. As Oona Hathaway explained:

> In broad terms, "path dependence" means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it. It entails, in other words, a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage. At the most basic level, therefore, path dependence implies that "what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time."

Hathaway, *supra* note 43, at 603–04 (footnote omitted). The use of QWERTY keyboard provides a classic example of path dependence. As John Bell observed:

> The classic example is the QWERTY keyboard, which made sense when metal keys were used on typewriters because it avoided keys jamming, and it was the approach to typing that provided training for typists at the key moment in the late nineteenth century in which several arrangements of typewriter keyboard were available. But that arrangement of a keyboard makes little sense on the computer or the

dealing paradigm set by the U.K. Copyright Act 1911, and without the adoption of a fair dealing regime in the first place, many jurisdictions seeking to introduce fair use today would probably have a much easier time introducing that new model. Indeed, during the copyright reform process, it is not uncommon for the copyright industries to criticize fair use for its limited adoption throughout the world.[260] What these industries have conveniently ignored, however, is the path dependence generated by colonial history.[261] It is no coincidence that those jurisdictions that have now adopted or proposed to adopt fair use, such as Australia, Hong Kong, Malaysia, Singapore, and Sri Lanka, are all former British colonies.[262]

At the global level, path dependence takes on a different level of significance. Because intellectual property norms do not reflect universal values, those countries that were the creators or early adopters of these norms tend to possess the ability to set future norms.[263] The norms they set as a group will then be multilateralized through international treaties to a growing number of new members, such as those joining the TRIPS Agreement or the WIPO Internet Treaties.[264]

> Blackberry, where there are no keys to clash against each other. Yet it continues to be used because those who type on the computer or use a Blackberry are used to that arrangement of keys.

John Bell, *Path Dependence and Legal Development*, 87 TUL. L. REV. 787, 794 (2013) (footnote omitted); *see also* Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 819–20 (1st Cir. 1995) (Boudin, J., concurring) ("Better typewriter keyboard layouts may exist, but the familiar QWERTY keyboard dominates the market because that is what everyone has learned to use.").

260. *See* Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 340–41 (discussing this line of criticism).

261. *See id.* at 340 ("[T]he reason why the fair dealing model still remains dominant in the world is not necessarily due to its popularity or proven superiority. Instead, its dominance is a historical legacy. Many countries are former colonies of European powers."); *see also* SARA BANNERMAN, INTERNATIONAL COPYRIGHT AND ACCESS TO KNOWLEDGE 2 (2015) (noting that "[t]he international copyright system in its current form . . . is a set of principles that arose out of chance and path dependency").

262. As I noted in an earlier article:

> [T]he reason why the fair dealing model still remains dominant in the world is not necessarily due to its popularity or proven superiority. Instead, its dominance is a historical legacy. Many countries are former colonies of European powers. They had no choice but to transplant from their mother countries a closed-ended regime of limitations and exceptions (such as the fair dealing model). The textbook colonial examples are former British colonies such as Australia, Canada, and Singapore—countries whose copyright laws the Hong Kong government actively considered in the three public consultations.

Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 340–41 (footnote omitted).

263. *See* ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 247 (1998) ("The range of Western beliefs that define intellectual and cultural property laws . . . are not universal values that express the full range of human possibility, but particular, interested fictions emergent from a history of colonialism that has disempowered many of the world's peoples."); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 235 (2000) ("[T]he Western intellectual property regime becomes universal because it is backed by great economic and military might, rather than because of its 'appeal to common sense or . . . innate conceptual force.'" (quoting William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 17 (1994))).

264. *See* TRIPS Agreement, *supra* note 5; WCT, *supra* note 145; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 18 (1997).

Even though the Paris Convention for the Protection of Industrial Property[265] and the Berne Convention for the Protection of Literary and Artistic Works[266] were created by mostly European powers in the nineteenth and early twentieth centuries,[267] the norms set in these two conventions have now been incorporated by reference into the TRIPS Agreement.[268] At the time of writing, the WTO has 164 members, all of which abide by TRIPS standards.[269] Should the fair use language be included in the TRIPS Agreement in the late 1980s and early 1990s, it would have been transplanted to other jurisdictions via the WTO. Sadly, as noted in the previous Section, the United States, a major *demandeur* country during the TRIPS negotiations, has steadfastly refused to transplant fair use abroad despite being the leader in this area.[270]

D. Summary

There are many different contributing factors, which range from economic to social and from legal to technological. The scope and length of this Article do not allow for an in-depth discussion of the myriad factors outside the legal system. Nevertheless, this Part covers three different areas of the law: intellectual property law, international and comparative law, and the legislative process. It shows that, even when we focus on causes within the legal system, contributing factors can come from many directions. The analysis in this Part is important because the continued expansion of the intellectual property system will likely cause the system to implicate many new areas of the law.

V. RECOMMENDATIONS

Part III showed how the paradigm in international copyright norms has evolved in light of the conscious choices made by those jurisdictions seeking to introduce the fair use model. Part IV then offered explanations concerning why these jurisdictions made those specific choices. This Part now turns to how the

265. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1538, 828 U.N.T.S. 305 (revised at Stockholm July 14, 1967).

266. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris July 24, 1971).

