

UNIVERSIDADE FEDERAL DE MINAS GERAIS  
FACULDADE DE DIREITO  
Programa de Pós-Graduação em Direito

EVOLUTION AND DEVELOPMENT OF THE LIMITATIONS AND EXCEPTIONS IN  
COPYRIGHT AND AUTHORS RIGHTS

Marcos Henrique Costa Leroy

BELO HORIZONTE  
2020

UNIVERSIDADE FEDERAL DE MINAS GERAIS  
FACULDADE DE DIREITO  
Programa de Pós-Graduação em Direito

EVOLUTION AND DEVELOPMENT OF THE LIMITATIONS AND EXCEPTIONS IN  
COPYRIGHT AND AUTHORS RIGHTS

Marcos Henrique Costa Leroy

Dissertação apresentada ao Programa de Pós-Graduação em Direito da Faculdade de Direito da Universidade Federal de Minas Gerais como requisito parcial para a obtenção do título de Mestre em Direito.

Linha de pesquisa: “Poder, Cidadania e Desenvolvimento no Estado Democrático de Direito”.

Área de Estudo: “Direito Econômico e Desenvolvimento”.

Orientador: Prof. Dr. Fabiano Teodoro de Rezende Lara

BELO HORIZONTE  
2020

---

L619e      Leroy, Marcos Henrique Costa  
Evolution and development of the limitations and exceptions in  
copyright and authors rights / Marcos Henrique Costa Leroy . — 2020.

Orientador: Fabiano Teodoro de Rezende Lara.  
Dissertação (mestrado) – Universidade Federal de Minas Gerais,  
Faculdade de Direito.

1. Direito civil – Teses 2. Propriedade intelectual – legislação  
3. Direitos autorais – Teses 4. Reproduções legítimas (direitos autorais)  
5. Organização Mundial da Propriedade Intelectual I. Título

CDU(1976) 347.78

---

Ficha catalográfica elaborada pelo bibliotecário Junio Martins Lourenço CRB 6/3167.

**DEFESA DE DISSERTAÇÃO DE MESTRADO  
ÁREA DE CONCENTRAÇÃO: DIREITO E JUSTIÇA  
BEL. MARCOS HENRIQUE COSTA LEROY**

Aos cinco dias do mês de fevereiro de 2020, às 08h30, no Auditório Orlando Magalhães Carvalho da Faculdade de Direito da Universidade Federal de Minas Gerais, reuniu-se, em sessão pública, a Banca Examinadora constituída de acordo com o art. 73 do Regulamento do Programa de Pós-Graduação em Direito da Universidade Federal de Minas Gerais, e das Normas Gerais de Pós-Graduação da Universidade Federal de Minas Gerais, integrada pelos seguintes professores: Prof. Dr. Fabiano Teodoro de Rezende Lara (orientador do candidato/UFMG); Prof. Dr. Marcelo Andrade Feres (UFMG) e Prof. Dr. Reinaldo Diogo Luz (UFMG), designados pelo Colegiado do Programa de Pós-Graduação em Direito da Universidade Federal de Minas Gerais, para a defesa de Dissertação de Mestrado do **Bel. MARCOS HENRIQUE COSTA LEROY**, matrícula nº **2018663440**, intitulada: **"EVOLUTION AND DEVELOPMENT OF THE LIMITATIONS AND EXCEPTIONS IN COPYRIGHT AND AUTHORS RIGHTS"**. Os trabalhos foram iniciados pelo Presidente da mesa e orientador do candidato, Prof. Dr. Fabiano Teodoro de Rezende Lara, que, após breve saudação, concedeu ao candidato o prazo máximo de 30 (trinta) minutos para fins de exposição sobre o trabalho apresentado. Em seguida, passou a palavra ao Prof. Dr. Marcelo Andrade Feres, para o início da arguição, nos termos do Regulamento. A arguição foi iniciada, desta forma, pelo Prof. Dr. Marcelo Andrade Feres, seguindo-se-lhe, pela ordem, os Professores Doutores: Reinaldo Diogo Luz e Fabiano Teodoro de Rezende Lara. Cada examinador arguiu o candidato pelo prazo máximo de 30 (trinta) minutos, assegurando ao mesmo, igual prazo para responder às objeções cabíveis. Cada examinador atribuiu conceito ao candidato, em cartão individual, depositando-o em envelope próprio. Recolhidos os envelopes, procedeu-se a apuração, tendo se verificado o seguinte resultado:

**Prof. Dr. Fabiano Teodoro de Rezende Lara (orientador do candidato/UFMG)**

Conceito: **APROVADO 95**

**Prof. Dr. Marcelo Andrade Feres (UFMG)**

Conceito: **Aprovado 95**

**Prof. Dr. Reinaldo Diogo Luz (UFMG)**

Conceito: **Aprovado 95**

A Banca Examinadora considerou o candidato..... **APROVADO** com nota **9,5**. Nada mais havendo a tratar, o Professor Doutor Fabiano Teodoro de Rezende Lara, Presidente da Mesa e Orientador do candidato, agradecendo a presença de todos, declarou encerrada a sessão. De tudo, para constar, eu, Fernanda Bueno de Oliveira, Servidora Pública Federal lotada no Programa de Pós-Graduação em Direito da UFMG, mandei lavrar a presente ata, que vai assinada pela Banca Examinadora e com o visto do candidato.

**BANCA EXAMINADORA:**



Prof. Dr. Fabiano Teodoro de Rezende Lara (orientador do candidato/UFMG)

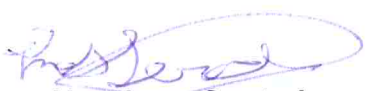


Prof. Dr. Marcelo Andrade Feres (UFMG)



Prof. Dr. Reinaldo Diogo Luz (UFMG)

OBS: O Professor Reinaldo participou por Skyp



- **CIENTE:** Marcos Henrique Costa Leroy (Mestrando)

## RESUMO

Desde a Convenção de Berna, o copyright e o direito autoral são comumente considerados por diversos países como uma necessidade para a promoção do desenvolvimento e inovação. Principalmente devido aos novos alcances da atual tecnologia, a discussão sobre as normas dessa propriedade intelectual ganha força sob o argumento da indispensabilidade da proteção econômica da criação feita por autores em contraste com o interesse público no acesso ao conhecimento e à informação.

Ao longo dos anos, a visão sobre os limites e exceções possíveis para a utilização de uma obra protegida foi se alterando em diferentes países e nas harmonizações internacionais como o *TRIPs*. Principalmente pressionadas pelos países desenvolvidos, essas tentativas de proteção comum do copyright e do direito autoral internacionalmente tentam garantir os direitos tradicionalmente conferidos pelas regras internas e internacionais com restritas limitações e exceções, mas cada jurisdição possui um contexto cultural e objetivos diferentes ao legislar ou decidir sobre a rigidez da proteção conferida às criações de autores.

O principal objetivo deste estudo é examinar o sistema de propriedade intelectual, mostrando brevemente o que são copyright e direitos autorais e por que os protegemos diante dos atuais desafios de inovação e desenvolvimento. Em seguida, serão investigadas as limitações e exceções do copyright e dos direitos autorais que buscam adaptar o sistema para balancear os direitos e obrigações do uso pelos criadores e usuários de uma obra protegida.