267. *See* Yu, *Currents and Crosscurrents*, *supra* note 7, at 330–54 (discussing the origins of the Paris and Berne Conventions); *see also* 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, 325–34 (2003) (discussing how the former colonies conducted their international intellectual property relations following their declarations of independence).

268. *See* TRIPS Agreement, *supra* note 5, art. 2.1 ("In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)."); *id.* art. 9.1 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.").

269. *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 10, 2018).

270. *See supra* text accompanying notes 228–29; *see also* Justin Hughes, *Fair Use and Its Politics—at Home and Abroad*, *in* AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 106, at 234, 263–72 (explaining the complexities involved in this refusal).

paradigmatic insights we have gained from the previous two Parts can be used to formulate recommendations concerning future efforts to broaden copyright limitations and exceptions in the United States and across the world.

Section A outlines six courses of action that seek to improve these reform efforts. Section B identifies three modalities that can help tailor the transplanted fair use paradigm to local needs, interests, conditions, and priorities. Because the analysis in this Part focuses on ways to combine rules, standards, and institutions, it will be relevant to not only copyright reform, but also legal reform in other areas of the law.

A. Courses of Action

As far as the effort to reform copyright limitations and exceptions is concerned, there are six specific courses of action that can be immediately taken to ensure the development of a paradigm that better responds to economic, social, cultural, and technological changes. First, policy-makers, legislators, and commentators should no longer have the debate fixated on labels—in particular, whether the proposed legislation is fair dealing or fair use. While fair dealing has been identified by many as a rule and fair use a standard, the continued evolution of fair dealing and the ubiquitous inclusion of multifactor balancing have made this distinction increasingly untenable.[271] Given the inherent difficulties in distinguishing between the two different regimes, the semantic debate on whether a jurisdiction has fair dealing or fair use is simply unhelpful. Instead, a better approach is to focus on whether the list of copyright limitations and exceptions is open or closed.[272] Such an approach will not only allow us to achieve the law and policy debate we want, but it will also enable us to find ways to expand the scope of copyright limitations and exceptions. For instance, a jurisdiction that seeks to have a broad fair dealing exception for quotation could easily achieve many important benefits provided by the fair use exception, especially when judges are willing to construe the exception liberally. Lamenting that this quotation exception is still fair dealing but not fair use is likely to take away a valuable opportunity to expand copyright limitations and exceptions.

Second, policy-makers, legislators, and commentators should stay away from any discussion of the paradigm shift from fair dealing to fair use unless there is a wholesale transplant of the fair use model—the new paradigm for the purposes of this Article. As I have shown in an earlier article, except for Liberia, Malaysia, and the Philippines—and, to a lesser extent, Israel—countries have declined to transplant the fair use model verbatim or substantially verba-

271. *See infra* text accompanying notes 293–98.

272. *Cf.* Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 327 ("[A] better way to distinguish between fair dealing and fair use is to describe the former as a closed-ended, purpose-based regime and the latter as an open-ended, flexible regime.").

tim.[273] Oftentimes, the jurisdictions seeking to introduce the fair use model retain a considerable part of their status quo, including preexisting fair dealing arrangements. As a result, any analysis—legal, empirical, or otherwise—of the paradigm shift from the status quo to the fair use model is mostly academic.[274] Such shift-related analyses should be discouraged, as it will make it difficult for reformers to highlight the specific strengths of the proposed hybrid model while causing them to be blindsided by the potential weaknesses of the fair use model. That type of analysis will also harm the proposal by giving its opponents criticisms—or, more precisely, red herrings[275]—that are not directly tied to the strengths and benefits of the proposed hybrid model.

Third, policy-makers, legislators, and commentators should take great care to ensure that the analysis they undertake is actually tailored to the copyright limitations and exceptions involved. Otherwise, they will end up in a so-called "garbage in, garbage out" situation, in which incorrect input ends up producing faulty output. In the area involving new technology, when laws are often hastily introduced without convincing empirical evidence, solid empirical analysis is particularly important.[276] Sadly, many of the existing studies on fair use proposals have focused on an arguably fictitious paradigm shift from fair dealing to fair use.[277] While an actual shift would certainly have considerable ramifications for business, technology, and society, that shift is of limited relevance to the hybrid model that many jurisdictions have chosen or proposed to adopt. As a result, the existing studies about the potential costs or benefits of a paradigm shift from fair dealing to fair use may need to be read and used with great care.[278] How useful these studies will be will largely depend on the exact structure of the proposed hybrid model. The further away that model is from the fair use model, the less relevant and instructive is the research about a potential paradigm shift.

273. *See* Yu, *Customizing Fair Use Transplants*, *supra* note 17, at 3–10 (discussing the efforts to transplant fair use across the world and the eight different modalities of transplantation that the transplanting jurisdictions have employed).

274. As I noted in an earlier article:

> The hybrid model advanced by the open-ended, catch-all fair use proposal . . . calls into question the relevance and usefulness of the existing comparative studies on the distinctions between fair dealing and fair use. . . . If these comparative studies are to guide legislative reforms, adjustment will be needed considering that these studies were not designed to explore the distinction between the fair dealing model and a hybrid fair dealing/fair use model.

Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 330.

275. *See* Peter K. Yu, *Friends of Opposition to Copyright Bill Amendments, Netizens Are Not Talking About This*, H.K. IN-MEDIA (Feb. 1, 2016), http://www.inmediahk.net/node/1040375 (in Chinese) (discussing the straw man and red herring arguments that the opponents of the fair use proposal have advanced in Hong Kong).

276. *See* WILLIAM F. PATRY, HOW TO FIX COPYRIGHT 49–74 (2011) (noting the need to "replace a faith-based approach to copyright with an evidence-based approach" (capitalization omitted)); Yu, *Digital Copyright and Confuzzling Rhetoric*, *supra* note 58, at 918–23 (noting the need for credible empirical evidence).

277. *See supra* Section II.B (showing the lack of a paradigm shift in jurisdictions that ended up adopting a hybrid model despite introducing or considering fair use proposals).

278. *See, e.g.*, PRICEWATERHOUSECOOPERS, UNDERSTANDING THE COSTS AND BENEFITS OF INTRODUCING A "FAIR USE" EXCEPTION 14–15 (2016) (identifying "key potential cost and benefit categories associated with a *shift* from fair dealing to fair use" (emphasis added)).

Fourth, instead of transplanting fair use, we should focus more on designing or customizing fair use. It is important to devote greater time, effort, and energy to researching which model will work best under specific local conditions. Even if a hybrid model is to be introduced, that model will still require us to determine the ideal mix of fair dealing and fair use provisions. To complicate matters further, that model can include other provisions outside either the fair use or fair dealing model,[279] such as best practices relating to fair use.[280] That model can also include institutional complements, which will be discussed further in Subsection V.B.3.[281] The important takeaway from the wide adoption of hybrid models is the need to reject a simple, and often false, binary choice between fair dealing and fair use. As Niva Elkin-Koren and Orit Fischman-Afori pointed out, the two choices are better seen as part of a continuum.[282] After all, both the fair dealing and fair use regimes require the case-by-case balancing of multiple fairness factors.[283] Because a hybrid model is not as structurally dis-

279. *See, e.g.*, Amira Dotan et al., *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience*, 57 J. COPYRIGHT SOC'Y U.S.A. 447 (2010) (discussing the process of drafting the Code of Fair Use Best Practices in Israel); *see also* Niva Elkin-Koren & Orit Fischman-Afori, *Taking Users' Rights to the Next Level: A Pragmatist Approach to Fair Use*, 33 CARDOZO ARTS & ENT. L.J. 1, 6 (2015) [hereinafter Elkin-Koren & Fischman-Afori, *Taking Users' Rights*] ("[B]ottom-up norms should play an important role in formulating fair use standards. Crafting rules by bottom-up norms may facilitate ongoing participation in lawmaking by relevant communities of users and authors, thus enhancing the efficacy of copyright and strengthening its legitimacy.").

280. The most notable example in this area is the best practices in fair use for documentary filmmakers, whose development was spearheaded by Patricia Aufderheide and Peter Jaszi. ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), http://archive.cmsimpact.org/sites/default/files/fair_use_final.pdf; *see also* PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004), http://archive.cmsimpact.org/sites/default/files/UNTOLDSTORIES_Report.pdf (exploring the implications of the rights clearance process on documentary filmmaking). A less successful effort is the development of the fair use guidelines for educators. *See, e.g.*, Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 160 (1998) ("[T]hough Congress specifically declined to incorporate these Guidelines into the Copyright statute, courts have generally held (and publishers have gleefully conceded) that educational photocopying that meets the Guidelines constitutes fair use of copyrighted works."); Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 701 (2001) ("One can only find failure in guidelines that have missed their constructive goals and served destructive ends. The vast range of parties with an interest in proper application of fair use have been poorly served by existing guidelines, and they would be better served had the guidelines never existed.").

281. *See* discussion *infra* Subsection V.B.3 (discussing the institutionalization of hybrid models).

282. As they declared:

> [A]t the theoretical level, we reject the binary choice between bright-line rules and vague standards, and suggest that courts adapt a continuum-based approach to fair use. In particular, we argue that in order to achieve the goals of fair use, courts should encourage the implementation of concrete rules within the open-ended fair use standard. Only such an approach, we argue, could promote a reasoned implementation of fair use and serve both the purpose of copyright law and the rule of law.

Elkin-Koren & Fischman-Afori, *Taking Users' Rights*, *supra* note 279, at 5–6; *see also* Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 163 (2017) [hereinafter Elkin-Koren & Fischman-Afori, *Rulifying Fair Use*] ("[T]he rule/standard distinction reflects a continuum, rather than a sharp binary division. Judges soften rules through interpretation and, in a similar fashion, rulify standards by elaborating discrete categories and developing contextual guidelines." (footnote omitted)).

283. *See* Geist, *supra* note 19, 158 ("[Like fair use, f]air dealing . . . incorporates fairness criteria to assure reasonable use of works, yet the key difference between fair use and fair dealing lies in the circumscribed purposes found under fair dealing."); Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 332 (noting that the

tinctive as either fair dealing or fair use, greater effort will also be needed in the design process to customize fair use based on existing local conditions.