**PALAVRAS-CHAVE:** Direito Autoral; Copyright; Limites e Exceções; Desenvolvimento.

.

## **ABSTRACT**

Since the Berne Convention, copyright and authors rights are commonly regarded by many countries as necessity for the promotion of development and innovation. Mainly due to the new scope of current technology, the discussion about the norms of this intellectual property gains strength under the argument of the indispensability of the authors' economic protection of creation in contrast with the public interest in access to knowledge and information.

Over the years, the view on the possible limitations and exceptions to the use of a protected work has changed in different countries and in international harmonization treaties such as the *TRIPs* Agreement. Mainly pressured by developed countries, these attempts for a common copyright and authors rights protections internationally try to guarantee the traditional rights conferred by domestic and international rules with strict limitations and exceptions, but each jurisdiction has a cultural context and different objectives in legislating or deciding on the rigidity of protection given to authors' creations.

The main goal of this thesis is to examine the intellectual property system, showing briefly what is copyright and authors rights and why do we protect it in face of the current's innovation and development challenges. Then, it will investigate the limitations and exceptions of copyright and authors rights, which pursuit to adjust the system in order to balance the rights and obligations for the use of a protected work by both creators and users.

**KEY-WORDS:** Limitations and Exceptions; Copyright; Authors Rights; Development.

## **LIST OF ABBREVIATIONS**

|         |                                                                                                                |
|---------|----------------------------------------------------------------------------------------------------------------|
| ALRC    | – Australian Law Reform Commission                                                                             |
| AU      | – Australia                                                                                                    |
| BR      | – Brazil                                                                                                       |
| CA      | – Canada                                                                                                       |
| CDPA    | – United Kingdom Copyright, Designs and Patents Act of 1988                                                    |
| EU      | – European Union                                                                                               |
| InfoSoc | – Information Society Directive of 2001                                                                        |
| Infopaq | – Infopaq International A/S v Danske Dagblades Forening Judgment of the Court (Fourth Chamber) of 16 July 2009 |
| IP      | – Intellectual Property                                                                                        |
| L&E     | – Limitations and Exceptions                                                                                   |
| TRIPS   | – Agreement on Trade-Related Aspects of Intellectual Property Rights                                           |
| UK      | – United Kingdom                                                                                               |
| US      | – United States of America                                                                                     |
| WCT     | – WIPO Copyright Treaty                                                                                        |
| WIPO    | – World Intellectual Property Organization                                                                     |
| WPPT    | – WIPO Performances and Phonograms Treaty                                                                      |
| WTO     | – World Trade Organization                                                                                     |

## SUMMARY

|                                                                                                                     |    |
|---------------------------------------------------------------------------------------------------------------------|----|
| 1 INTRODUCTION TO THE INTELLECTUAL PROPERTY: COPYRIGHT VERSUS AUTHORS RIGHTS.....                                   | 9  |
| 1.1 Concept of Copyright and Authors Rights.....                                                                    | 13 |
| 1.2 Copyright and Authors Rights System Protection Design.....                                                      | 17 |
| 1.3 Copyright and Authors Rights, Development and Innovation.....                                                   | 20 |
| 2 LIMITATIONS AND EXCEPTIONS OF THE COPYRIGHT AND AUTHORS RIGHTS.....                                               | 24 |
| 2.1 Limitations and Exceptions.....                                                                                 | 25 |
| 2.1.1 Justifying Limitations and Exceptions.....                                                                    | 28 |
| 2.2 International Copyright and Authors Rights Law on Limitations and Exceptions.....                               | 30 |
| 2.2.1 Berne Convention for the Protection of Literary and Artistic Works.....                                       | 31 |
| 2.2.2 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations..... | 34 |
| 2.2.3 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).....                               | 35 |
| 2.2.4 WIPO Copyright Treaty (WCT).....                                                                              | 37 |
| 2.2.5 WIPO Performances and Phonograms Treaty (WPPT).....                                                           | 38 |
| 2.2.6 International provisions considerations.....                                                                  | 39 |
| 2.3 Fair Use Approach.....                                                                                          | 43 |
| 2.3.1 Conceptualizing Fair Use.....                                                                                 | 45 |
| 2.3.2 Courts Role.....                                                                                              | 48 |
| 2.3.3 Transformative Use of a Work.....                                                                             | 49 |
| 2.3.4 Fair Use versus Three-Step Test.....                                                                          | 50 |
| 2.3.5 Fair Use Adaptation to New Technologies.....                                                                  | 52 |
| 2.3.6 Fair Use Economic Justification.....                                                                          | 53 |
| 2.3.7 Sony Corporation of America v. Universal City Studios Case.....                                               | 57 |
| 2.3.8 Possible Fair Use Reforms.....                                                                                | 57 |
| 2.3.9 Fair Use International Use.....                                                                               | 60 |
| 2.4 Fair Dealing Approach.....                                                                                      | 60 |
| 2.4.1 UK....                                                                                                        | 64 |
| 2.4.1.1 UK Fair Dealing Legislations.....                                                                           | 64 |
| 2.4.1.2 Per Se Exception versus Rule of Reason.....                                                                 | 66 |
| 2.4.1.3 UK Final Considerations.....                                                                                | 66 |
| 2.4.2 Canada.....                                                                                                   | 67 |
| 2.4.2.1 Canada Fair Dealing Legislations.....                                                                       | 67 |

|                                                                            |           |
|----------------------------------------------------------------------------|-----------|
| 2.4.2.2 CCH Canadian Ltd. v. Law Society of Upper Canada Case.....         | 68        |
| 2.4.2.3 Copyright Modernization Act of 2012: the Users' Rights .....       | 69        |
| 2.4.2.4 Canada Fair Dealing versus US Fair Use .....                       | 71        |
| 2.4.2.5 Canada Lessons by Geist .....                                      | 73        |
| 2.4.3 Australia.....                                                       | 74        |
| 2.4.3.1 Australia Fair Dealing Legislations .....                          | 74        |
| 2.4.3.2 Australian Law Reform Commission (ALRC).....                       | 76        |
| 2.5 Designated Limitations and Exceptions Approach.....                    | 78        |
| 2.5.1 European Union .....                                                 | 79        |
| 2.5.1.1 Designated Limitations and Exceptions Legislations in Europe ..... | 79        |
| 2.5.1.2 Courts Decisions in Europe .....                                   | 82        |
| 2.5.1.3 European L&E versus other approaches .....                         | 83        |
| 2.5.1.4 Proposing Flexibilities to European L&E.....                       | 84        |
| 2.5.2 Brazil .....                                                         | 85        |
| 2.5.2.1 Designated Limitations and Exceptions Legislations in Brazil.....  | 86        |
| 2.5.2.2 Brazilian Federal Justice Council Legal Understanding .....        | 87        |
| 2.5.2.3 Reform Proposals in Brazil.....                                    | 87        |
| 2.6 Limitations and Exceptions: Final Evaluations .....                    | 89        |
| <b>3 FINAL CONSIDERATIONS.....</b>                                         | <b>91</b> |
| <b>REFERENCES.....</b>                                                     | <b>95</b> |

## 1. INTRODUCTION TO THE INTELLECTUAL PROPERTY: COPYRIGHT VERSUS AUTHORS RIGHTS

Intellectual Property (*IP*) is a field of study that deals with the creations of the human intellect. The law grants a property protection upon these creations for a limited time so that the creator can have a monopoly position to explore the intangibles as a reward for making the innovation public and also to provide an economic incentive to the continuous production of new creations.

The objects of this field of study are mostly goods that can confer technological development, such as: patents, copyrights/authors rights, trademarks, utility models, geographical indications, industrial designs, and integrated circuits. The IP rights have a crucial economic and political significance that makes an impact on policy making in all areas of human development and other topics such as: public health, food, security, education, trade, industrial policy, traditional knowledge, biodiversity, biotechnology, the internet, the entertainment and media industries<sup>1</sup>.

Overall, the IP legislations indicate the types of creations of the mind covered by the intellectual property protection and the specific rights and limitations attached to it. Thereby, it will define the criteria to grant such protection privileges, describing how the rights can be transferred<sup>2</sup> and which types of use are considered as an infringement to the owners' rights.

The '*intellectual property*' terminology demonstrates aspects regarding the doctrine. The word '*intellectual*' is connected to the human mental activity behind the pattern protected by IP, which can either be the method of creation or the way it is used<sup>3</sup>. Meanwhile, the '*property*' portion has practical and conceptual difficulties as it distinguishes from the *tangible* property. Because it aims to create incentives, but also give liberties to the public,

---

<sup>1</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006., p. vii

<sup>2</sup> GORDON, Wendy J. Intellectual Property. *The Oxford Handbook of Legal Studies*, Peter Cane and Mark Tushnet, eds., Oxford University Press, pp. 617-646, October 2003. p. 618

<sup>3</sup> Ibidem. p. 618/619

IP law has a person-to-person not a person-to-thing application, as it tries to avoid acts of duplication and free riding<sup>4</sup>.

For this reason, the term '*property*', especially in the two main objects of IP protection – patents and copyrights/authors rights –, differs from the common tangible property. They are more typically un-owned inexhaustible '*public goods*' than exhaustible '*private goods*' because there are personal and public interests' components in the IP study moderating the owners' control of a market than compared to ordinary tangible property<sup>5</sup>.

Scholarly works have shown that IP constrain can contribute by allowing more goods to be accessible by the society based on public domain and commons-based institutions. Nevertheless, pressure from the industry and international agreements pushed IP to become closer to the ordinary tangible property application as it is an attractive asset to owners, causing an expansion of the doctrine legitimacy in the legislation and courts<sup>6</sup>.

Along these lines, IP doctrine often justifies the protection of the exclusive goods, similarly to the '*unfair competition*'. It is alleged that, to restrain other uses to the IP creations, there is a supposal immorality or a harm to the public, which outruns the IP doctrine's rationality<sup>7</sup>.

As Backer stated and summarized in his paper<sup>8</sup>, IP rights have an economic study background coherent and integrated with the doctrine, including: Kenneth Arrow, on the economic nature of invention and creativity as a process; George Stigler, on the economic nature of information; Ronald Coase, on the role of law and property rights in the economic system; Harold Demsetz advancing the Coase economic perspective; William Landes with Richard Posner specifically studying economics on the copyright law; and Douglass North on the property rights' role in economic growth and development through their effect in limiting the free rider problem<sup>9</sup>.

---

<sup>4</sup> Ibidem. p. 619

<sup>5</sup> Ibidem. p. 621

<sup>6</sup> Idem

<sup>7</sup> Idem

<sup>8</sup> BARKER, George Robert. Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age. In: *2013 Annual Congress of the Society for Economic Research on Copyright Issues (SERCI) held in MINES ParisTech, Paris (France)*. 2013.

<sup>9</sup> Ibidem. p. 14

The philosophical reasoning to IP has a major influence by the Lockean theory. John Locke proposes that a person should have a property when there is a mix of his/her labor with an object from the common<sup>10</sup> and must not deprive others of the opportunity to benefit. Thus, there should be a property protection when there is admixture of nature and human labor to ensure continued productive labor, which justifies the IP rights and its limitations<sup>11</sup>.

In a deeper view of that perspective, it is also important to understand the Garret Hardin studies on the tragedy of the commons with the multi-person prisoner's dilemma to understand the economic approach to property when there are insufficient resources. The unregulated resources appropriated by a person privately have an externalization effect of the use and cost shared with other co-owners, which can foster growth. However, when there are too many private claims to a limited resource to get results and benefits, it might end up being a too small profit – consequence known as tragedy of the anticommons<sup>12</sup>.

There is a significant impact of all these analysis to the IP justification. The idea of internalizing externalities becomes crucial in order to discourage overly risky activities when there is a negative impact, but also brings positive effects to those who cause them, in order to encourage productive activity – IP's base concept to protect the intellectual goods<sup>13</sup>.

Furthermore, Fabiano Lara contributes to the discussion by explaining that IP is a right on intangible goods that, considering the time and space of the juridical evolution, received protections as a property status<sup>14</sup>. Moreover, Lara suggests that it is not adequate to examine intellectual property institute only in a static perspective, as set by the Napoleonic tradition. The dynamic perspective should also be used, as it allows for a correct identification of the political, economic and social function of the property<sup>15</sup>.

In situations where IP protected goods have no functional substitute, there is a possibility of having a market power which can lead to higher prices. The monopolistic prices generate

---

<sup>10</sup> GORDON, Wendy J. Intellectual Property. *The Oxford Handbook of Legal Studies*, Peter Cane and Mark Tushnet, eds., Oxford University Press, pp. 617-646, October 2003. p. 624

<sup>11</sup> Idem

<sup>12</sup> Ibidem. p. 640

<sup>13</sup> Ibidem. p. 639

<sup>14</sup> LARA, Fabiano Teodoro. *Propriedade intelectual: uma abordagem pela análise econômica do Direito*. DelRey Editora, 2010. p. 5/6

<sup>15</sup> Ibidem. p. 3/4

a dead weight, which creates an inefficiency and a social loss. In these cases, the use of the IP protected goods by those who are out of the demand projected by the rightsholder does not reduce the property value and it is the outcome to reach the Pareto efficiency (best possible allocation of the resources without making the situation of one individual worse)<sup>16</sup>.

Lara argues that, like in any other property institution, Intellectual Property has a social function that imposes to the rightsholder the obligation of management and distribution of the protected innovation, which does not prevent the monopolist prices but authorizes the use of the protected IP object by those who are excluded, by pricing, from the licensed use. By doing so, the IP fulfills its social function and promotes economic development when it protects the exploitation of the protected IP and also balances it with the right to access to innovation by those excluded by the monopolist power<sup>17</sup>.

Intellectual property has proliferated over the last century to occupy a central position in the law, both within the United States and globally. Its domain is human ingenuity and the substratum of much contemporary life—technology, communication, entertainment, and commerce. What chunks of these are free for capture, and what it takes to capture them, are critical in determining the direction and composition of society. These grand themes, however, still depend on the particulars of legal doctrine and the conceptual framework that shapes and is shaped by them.<sup>18</sup>

Ultimately, IP faces some challenges to balance the economic standards and the social function. To overcome the social function, political lobby by the rightsholders pressures the congress and courts to only take measures to protect the IP as an exclusive right and, consequently, not considering the public interest involved. Therefore, the efforts to enclose IP reduce the field potential as a resource for building community<sup>19</sup> and development.