Fifth, as eager as we are to export fair use to other countries, we should remember that legal transplant is a two-way street. As Alan Watson observed, "the time of reception is often a time when the provision is looked at closely, hence a time when law can be reformed or made more sophisticated. It thus gives the recipient society a fine opportunity to become a donor in its turn."[284] More than a century ago, Jeremy Bentham also wrote, "[t]hat a system might be devised, which, while it would be better for Bengal, would also be better even for England."[285] Section IV.A has identified the weaknesses of the fair use model. To respond to these weaknesses, those jurisdictions seeking to introduce fair use may therefore want to explore proposals that take advantage of the attractive features of preexisting fair dealing arrangements. Consider the United States for example. Although the country already has many limitations and exceptions in the Copyright Act besides the fair use provision,[286] it does not have any other limitation or exception that requires the type of multifactor balancing found in a traditional fair use analysis. In addition, policy-makers and commentators tend to assume that having a standalone fair use provision is better than having multiple fair use provisions.[287] Yet we have not spent much time and effort exploring both legally and empirically the validity of these assumptions. Indeed, the ongoing developments in other jurisdictions have given us a valuable opportunity to evaluate and reexamine our system of copyright limitations and exceptions at home.

Finally, the continued disagreement over the benefits provided by fair dealing and fair use underscores the need for caution in making recommendations that are to be implemented at the global level. The Max Planck Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law seems to have struck the right balance by focusing on "open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable."[288] Such an approach qualifies open-endedness with the concept of reasonable foreseeability. While this declaration aimed to convince policy-makers and commentators in continental Europe of the possibility of adopting an open list of limitations and exceptions in civil law jurisdictions, this approach will give policy-makers and legislators the flexibility needed to determine which limitations and exceptions should be included in an open list. After all, as much as policy-makers, legislators, and commentators have been

fair dealing provisions in Hong Kong "require[] the balancing of fairness factors," similarly to what U.S. fair use analysis requires).

284. WATSON, *supra* note 3, at 99.

285. JEREMY BENTHAM, *Of the Influence of Time and Place in Matters of Legislation*, *in* THE WORKS OF JEREMY BENTHAM 171, 185 (2005) (1843).

286. *See* 17 U.S.C. §§ 107–122 (2018) (providing various limitations and exceptions in the U.S. copyright regime).

287. *See* Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 327–30 (discussing the difference between a standalone fair use provision and a supplemental catch-all fair use provision).

288. MAX PLANCK DECLARATION, *supra* note 148, ¶ 3(a).

worrying about the uncustomized transplant of TRIPS and TRIPS-plus standards, they have to be equally concerned about the potential drawbacks and risks of the uncustomized transplant of the fair use model, even when that model is known to have provided many important benefits.

B. Modalities

The previous Section has outlined the different courses of action that can improve the effort to reform copyright limitations and exceptions. This Section turns to three modalities that can better tailor the transplanted fair use paradigm to local needs, interests, conditions, and priorities. Such tailoring will enlarge the flexibilities available in the copyright system.[289] It will also enable the system to strike a more appropriate balance between access and proprietary control.

Subsections 1 and 2 illustrate how rules and standards can be combined to create laws and policies that are suitable to specific local conditions. Subsection 3 then explores how institutions can be developed or brought in to further strengthen this combination. Rather than perpetuating the age-old debate on the superiority of rules or standards,[290] this Section calls for a more constructive debate on the different ways to combine rules, standards, and institutions. Such a debate will help redirect our focus to designing or customizing fair use, as opposed to merely transplanting it.

1. Standardizing Rules

The first modality concerns efforts to turn rules into standards. Such efforts are not that unusual, considering that policy-makers, legislators, and commentators have already questioned the distinction between rules and standards.[291] With respect to provisions that have been developed under the old fair

289. *See* Yu, *The International Enclosure Movement*, *supra* note 23, at 869–70 (discussing the limitations, flexibilities, and public interest safeguards in the TRIPS Agreement). For commentaries emphasizing the flexibilities within the TRIPS Agreement, see generally CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT (2007); UNCTAD-ICTSD PROJECT ON INTELLECTUAL PROPERTY RIGHTS AND SUSTAINABLE DEVELOPMENT, RESOURCE BOOK ON TRIPS AND DEVELOPMENT (2005).

290. For discussions of the distinction between rules and standards, see generally H.L.A. HART, THE CONCEPT OF LAW 124–35 (2d ed. 1994); John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTL. J. LEGAL PHIL. 47 (2002); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995). For discussions in the intellectual property area, see generally ALRC FINAL REPORT, *supra* note 18, at 98–100 (discussing rules and standards in the fair use context); Chiang Tun-Jen, *The Rules and Standards of Patentable Subject Matter*, 2010 WIS. L. REV. 1353 (2010) (breaking Section 101 of the U.S. Patent Act down into rules and standards, and providing utilitarian justifications for each type of subject-matter restriction covered by the provision); Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275 (2002) (discussing rules and standards in the cyberlaw context); Thomas B. Nachbar, *Rules and Standards in Copyright*, 52 HOUS. L. REV. 583 (2014) (discussing the implications of shifting copyright law in the direction of either rules or standards).

291. *See* Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 322 ("While th[e] rule-standard distinction is easy for the public to comprehend and has been widely used by legal commentators, including those

dealing paradigm, courts have increasingly treated them as standards or converted them as such.[292]

Consider again Section 30(2) of the U.K. Copyright, Designs and Patents Act 1988,[293] the fair dealing exception for the purpose of reporting current events discussed in Section II.C. This provision states explicitly that "[f]air dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that . . . it is accompanied by a sufficient acknowledgement."[294] Because this provision specifies the permissible conduct and does not require any case-by-case balancing of the fairness factors, it is best described as a rule, not a standard.