---

<sup>16</sup> Ibidem. p. 114

<sup>17</sup> Ibidem, p. 114/115

<sup>18</sup> OLIAR, Dotan; STERN, James Y. Right on Time: First Possession in Property and Intellectual Property. *BUL Rev.*, v. 99, p. 395, 2019. p. 457

<sup>19</sup> GORDON, Wendy J. Intellectual Property. *The Oxford Handbook of Legal Studies*, Peter Cane and Mark Tushnet, eds., Oxford University Press, pp. 617-646, October 2003. p. 645

### 1.1. Concept of Copyright and Authors Rights

Known in some countries as copyright and in others as authors rights, these forms of property grant exclusive rights to the creator, for a period of time, for the production of a creative work. The copyright and authors rights normally include different forms of artistic, literary, education, and scientific expressions, not protecting the idea itself. The idea-expression distinction intends to ensure a completion of substantial steps along the developmental timeline<sup>20</sup>, in other word, it limits the scope of the copyright and authors rights by demanding the manifestation of the idea (and also facilitates making proof of authorship).

As part of the intellectual property rights, copyright and authors rights intend to encourage authors and creators to produce and publicize intellectual works. To achieve this purpose, these IP rights give protection and compensation to the rightsholder in exchange for the access to the IP protected work. Historically, copyright and authors rights managed to balance the private and public interests because of the unsophisticated means of the work dissemination. Today, the expansion of the technology facilitated the information transmission, which increased the public pressure to have access to creative goods<sup>21</sup>, destabilizing the traditional copyright and authors rights protections.

The dichotomy of copyright and authors rights is normally associated with the economic and moral rights. The copyright – used by many countries like US, UK, Canada, and Australia – grants exclusive rights for authors and companies to control the production and dissemination of works, which is known as economic rights<sup>22</sup>. On the other hand, the authors rights – used in countries like France, Germany, and Brazil – recognize an innate value of the author's vocation<sup>23</sup>.

The copyright has a primarily economic function, but the author of the copyrighted work also has the moral rights, which are personal rights like rights of attribution and integrity

---

<sup>20</sup> OLIAR, Dotan; STERN, James Y. Right on Time: First Possession in Property and Intellectual Property. *BUL Rev.*, v. 99, p. 395, 2019. p. 439

<sup>21</sup> MILLS, Mary L. New technology and the limitations of copyright law: An argument for finding alternatives to copyright legislation in an era of rapid technological change. *Chi.-Kent L. Rev.*, v. 65, p. 307, 1989. p. 308/309

<sup>22</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016.

p. 3

<sup>23</sup> Ibidem. p. 4

(notice that the author can differ from the rightsholder – for example companies owning movie, books, etc). The authors rights rather primarily protect the moral rights (*le droit moral*), but also entitle authors to economic rewards (*le droit patrimonial*)<sup>24</sup>.

The copyright and authors rights system is not only founded in those two rights. The copyright and authors rights protected work also consists of the influence from information, cultural development, exchange and evolution. Each society was built on information for enlightenment and freedom and has a different view and interests on how to express and regulate it<sup>25</sup>.

To a better understanding of the current form and the limits of the copyright and authors rights system, many intellectuals and experts have debated over the legal protections by defending different theories. There have been four main clusters of theories: fairness; personality/natural; welfare/utilitarian; and cultural theories<sup>26</sup>.

In a few words, the fairness theory argues that the law should give authors what they are morally entitled to. Strictly speaking, this theory is associated to authors being rewarded with the rights for their hard work or important contributions to culture<sup>27</sup>.

The personality or natural theory argues that the law should give fully realization or joyful personhood to people through the rights, powers or protections they need<sup>28</sup>. It states that authors are vested with exclusive property rights over the work by virtue of the mere act of creation. In other words, intellectual property rights derive directly from creative labor<sup>29</sup>.

The welfare/utilitarian theory is concerned on the production of the greatest good of the greatest number for the society, in a utilitarianism criterion. Law should create a system of incentives to authors to generate more works and make them widely available, as an optimal

---

<sup>24</sup> Idem

<sup>25</sup> Idem

<sup>26</sup> FISHER, William W. *CopyrightX course lecture transcripts*. 2018. p. 27.

<sup>27</sup> Idem. See more on page 28.

<sup>28</sup> Idem. See more on page 36.

<sup>29</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 6 and 11

mixture of creativity stimulation and distribution<sup>30</sup>. It tries to bring balance between grants and reservations of copyright and authors rights law to the benefit of authors and users.<sup>31</sup>

Lastly, the culture theory focuses more on the society well-being. The law should foster a just and attractive culture, without measuring what the consumer currently wants. The theory seeks to identify and cultivate conditions that will support widespread human flourishing<sup>32</sup>, as the cultural rationale of the copyright and authors rights promote a free and independent intellectual debate<sup>33</sup>.

All theories have impacted, to a degree, the copyright and authors rights system in different forms around the world. There is no right answer as it depends on the interpretation and how each theory applies in all sort of ways to the IP law nationally or internationally.

The theories and, consequently, the copyright and authors rights system are impacted depending on each country law tradition: common law tradition or civil law tradition. The common law tradition normally applies the copyright with primarily economic rights and has a more utilitarian influence, while the civil law tradition with authors rights and the *droit d'auteur* has a bigger natural law influence. However, the two traditions have a mixture of a shared set of basic ideas derived from the theories<sup>34</sup>.

Even with different approaches in both systems, the copyright and authors rights system reached an agreement on the international level on behalf of the harmonization interests. Examples like the Berne Convention, TRIPS Agreement and the WIPO Copyright Treaty (all which will be investigated later on) show the circumstances agreed upon internationally<sup>35</sup>.

Overall, IP is considered to have two distinctive aspects: it is not easy to define the exactly extension of the rights of the protected works and the works can be used by large numbers

---

<sup>30</sup> FISHER, William W. *CopyrightX course lecture transcripts*. 2018. p. 27. See more on page 81.

<sup>31</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 13/14

<sup>32</sup> FISHER, William W. *CopyrightX course lecture transcripts*. 2018. p. 27. See more on page 257.

<sup>33</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 16

<sup>34</sup> Ibidem. p. 8 and 10

<sup>35</sup> Ibidem. p. 7

of people without scarcity. To such a degree, there is a great development on the extension, but not much on the inexhaustibility of IP<sup>36</sup>.

In addition, copyright and authors rights have an important role on knowledge and culture promotion. Some IP experts even declare the copyright and authors rights policy to be “the collection of ways that a government provides incentives to create culture”, including building, aggregating, and sharing knowledge. They argue that progress is established in the growth of culture<sup>37</sup>:

The most important reason we want authors to create and communicate new works is that we hope people will read the books, listen to the music, see the art, watch the films, run the software, and build and inhabit the buildings. That is the way that copyright promotes the Progress of Science.<sup>38</sup>

For the motivation to the creation of culture, the current way is by rewarding creators with a limited monopoly over the use of their work. However, it also needs to limit the rights in order to enlarge the goal or encourage creation of culture<sup>39</sup>. Besides, the creativity is not an individual act<sup>40</sup>, authors need to have access to other works to learn, get inspired and create.

To sum up, the typical copyright and authors rights discussion involves “providing more access for the public to created works and giving profits to those who created the works”<sup>41</sup>. So, considering the copyright and authors rights system structure today, it is necessary to balance the protection of exclusive property rights with limitations and exceptions that allow public access and foster culture and innovation.

---

<sup>36</sup> GORDON, Wendy J. Intellectual Property. *The Oxford Handbook of Legal Studies*, Peter Cane and Mark Tushnet, eds., Oxford University Press, pp. 617-646, October 2003. p. 644

<sup>37</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 16

<sup>38</sup> LITMAN, Jessica. Fetishizing Copies. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 108

<sup>39</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 16

<sup>40</sup> Ibidem. p. 21

<sup>41</sup> BRENNAN, Timothy J. ‘Fair Use’ as policy instrument. In: TAKEYAMA, Lisa N.; GORDON, Wendy J.; TOWSE, Ruth. *Developments in the economics of copyright*. Edward Elgar Publishing, 2005. p. 80

## 1.2. Copyright and Authors Rights System Protection Design

The copyright and authors rights system protection today is designed in the policy and practice in favor of copyright and authors rights owners. There is a common assumption that copyright and authors rights exist only to protect owners and that creators of new work deserve unlimited protection<sup>42</sup>. Conjointly, copyright and authors rights would confer authors a monopoly position to freely control the use and enjoyment of his work alongside with the right to impede or even prevent access to his work<sup>43</sup>.

These copyright and authors rights premises are incorrectly devoted as they exclude others from freely speaking or receiving information. There are various reasons for copyright and authors rights regulation, but it does not automatically imply on strong exclusive rights for authors, as it can also benefit the others with limitations upon those rights<sup>44</sup>. Nonetheless, representatives of copyright and authors rights owners usually argue that they should be able to control all uses of their works, which is not something sustained by law or history<sup>45</sup>.

Historically, property tends to extend the control over whatever is controllable, especially in recent years with new potential markets created from the advance of technology, suggesting an irreducible and illimitable regime of private property<sup>46</sup>. However, considering copyright and authors rights are useful instruments to promote intellectual creation, it does not consequently imply in strong protection<sup>47</sup>.

Despite of it, the copyright and authors rights enforcement is regarded by mainstream economics as having significant economic benefits to prevent ‘*free riding*’ on the investments of creators. It is alleged that freely copying another person’s creation without permission encourages ‘*free riding*’ and undermine the creators’ ability to earn a living

---

<sup>42</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 16

<sup>43</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 17

<sup>44</sup> Idem

<sup>45</sup> LITMAN, Jessica. *Fetishizing Copies*. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 109

<sup>46</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 134

<sup>47</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 13

(even with some indirectly gain like advertising). “By limiting the reward of creators and inventors, free riding weakens their incentive and ability to create in the first instance, and is therefore likely to lead to less creative and inventive work over time”<sup>48</sup>.

The intellectuals that worries with the economic rapport argue closely to the content industry groups concerning with asserting maximum control in the uncertain digital environment. On the other hand, many legal scholars sustain a free culture with vastly expanded Public Domain and Open Sources<sup>49</sup>. In addition, other alternatives to the copyright and authors rights system arose in the attempt to create a more balanced approach than the current copyright and authors rights laws.

For the Public Domain defenders, there would be further creative production if there were no exclusive IP rights diminishing creativity accessibility. Thus, the productive function needs to be very-well shaped in the copyright and authors rights system to adapt as “a disciplined copyright system tailored to the formal and informal structures of the local community is essential to improve the size, quality, and diversity of the public domain”<sup>50</sup>.

Associated with software, the Copyleft was developed by Richard Stallman and it is also identified by the name of General Public License. The goal was to preserve ongoing free access to software developed by programmer teams in MIT, creating a work with flexible rights that permit programmers to use, study, and distribute modified or unmodified versions of the software in a manner that safeguards ongoing access<sup>51</sup>.

The Open Access, a movement dedicated to free online distribution of journal articles<sup>52</sup>, gives unrestricted public access to these works, usually in the context of research (open science). The right to make available to the public the scientific work is important for

---

<sup>48</sup> BARKER, George Robert. Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age. In: *2013 Annual Congress of the Society for Economic Research on Copyright Issues (SERCI) held in MINES ParisTech, Paris (France)*. 2013. p. 13

<sup>49</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 48

<sup>50</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 726

<sup>51</sup> EINHORN, Michael A. *Media, Technology, and Copyright: Integrating Law and Economics*. Edward Elgar Publishing, 2005. p. 169

<sup>52</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 125

academic freedom<sup>53</sup>. Roberto Caso explains that open science is considered a system that leverages academic copyright to bring public, democratic and autonomous science to the internet. Then it must be admitted that the concentration of the power to control information and data is increasingly in the hands of few commercial entities<sup>54</sup>.

One of the most famous and influential alternatives is the Creative Commons. Founded by Lawrence Lessig in 2001, it articulates different licenses to allow creators to have a work protected accordingly to a range of copyright and authors rights conditions that he/she chooses, as an alternative zone with appropriately labeling<sup>55</sup>. With the purpose of facilitating the legal dissemination of works and information, there are six types of licenses available for use<sup>56</sup>: Attribution (CC BY), Attribution Share Alike (CC BY-SA), Attribution No Derivatives (CC BY-ND), Attribution Non-Commercial (CC BY-NC), Attribution Non- Commercial Share Alike (CC BY-NC-SA), Attribution Non-Commercial No Derivatives (CC BY-NC-ND)<sup>57</sup>.

By working with the current system, copyright and authors rights can more efficiently attend to different people's intentions by offering "a middle way that allow people and institutions to steer a productive course between copyright advocate and abolitionists". The repercussion of the success of Creative Commons may influence copyright and authors rights legislations to encourage a more permissive sharing and dissemination of information for private and public purposes<sup>58</sup>.

In the end, copyright and authors rights system protection has a challenge when it comes to information. As information becomes limitless digitally, internet resembles a free market

---

<sup>53</sup> CASO, Roberto. La libertà accademica e il diritto di messa a disposizione del pubblico in Open Access (Academic Freedom and Right of Making Available in Open Access to the Public). *Trento Law and Technology Research Group Research Paper Series*, n. 37, 2019. p. 2

<sup>54</sup> CASO, Roberto. Il diritto d'autore accademico nel tempo dei numeri e delle metriche (Academic Copyright in the Age of Numbers and Metrics). *Trento Law and Technology Research Group Research Papers*, n. 36, 2018. p. 23/24

<sup>55</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 13

<sup>56</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 125/126

<sup>57</sup> CREATIVE COMMONS LICENSES. Creative Commons.

<sup>58</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 126

(or at least with negligible transaction costs) with attenuated control of the property, leaving industries less powerful<sup>59</sup>.

It is unlikely that copyright and authors rights laws cease to regulate information dissemination<sup>60</sup>. However, there are new alternative models of cultural production that forces alternative models of rewards, as authors are supposed to expect less from a book or a music recording itself and rely more on merchandising properties and concert tickets<sup>61</sup>.

### 1.3. Copyright and Authors Rights, Development and Innovation

There is an increasing debate over the impact of the IP regime to developing countries. While some scholars defend that IP stimulates untold innovation and economic progress, others question the IP role believing that it can put an unforeseen burden on social and economic development<sup>62</sup>.