Nevertheless, in *Ashdown v. Telegraph Group Ltd.*, Lord Phillips interpreted the provision by introducing several fairness factors.[295] As he observed, quoting with approval the late Justice Hugh Laddie's noted treatise:

> It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate

in the intellectual property field, such a distinction does not work very well in regard to the fair dealing/fair use debate." (footnotes omitted)).

292. As Lord Denning declared in the classic case of *Hubbard v. Vosper*:

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

Hubbard v. Vosper, [1972] 2 Q.B. 84 (Eng.); *see also* D'Agostino, *supra* note 66, at 342–43 (extracting from English copyright law the following fairness factors: nature of the work, how the work was obtained, amount taken, uses made, commercial benefit, motives for the dealing, consequences of the dealing, and purpose achieved by different means); Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 323 ("[B]ecause of the common law tradition in those Commonwealth jurisdictions embracing the fair dealing model, the use of fairness factors often emerge through case law even when those factors have not been written into the statutory provisions.").

293. Copyright, Designs and Patents Act 1988, c. 48, § 30(2) (Eng.).

294. *Id.*

295. Ashdown v. Telegraph Group Ltd., [2002] EWCA (Civ) 1142 (Eng.).

> public controversy to make use of "leaked" information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing.[296]

By introducing these factors, Lord Phillips successfully "standardized" the rule in Section 30(2).[297] With the consideration of the added factors, the only difference between this now-standardized rule and a fair use provision is the requirement that the conduct at issue fits the specified purpose. As Michael Geist observed: "The [fair dealing] model creates a two-stage analysis: first, whether the intended use qualifies for one of the permitted purposes, and second, whether the use itself meets the fairness criteria. By contrast, fair use raises only the second-stage analysis, since there are no statutory limitations on permitted purposes."[298]

To be sure, a rule will provide more certainty to both copyright holders and users. Standardizing the rule could therefore burden them by muddling an otherwise clear rule. Nevertheless, in its comparison between fair dealing and fair use, the ALRC reminded us of the need to distinguish between simple and complex rules. As the Commission stated, "a clear principled standard is more certain than an unclear complex rule."[299] This statement built on John Braithwaite's work, which has been elaborated as follows:

> 1. When the type of action to be regulated is simple, stable and does not involve huge economic interests, rules tend to regulate with greater certainty than principles.
>
> 2. When the type of action to be regulated is complex, changing and involves large economic interests:
>
> (a) principles tend to regulate with greater certainty than rules;
>
> (b) binding principles backing non-binding rules tend to regulate with greater certainty than principles alone;
>
> (c) binding principles backing non-binding rules are more certain still if they are embedded in institutions of regulatory conversation that foster shared sensibilities.[300]

Indeed, there are many tactical benefits to standardizing rules. For instance, "[l]aw that incorporates principles or standards [are] generally more flexible and adaptive than prescriptive rules."[301] As a result, standardized rules may allow courts and law enforcement personnel to strike a better balance in the copyright system than rules alone. In addition, greater standardization may allow otherwise unacceptable rules to be more politically palatable. From a

296. *Id.* ¶ 70.
297. *See id.*
298. Geist, *supra* note 19, at 158.
299. ALRC FINAL REPORT, *supra* note 18, at 112.
300. Braithwaite, *supra* note 290, at 75.
301. ALRC FINAL REPORT, *supra* note 18, at 87.

copyright user's standpoint, obtaining a clear rule on limitation and exception is preferable to obtaining a standard that involves multifactor balancing. Nevertheless, when copyright limitations and exceptions are being considered, rules can sometimes be rejected because they are considered as either overinclusive or underinclusive.[302] In that case, standardization can help make these rules more palatable to opposing policy-makers and legislators.

A case in point is a proposal modeling after Section 29.21 of the Canadian Copyright Modernization Act.[303] This attractive, yet controversial, provision creates an exception for the development and dissemination of noncommercial user-generated content.[304] Although the provision has earned the support of many, myself included,[305] policy-makers, commentators, and industry representatives continue to criticize it for failing to comply with international copyright standards,[306] in particular the three-step test under the TRIPS Agreement and the WIPO Copyright Treaty.[307] For those jurisdictions that are eager to introduce a similar exception but remain concerned about the provision's criticisms, standardizing this rule-based provision by adding multiple fairness factors could make it more politically palatable. Such a compromise will also be

302. *See* Elkin-Koren & Fischman-Afori, *Rulifying Fair Use*, *supra* note 282, at 195 ("[T]he over- or under-inclusiveness of a rule generates decisions that are 'obtuse, unfair, or otherwise contrary to the "spirit" of the doctrinal inquiry being conducted.'").

303. Copyright Modernization Act, S.C. 2011, c. 22 (Can.). Section 29.21 provides:

(1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual—or, with the individual's authorization, a member of their household—to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source—and, if given in the source, the name of the author, performer, maker or broadcaster—of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter—or copy of it—or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

(2) The following definitions apply in subsection (1).

'intermediary' means a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public.

'use' means to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything.

Id. § 29.21.