The term ‘*development*’ is understood as the mean to improve the individuals’ lives socially and economically by providing greater education, skills development, income and employment. Considering the international community, each aspect of the development concept may differ depending on each country and has being contested by scholars, organizations and development experts in developed and developing countries<sup>63</sup>,

There are many sources of international pressure over the promulgation of IP laws in developing and least-developed countries. In the copyright and authors rights system, undue foreign influence can result in unpleasant norms like enhanced civil penalties for copyright

---

<sup>59</sup> ATKINSON, Benedict; FITZGERALD, Brian. Short History of Copyright. Springer International Pu, 2016. p. 124

<sup>60</sup> Ibidem. p. 134

<sup>61</sup> GINSBURG, Jane C. Exceptional authorship: the role of copyright exceptions in promoting creativity. In: FRANKEL, Susy; GERVAIS, Daniel (Ed.). *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 39

<sup>62</sup> OLWAN, Rami; FITZGERALD, Brian. IP and Development: A Road Map for Developing Countries in the Twenty-First Century. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 85

<sup>63</sup> Ibidem. p. 86

and authors rights infringement in poverty societies and culturally ill-suited, meaning a copyright and authors rights protection over sacred objects, for example<sup>64</sup>.

In these terms, the IP law introduced in developing countries should consider the structure of their IP system as a broader development plan for the country. That's because "while IP may bring Foreign Direct Investment (FDI), technology transfer, domestic innovation, and Research and Development (RD) to developing countries, economic development will not occur simply through the introduction of IP laws"<sup>65</sup>

In the light of the international treaties minimum standards, some argue that it creates a sufficient structure to promote knowledge, innovation and private investment flows to developing countries. On the other hand, the international IP structure can be counterproductive by "limiting the availability of educational materials for developing country school and university students; legitimizing the piracy of traditional knowledge; and undermining the self-reliance of resource-poor farmers"<sup>66</sup>

To attack this problem, the UNCTAD/ICTSD Project on Intellectual Property Rights and Sustainable Development appeared in 2001. The purpose is to facilitate developing countries own definition of sustainable human development to be established at the national and international levels<sup>67</sup>.

Under the development argument, there were institutional and political strategies to encourage enactment of IP laws, including conditioning developing and least-developed countries participation in the international IP framework to demand formal assurances of technical assistance. This leads to a higher costs of knowledge acquisition for developing countries with limited technology diffusion<sup>68</sup>.

---

<sup>64</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 697

<sup>65</sup> OLWAN, Rami; FITZGERALD, Brian. IP and Development: A Road Map for Developing Countries in the Twenty-First Century. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 88

<sup>66</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006. p. vii

<sup>67</sup> Idem

<sup>68</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 691

Another postulation is that IP law contributes to industrialization and consequently material well-being of developing countries. It justifies copyright and authors rights strong rights as a requirement to boost creativity and production wherefore economic and cultural progress. However, economic development is not directly associated with strong copyright and authors rights protection as many countries have weak performances in promoting democratic governance, robust marketplace of ideas, access to educational materials, and improving literacy<sup>69</sup>.

Even between two similarly situated countries, it is possible to have different development outcomes because of other aspects such as culture, history, and institutions. In the end, considering only resources, technology, and preferences as the fundamental premises for development is incorrect as they are not the only deep determinants of economic results<sup>70</sup>.

So, as the harmonization of copyright and authors rights systems typically uses internationally designed copyright and authors rights regimes, it can create disruptive effects in the most vulnerable countries and local communities<sup>71</sup>. There should be a prioritization of the specific cultural context, institutional environment, and value choices as it happens in the leading neoliberal societies<sup>72</sup>.

This adaptation needs to consider the cultural and institutional context, as it can be very different in each country or even have different cultural and economic impacts. To mobilize culture in relatively inhospitable conditions, is recommended to have appropriate limits to the copyright and authors rights laws in countries that have low income or are institutionally weak<sup>73</sup>.

For example, a new creative business model has originated in the Brazilian music sector. It is called tecnobrega. By achieving specific cultural conditions, expectations, and practices, this example has become a distinctive global phenomenon that can contribute positively to economic growth and development in the region by employing more people, creating more cultural goods, and investing in technologies. Through the limitations and exceptions of the copyright and authors rights system (which is the next investigated topic), it was possible

---

<sup>69</sup> Ibidem. p. 692/693

<sup>70</sup> Ibidem. p. 696

<sup>71</sup> Ibidem. p. 706

<sup>72</sup> Ibidem. p. 709

<sup>73</sup> Idem

for creators to have access to ideas and other public domain materials, as they “ignore any attempt to enclose mass culture, and instead to understand sharing, borrowing, and remixing practices as legitimate (or at least uncontrollable) exercises of creativity”<sup>74</sup>.

To conclude, facilitating access to works is essential for ongoing creativity. “As users, creators themselves need an appropriate level of access, and as potential creators, users also require an appropriate incentive structure”<sup>75</sup>. Although it is unclear what constitutes ‘*development*’ in international copyright and authors rights policy<sup>76</sup>, it is possible to state that the copyright and authors rights system should balance the aspects of the private and public interests to promote progress and encourage growth<sup>77</sup>.

---

<sup>74</sup> Ibidem. p. 719/720

<sup>75</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006. p. x

<sup>76</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 696

<sup>77</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006. p. x

## **2. LIMITATIONS AND EXCEPTIONS OF THE COPYRIGHT AND AUTHORS RIGHTS**

Considering the two main systems of regulation – Copyright and Authors Rights – already mentioned and distinguished before, this topic focuses on the balance of the creators’ rights and the public interest known as limitations and exceptions (L&E). They are the mechanisms that tailor the scope of protection of the creators’ exclusive rights to enable the reproduction of a work in special cases that does not conflict with normal exploitation or prejudice legitimate authors’ interests – which will be explained in the first subsection.

Despite copyright and authors rights having general limitations on granting rights (such as limitations on copyrightable subject matter; duration; or conditions of protection), this topic will address L&E in which authors already have fulfilled the conditions to have rights in the copyright and authors rights, but may have their work reproduced in some circumstances without any proper license or due remuneration.

It is also important to notice that this study includes the analysis of works excepted by statutory and compulsory licenses (called non-voluntary licenses), but it will mainly focus on the work reproduction without the creators’ authorization and remuneration.

In the second subsection, the international treaties on the subject will be examined to better understand the framework created and adopted by several countries in the world, and the parameters they should adopt for the minimum international harmonization of the copyright and authors rights on limitations and exceptions.

Following, three worldwide different applications of the L&E will be explained: the fair use doctrine; the fair dealing doctrine; and the designated limitations and exceptions doctrine. Each of these processes differ from one another with legal procedures and statements, which makes it difficult to have a more parallel *modus operandi* internationally.

For the research purpose, it was necessary to limit the scope of study to focus on fewer but more influential countries or regions for the copyright and authors rights field internationally. In the view of that fact, and considering the different L&E approaches, the following copyright and authors rights jurisdictions were examined: Australia, Brazil, Canada, European Union, United Kingdom and United States of America.

## 2.1. Limitations and Exceptions

By setting forth exclusive rights to exploit the works, which are granted to the creators, the intellectual effort of such creators can be compensated through the remuneration of different possibilities of use of such goods. Nevertheless, the creator does not have unlimited power over the work by virtue of the economic, social or cultural public interest.

In order to conceive a better symmetry between the two essential parties, the limitations and exceptions shape the copyright and authors rights into having a more suitable contour to promote the best dissemination of the work without neglecting the expected counterpart to the intellectual invention of the creator.

The limitation and exception (L&E) terminology is sometimes seen as out of date considering the context when it was introduced: the invention of the printing press and related technologies. The publishers had a stable profit-making and legislatures weighed the space in which to preserve certain public-good uses of copyrighted works against the resulting sacrifices imposed on both authors and the intermediaries on whom they depended, specially to evaluate the future of the copyright law<sup>78</sup>.

Taking into account the first arising discussions in the English courts in the beginning of the eighteenth century, Ginsburg<sup>79</sup> demonstrates that there were already distresses over permitting continued circulation of ‘*extremely useful*’ works by follow-on creators and emphasizes the authorship contributions of the second comer whose alterations of the underlying work demonstrates ‘*invention, learning and judgment*’.

Despite this, the L&E have a relevant denotation of restricting the unlimited exclusive rights of the creator with a corresponding and appropriate tool in pursuance of development priorities, but also for the creative and innovation process itself with large long-term

---

<sup>78</sup> REICHMAN, Jerome H. The Limits of “Limitations and Exceptions” in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 292

<sup>79</sup> GINSBURG, Jane C. Exceptional authorship: the role of copyright exceptions in promoting creativity. In: FRANKEL, Susy; GERVAIS, Daniel (Ed.). *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 16

implications<sup>80</sup>. Senftleben<sup>81</sup> adds to the exemptions from authors' rights the intention to ensure that not only '*antiquated*' works contribute to the abundance of works in the intellectual world, by permitting, to a certain extent, new and fresh material to be reproduced in special cases. "The possibility of consulting a wide variety of works serves as a source of inspiration and basis for realising one's own expressive potential"<sup>82</sup>

Under the copyright and authors rights system, the L&E are meant to be an exception to the framework. Although it does not conform to the individualistic concept of Locke's natural right to, it still does not entirely exclude the author-centric position merit that focus attention on the act of creation<sup>83</sup>.

Senftleben<sup>84</sup> calls attention to face the exceptions through the prism of intergenerational equity. In this structure, the most important limitation is the transformative use of the work due to the dependence of the later author material for creating a new work, specially assuming the strong interest in freely using protected work insofar as necessary for freely expressing themselves. Different eras of intellectual creation have references and allusions to already existing literary and artistic works, guaranteeing, in the background, the freedom of expression and showing the importance of permitting quotations and exempting the use of copyrighted material for transformative purposes such as caricature, parody and pastiche.

Furthermore, without the L&E over the work, owners become chiefs of private fiefdoms of culture, and private censors of future culture. They become culture misers providing local security and hoarding their own pile of it, which is not a way to encourage expression, but a way to discourage it, in a less thriving economy and culture<sup>85</sup>.

The L&E balance allows users of copyright and authors rights works sufficient freedoms to interact with these works without unduly undermining copyright and authors rights multiple rationales. The general limits of copyright and authors rights define the subject matter, scope

---

<sup>80</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006. p. x

<sup>81</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 37

<sup>82</sup> Ibidem. p. 39/40

<sup>83</sup> Ibidem. p. 12

<sup>84</sup> Ibidem. p. 39

<sup>85</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 16/17

of protection and duration of the exclusive rights, while L&E accommodate more specifically a variety of cultural, social, informational, economic and political needs and purposes with their flexibilities. The L&E instruments make possible to courts considerable *ad hoc* freedoms to decide what is and what is not copyright protected by the notion of ‘*originality*’ and the idea/expression dichotomy, especially in common law jurisdictions.<sup>86</sup>

In a rulemaking structure, it needs to favor precisely defined legal provisions that provide optimal predictability *ex post* and fairness, but that also favors open and flexible legal concepts that allow a wide margin of judicial appreciation *ad hoc*. Considering the civil law tradition on strict and complete norms, it tends to have more predictability, so the copyright and authors rights legislations on L&E must be codified in a more relatively abstract manner with open legal provisions that spell out the general rules without impeding civil courts to apply general normative principles such as ‘*reasonableness and fairness*’. On the other hand, common law traditions have the wide margin of judicial appreciation *ad hoc*, but the lack of more L&E predictability propels the copyright and authors rights system to rethink the common law codified norms as it should be more precise and extensive to apply to distinct cases<sup>87</sup>.

Putting the authorship-oriented perspective behind, the L&E should be business-model-enabling, fostering not new works but redisseminations of content<sup>88</sup>, relying on the public benefit (access to culture) as justification, coupled with an absence of economic harm to the authors or copyright and authors rights holders on the ground that its provisions may create a new market for a creative work and do not directly compete with the traditional exploitations<sup>89</sup>.

When perceiving the new markets for reproductions or public communications of works, copyright and authors rights traditionally vest the control to the author. But, when applying the L&E, there should be caution because new copyright and authors rights exploiting businesses would prefer to avoid the expense and transaction costs of finding and paying

---

<sup>86</sup> HUGENHOLTZ, P. Bernt; SENFTLEBEN, Martin. Fair use in Europe: in search of flexibilities. *Amsterdam Law School Research Paper*, n. 2012-39, 2012. p. 6

<sup>87</sup> *Idem*

<sup>88</sup> GINSBURG, Jane C. Exceptional authorship: the role of copyright exceptions in promoting creativity. In: FRANKEL, Susy; GERVAIS, Daniel (Ed.). *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 20

<sup>89</sup> *Ibidem*. p. 22

authors, seeking to portray the author as an impediment to technological progress or to access to knowledge, and/or as the undeserving beneficiary of a windfall created by the entrepreneur's ingenuity<sup>90</sup>.

The authors and the public interest purposes need to be applied in the copyright and authors rights system with a balanced structure between the authors protection and the application of the L&E, enabling the creator incentive and remuneration to continue producing and the users to provide new transformative applications of the derivative works so that culture, knowledge and development may flourish in the country.

### **2.1.1. Justifying Limitations and Exceptions**

Besides the public interest and economic justifications, Senftleben acknowledge certain elements which have a deep impact on the balance between rights and reservations of copyright law<sup>91</sup>.

He stated that copyright limitations rest primarily on the enforcement of the following fundamental rights and freedoms: freedom of expression and information; the dissemination of information; the right to privacy; and the enhancement of democracy.

Freedom of expression is treated by far as the most powerful justification of copyright limitations. Freedom of expression and the right to receive information can be characterized as concomitant fundamental guarantees undergirding the process of communicative interaction in a democratic society.<sup>92</sup>

These rights give people the freedom to seek and receive information which is an indispensable prerequisite for the formation of an opinion and freedom to impart information which allows the final communication once an opinion has been formed.<sup>93</sup> A more restrict approach to authors' rights will inevitably bar members of society from using or communicating information under certain circumstances, obliterating the potential

---

<sup>90</sup> Idem

<sup>91</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 24 and so on

<sup>92</sup> Idem.