304. *See id.*

305. *See* Yu, *Canadian UGC Exception*, *supra* note 3 (exploring the feasibility of transplanting Section 29.21 of the Canadian Copyright Modernization Act abroad); Yu, *Quest for User-Friendly Copyright*, *supra* note 74, at 327–30 (discussing the proposal to create a copyright exception for predominantly non-commercial user-generated content).

306. *See* Yu, *Canadian UGC Exception*, *supra* note 3, at 190–96 (responding to these criticisms); Yu, *Confuzzling Rhetoric*, *supra* note 122, at 287–95 (responding to these criticisms).

307. See sources cited *supra* notes 144–45.

more attractive than succumbing to the opposition and abandoning the entire exception.

For broader copyright reform in the United States, it is also worth considering whether new limitations and exceptions can be developed by adding the fair use factors found in Section 107 of the U.S. Copyright Act.[308] Such addition will make the newly created exceptions similar to those factor-intensive fair dealing provisions that are now found in Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka, Taiwan, and other jurisdictions.[309] In the current U.S. copyright statute, except for Section 107, no other provisions condition the outcome on a case-by-case balancing of multiple fair use factors. One, therefore, cannot help but wonder whether the introduction of fairness factors could make some new limitations and exceptions possible, or at least more politically palatable.

2. Rulifying Standards

The second modality pertains to efforts to turn standards into rules—or, in the words of Niva Elkin-Koren and Orit Fischman-Afori, to "rulify" standards.[310] As Professors Elkin-Koren and Fischman-Afori explained:

> Copyright exceptions drafted as rules would . . . offer more certainty; however, this certainty comes at the cost of rigidity that may fail to address the needs of users in a dynamic environment.
>
> For many years, these tradeoffs in copyright policy were presented as a binary choice between rules and standards. The rule/standard distinction, however, overlooks the dynamic nature of adjudication, which is shaping the nature of legal norms. As recently recognized by legal theorists, the rule/standard distinction reflects a continuum, rather than a sharp binary division. Judges soften rules through interpretation and, in a similar fashion, rulify standards by elaborating discrete categories and developing contextual guidelines.[311]

To be sure, policy-makers and commentators may express skepticism of this approach. Nevertheless, the approach may have already been put in practice, even though it is rarely discussed. As commentators have noted, soft rules exist under the current fair use paradigm. Examples of these soft rules include rules concerning whether the purpose of the use is commercial,[312] whether the original work is published,[313] whether the use involves reverse engineering of software through decompilation or disassembly of object code,[314] whether

308. *See* 17 U.S.C. § 107 (2018) (providing the fairness factors).

309. *See, e.g.*, *Copyright Act 1968* (Cth) s 40(2) (Austl.); Copyright Act, (2006) Cap. 63, § 35(2) (Sing.).

310. Elkin-Koren & Fischman-Afori, *Rulifying Fair Use*, *supra* note 282.

311. *Id.* at 163.

312. *See id.* at 184 (discussing the emphasis on commercial interests in fair use cases).

313. *See id.* at 185 (discussing the focus on whether the original work is published).

314. *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1106 (2007) (discussing the soft fair use rule concerning "reverse engineering of software through decompilation or disassembly of object code for purposes of developing competing or complementary entertainment products or platforms").

"time shifting" has taken place,[315] and whether commercial piracy is involved.[316]

The consideration of efforts to rulify standards is particularly important when we explore possibilities for future copyright reform.[317] As much as we have explored ways to transplant fair use to other jurisdictions, it is time we used the transplant process to reflect on the strengths and weaknesses of our existing fair use model. It is also worth exploring whether there are benefits to cross-fertilizing fair use with fair dealing, such as those proposals adopted in Singapore and Sri Lanka.[318]

While fair use has provided many important benefits, which support its introduction abroad and explain the success of the U.S. copyright industries, the criticisms of this model deserve policy reflection. To be sure, the highly polarized nature of the copyright debate—both at home and abroad—has made it difficult for people on either side of the debate to listen to criticisms made by their opponents.[319] Nevertheless, a greater understanding of the weaknesses of the U.S. fair use model will likely benefit not only those jurisdictions that seek to import fair use, but also those that have already adopted fair use. After all, it is no coincidence that the United States Court of Appeals for the Second Circuit described the fair use doctrine as "the most troublesome in the whole law of copyright."[320]

Since the creation of the fair use doctrine in *Folsom v. Marsh*[321] in the mid-nineteenth century—or, more recently, the codification of this doctrine in the 1976 Copyright Act[322]—many new legal, economic, and technological developments have taken place. As much as we trust the common law system to improve the existing fair use model in the United States—such as by expanding the transformative use doctrine[323] or by extending the law to cover what Ed-

315. *See id.* at 1107 (discussing the soft fair use rule concerning whether "personal copying for purposes of 'time shifting' is fair").

316. *See id.* (discussing the "clarifying rule . . . that commercial piracy—wholesale commercial duplication of a copyrighted work for nonexpressive purposes—is not a fair use").

317. See sources cited *supra* note 22.

318. *See* Yu, *Customizing Fair Use Transplants*, *supra* note 17, at 7–8 (discussing the mixing of fair dealing and fair use as a modality of transplantation).

319. *See* Yu, *Confuzzling Rhetoric*, *supra* note 122, at 292 ("The [current debate on digital copyright reform] is so polarized today that it is virtually impossible to find a proposal that all parties would accept, especially when one takes into account the high social, economic and cultural stakes involved."); Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 10 ("When [the two rival camps in the intellectual property debate] argue, they often talk past each other, rather than to each other. At times, they even accuse their rivals of being 'greedy,' doing 'evil,' or committing thefts and piracy." (footnotes omitted)).

320. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

321. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). For discussions of *Folsom*, see generally R. Anthony Reese, *The Story of* Folsom v. Marsh*: Distinguishing Between Infringing and Legitimate Uses*, *in* INTELLECTUAL PROPERTY STORIES 259 (Jane C. Ginsburg & Rochelle C. Dreyfuss eds., 2006); L. Ray Patterson, Folsom v. Marsh *and Its Legacy*, 5 J. INTELL. PROP. L. 431 (1998); Peter K. Yu, *Tales of the Unintended in Copyright Law*, 67 STUD. L. POL. & SOC'Y 1, 2–6 (2015).

322. *See* 17 U.S.C. § 107 (2018) (codifying fair use).

323. *See* Samuelson, *supra* note 85, at 2548–58 (discussing the evolution of the transformative use doctrine).

ward Lee has coined "technological fair use"[324]—we also need to explore whether the U.S. fair use regime should stay the same in the next round of copyright reform.[325]

While there are certain benefits to retaining the flexibility of the present regime, it is worth exploring whether that regime could become even better by inserting additional statutory language to provide public guidance, such as through the inclusion of a nonexhaustive list of illustrative purposes as the ALRC proposed.[326] It is also worth exploring whether a single fair use provision can serve the copyright system better than having a few fair use provisions that cover different types of fair uses. As Pamela Samuelson has shown, the transformative use doctrine in U.S. copyright law has now evolved to cover three different types of derivative uses: transformative uses, productive uses, and orthogonal uses.[327] Commentators such as Professor Samuelson and Michael Madison have also noted how the use of clusters could help provide the fair use regime with more clarity and predictability.[328]

3. Institutionalizing Hybrids

The final modality involves efforts to institutionalize hybrid models, either as standardized rules or rulified standards. Because there are virtually unlimited ways to develop institutional complements to facilitate these hybrid models,[329] this Subsection illustrates with three institution-based proposals that have been advanced in this area.

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324. *See* Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 806–07 (2010) (identifying the successful technological fair use cases); *see also* U.S. GREEN PAPER, *supra* note 22, at 21 ("Fair use has been applied by the courts to enable, among other things, the use of thumbnail images in Internet search results, caching of web pages by a search engine, and a digital plagiarism detection service." (footnotes omitted)); Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1610 (2009) (calling for the recognition of a principle of nonexpressive use to resolve questions relating to copy-reliant technologies).

325. See sources cited *supra* note 22.

326. *See* ALRC FINAL REPORT, *supra* note 18, at 150–51.

327. *See* Samuelson, *supra* note 85, at 2548–58 (discussing these different uses); *see also* Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 397 (2005) ("Fair use has become too many things to too many people to be of much specific value to anyone."). Orthogonal uses refer to "uses for a different purpose than the original." Samuelson, *supra* note 85, at 2545.

328. *See generally* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004) (advancing a pattern-oriented approach to fair use decisions); Samuelson, *supra* note 85 (arguing that a focus on common patterns, or what Professor Samuelson called "policy-relevant clusters," will make fair use law more coherent and predictable than many commentators have perceived).

329. There are other institution-based or -related proposals. *See, e.g.*, Copyright Act, 5768–2007, § 19(c) (2007) (Isr.). ("The Minister [of Justice] may make regulations prescribing conditions under which a use shall be deemed a fair use."); CRC FINAL REPORT, *supra* note 18, at 94 (proposing an amendment that allows the minister to make regulations to "prescribe[e] what constitutes a fair use in particular cases"). As Joseph Liu observed:

> Taking the regulatory approach [in copyright law] seriously suggests . . . granting the Copyright Office or some other agency greater rulemaking authority in order to flexibly adapt copyright law to changing circumstances; giving the Copyright Office sufficient resources and expertise to undertake this task; and ensuring that the process is open to participation from a wide range of interests.

Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 140 (2004); *see also* Nimmer, *supra* note 85, at 12–15 (calling for the establishment of nonbinding fair use arbitration).

The first proposal concerns the establishment of a fair use board.[330] As Michael Carroll, who advanced this proposal, explained:

> Congress should extend the advisory opinion function available in other bodies of federal law to copyright law by amending the Copyright Act to create a Fair Use Board in the U.S. Copyright Office. Fair use judges would have the authority and the obligation to consider petitions for a fair use ruling on a contemplated or actual use of a copyrighted work. The copyright owner would receive notice of the petition and would have the opportunity to participate in the proceeding.
>
> If the fair use judge determines that such a use is or would be a fair use, the petitioner and the petitioner's heirs or assigns would be immune from liability for copyright infringement for such use. Such a ruling would not affect the copyright owner's rights and remedies with respect to any other parties or any other uses of the copyrighted work by the petitioner. If the judge rules that such use is not, or would not be, a fair use, the petitioner retains all other defenses to copyright infringement. In either case, the judge's determination would be administratively reviewable by the Register of Copyrights. The Register's decisions would be reviewable de novo in the federal circuit courts of appeals.[331]

The second proposal originated from Jason Mazzone.[332] Utilizing an administrative agency to enforce a federal fair use protection statute, this proposal can be further broken down into two models of agency regulation. As Professor Mazzone elaborated:

> In the first model, an agency [known as the Office for Fair Use] is responsible for generating regulations that determine what constitutes fair use in specific contexts as well as preventing efforts to interfere with fair uses of copyrighted works. In the second model, an agency [called the Copyright Infringement Review Office] issues fair use regulations and determines whether the use in question constitutes fair use prior to any copyright infringement claim being brought in court.[333]

The final proposal concerned the role the Federal Trade Commission can play in implementing user privileges in the digital world.[334] As Gideon Parchomovsky and Philip Weiser, who advanced the proposal, explained, "the [Commission]—which has already begun to oversee and address deceptive and unfair practices with regard to digital rights-management systems—is well equipped to oversee such a regime."[335] Compared with the proposal advanced by Professor Carroll, both this proposal and Professor Mazzone's earlier proposal called for an institutional setup that affects the rights of not only those in-

330. *See* Carroll, *supra* note 314, at 1122–43 (discussing this proposal).

331. *Id.* at 1123.

332. *See generally* Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395 (2009) (discussing this proposal).

333. *Id.* at 399.

334. *See* Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 126–36 (2010) (discussing this proposal).

335. *Id.* at 97.

dividuals or parties seeking to make fair use of a copyrighted work, but also all other individual parties that could make an identical use.[336]

Taken together, these three proposals show how institutions can be utilized to strengthen the combination of rules and standards in an effort to broaden copyright limitations and exceptions. There is no doubt any proposal to create institutions will raise questions about the process, the budget, personnel, and other administrative issues.[337] Nevertheless, if the newly created institutions can help strengthen existing proposals concerning rules, standards, or their combinations, it would be worthwhile to study new institution-based proposals. Those proposals seeking to co-opt existing institutions will be particularly promising. In the examples listed in this Section, Professor Carroll's proposal utilized the U.S. Copyright Office,[338] while Professors Parchomovsky and Weiser's proposal involved the Federal Trade Commission.[339]

VI. CONCLUSION

In the past decade, jurisdictions from across the world have actively embraced efforts to modernize their copyright systems. Garnering considerable policy, scholarly, and popular attention is the introduction of fair use, which is based on the paradigmatic U.S. model. Interestingly, as eager as these jurisdictions are to introduce a more flexible set of copyright limitations and exceptions, many of them made a conscious choice to introduce a hybrid model that introduces only select aspects of the fair use model while retaining a considerable part of the status quo.[340]

This Article calls on policy-makers, legislators, and commentators to pay greater attention to those largely under-analyzed hybrid models[341] and how they

336. As Jason Mazzone noted:

> [Professor Carroll's proposal] fall[s] short in that [it] provide[s] certainty only to the individual user who goes through [the] Fair Use Board . . . , and the certainty is only with respect to the particular use that is reviewed. Other users will not know whether their uses are fair use unless they, too, go through the process. Certainty on a large scale is therefore impossible.

Mazzone, *supra* note 332, at 432.

337. *See* Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 68–69 (2006) (discussing the challenges of establishing a process that would bring together copyright holders, technology developers, consumer advocates, civil libertarians, and other stakeholders in the copyright system).

338. *See* Carroll, *supra* note 314, at 1123 (creating the proposed Fair Use Board in the U.S. Copyright Office).

339. *See* Parchomovsky & Weiser, *supra* note 334, at 126–36 (discussing the role of the Federal Trade Commission in their proposal).

340. *Compare* discussion *supra* Section III.A (documenting efforts to reform the copyright system and to introduce fair use proposals), *with* discussion *supra* Section III.B (showing a lack of a paradigm shift in jurisdictions that ended up adopting a hybrid model despite introducing or considering fair use proposals).

341. Some commentators are keenly aware of these models. As Michael Carroll observed:

> A different approach to improving ex ante certainty would be to amend the Copyright Act to create a list of privileged uses or, less forcefully, to create a list of presumptively fair uses or safe harbors. Versions of this approach have been taken through the narrow privilege of "fair dealing" recognized in commonwealth countries such as the United Kingdom, Canada, and Australia.

Carroll, *supra* note 314, at 1147 (2007) (footnotes omitted). Seagull Song also noted that a third model of fair use or fair dealing exists in the form of

have reflected the ongoing evolution of the fair use paradigm. A better understanding of these hybrid models will not only help us develop greater appreciation for copyright reform but will also enable us to reexamine our existing copyright system and thereby explore whether and how that system can be further modernized. At a broader level, such analysis will further help us develop better insights into global law reform that is based on paradigmatic U.S. models.

a combination of the U.S. and U.K. models found in the Taiwanese Copyright Act and the recently revised South Korean Copyright Act, which offer both an enumerated list of permissible uses (as with the United Kingdom) and a number of factors to be considered in determining whether the particular use is fair (as with the United States).

Seagull Haiyan Song, *Revaluating Fair Use in China—A Comparative Copyright Analysis of Chinese Fair Use Legislation, the U.S. Fair Use Doctrine, and the European Fair Use Dealing Model*, 51 IDEA 453, 454–55 (2011) (footnotes omitted).