<sup>93</sup> Idem.

decisive role to ensure cultural diversity and contribute to the exchange of diverse and different perceptions of the world.<sup>94</sup>

By ensuring that information diversity is not stifled by excessive copyright protection, the freedom of expression and information complement the idea/expression dichotomy known in copyright law as it allows for the use of a work's expressive core which normally arises in the context of news reporting and the use of a work for the purpose of quotation, criticism or parody.<sup>95</sup>

Subsequently, the related public policy objective to promote the dissemination of information offers members of society the opportunity of receiving the information enshrined in works of the intellect. It fosters the access to a broad and diverse supply of information to its citizens. It is likely to copyright law in the future be primarily understood as a means to ensure the just distribution of information resource in the digital environment.<sup>96</sup>

The fundamental right to privacy focus on preventing copyright holders from exerting their exclusive rights in the intimacy of the private circle surrounding each individual, which is related to the justification for the exemption of private copying, for example.<sup>97</sup> The use and enjoyment of intellectual works in the private sphere involves the right to receive and disseminate information and requires the maintenance of personal use privileges.<sup>98</sup>

Finally, limitations also have a role in the democracy-enhancing function of copyright preservation to the free constitution as it is a limited proprietary entitlement through which the state deliberately and selectively employs market institutions to support a democratic civil society.<sup>99</sup>

Crafting the appropriate balance between rights and limitations/exceptions in domestic copyright is a dynamic experiment, not easily subject to formulaic

---

<sup>94</sup> Ibidem. p. 25

<sup>95</sup> Ibidem. p. 30

<sup>96</sup> Idem

<sup>97</sup> Ibidem. p. 32

<sup>98</sup> Ibidem. p. 32/33

<sup>99</sup> Ibidem. p. 34

approaches, particularly in light of ongoing technological developments and shifting social and economic expectations by users and authors respectively.<sup>100</sup>

In the end, L&E have many important roles not only in the copyright system but also to the society.

## **2.2. International Copyright and Authors Rights Law on Limitations and Exceptions**

In search of similar L&E for the balance of the copyright and authors rights system, countries and international organizations grouped throughout the years to pursue a standardization of the subject. The too distinct approaches created a challenge to the authors to explore international markets with diverse rights and restrictions to their works, which led to pressure into various negotiations and treaties for a minimum convergence on the copyright and authors rights structure worldwide, including the limitations and exceptions.

A salient point must be made that limitations and exceptions sometimes played a major role in designing both domestic and international copyright laws, even if that role seldom delivered optimal results<sup>101</sup>, showing the importance to the study of the international treaties.

Various deals/agreements were made over the years that regarded the copyright and authors rights international standardization. However, the most influential treaties in which L&E appears to give immunity from infringement proceedings for particular kinds of use such as, for example, for the purposes of news reporting or education, or when particular conditions are satisfied<sup>102</sup> – generally are based in the three-step test of the Berne Convention.

---

<sup>100</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006. p. 3

<sup>101</sup> REICHMAN, Jerome H. The Limits of “Limitations and Exceptions” in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 293

<sup>102</sup> RICKETSON, Sam. WIPO study on limitations and exceptions of copyright and related rights in the digital environment. *Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June, v. 203, 2003. p. 4*

### 2.2.1. Berne Convention for the Protection of Literary and Artistic Works

Usually known as the Berne Convention<sup>103</sup>, this international agreement first signed in 1886 established standards of copyright protection that created uniform norms across the conforming nations<sup>104</sup>. Afterwards, it was completed at Paris (1896), revised at Berlin (1908), completed again at Berne (1914), revised a few times more at Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971), and amended in 1979 (Berne Union). These new norms or amendments to the original Convention text were made periodically and held on an as-needs basis, requiring a member nation to give effect in legislation to the minimum standard specified in the amended Convention text<sup>105</sup>.

It means that an author domiciled in one conforming nation could expect another conforming jurisdiction to accord identical legal treatment to the author's work<sup>106</sup>. In addition to the principle of national treatment, the convention recognizes copyright and authors rights in literary and artistic works, including pamphlets, dramatic works, musical compositions, drawings, paintings, works of architecture, and sculpture, geographical charts, lithographs and illustrations<sup>107</sup>.

The Convention establishes the category of copyright works, vesting authors in control over the uses of such works. In this way, the text demanded for authors something not previously contemplated in common law countries: exclusive control over every mode of copying, adapting, translating or disseminating any original output in the '*literary, scientific and artistic domain*', conferring the exclusive right to control output '*whatever may be the mode or form of its expression*'<sup>108</sup>.

The Berne Convention aims to protect the rights of authors in a manner as effective and uniform as possible, not inspired to enhance the benefits for society, resembling the author-centric natural law concept. It also served as a vehicle to the introduction of moral rights

---

<sup>103</sup> BERNE Convention for the Protection of Literary and Artistic Works. September 9, 1886, and amended on September 28, 1979.

<sup>104</sup> ATKINSON, Benedict; FITZGERALD, Brian. Short History of Copyright. Springer International Pu, 2016, p. 51

<sup>105</sup> Idem

<sup>106</sup> Idem

<sup>107</sup> Idem

<sup>108</sup> Idem

protection into utilitarian systems, even though this is a typical feature of natural law theory, thus creating broader rights for authors and restrictively-defined exceptions.<sup>109</sup>

Although the exclusive rights gave a powerful control to the authors, it had not been possible to codify even the authors' exclusive reproduction right in the Berne Convention, because the country members had not agreed on L&E to the most basic of all the author's exclusive rights in the print media. This was only resolved in 1967, with the adoption of the three-step test rule in Article 9(2), as an outer limit to any codified exceptions in domestic laws to the reproduction right of the Berne Convention<sup>110</sup>:

Article 9 (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.<sup>111</sup>

The provision describes three conditions that permit the reproduction of a work and is the minimum valid for the most countries in the world (177 until this date)<sup>112</sup>. Professor Ricketson unraveled each of the combined situation quoting the WTO Panel in his article *WIPO study on limitations and exceptions of copyright and related rights in the digital environment*<sup>113</sup> summarized as follows.

According to the author, to consider a permitted reproduction, Berne first states that it should only occur in '*certain special cases*', which means that there must be limits to any exception to the reproduction right that is made under Article 9(2). For the WTO, the word '*certain*' means that an exception or limitation in national law must be clearly valid or defined, but there is no need to identify explicitly each and every possible situation in which it is applicable, provided that the scope of the exception is known and particularized<sup>114</sup>. The '*special*' term imply that an exception or limitation should be narrow in a quantitative as

---

<sup>109</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 10

<sup>110</sup> REICHMAN, Jerome H. The Limits of "Limitations and Exceptions" in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 293/294

<sup>111</sup> BERNE Convention for the Protection of Literary and Artistic Works. September 9, 1886, and amended on September 28, 1979.

<sup>112</sup> BERNE Convention for the Protection of Literary and Artistic Works Contracting Parties.

<sup>113</sup> RICKETSON, Sam. *WIPO study on limitations and exceptions of copyright and related rights in the digital environment*. Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June, v. 203, 2003.

<sup>114</sup> Ibidem. p. 23

well as qualitative sense, suggesting a narrow scope and also an exceptional or distinctive objective, characterized as the opposite of a non-special case, in other words, not a usual or common case<sup>115</sup>.

Next, the conflict with the normal exploitation of the work advocates not to permit uses of a work in which the copyright owner would ordinarily or, perhaps, reasonably seek to exploit. On this more qualitative or dynamic approach, '*normal exploitation*' requires consideration of potential, as well as current and actual uses or modes of extracting value from a work<sup>116</sup>. However, Ricketson adds that this provision gives no guidance as to the kinds of non-economic normative considerations and to the extent to which they may limit uses that would otherwise be within the scope of normal exploitation by the copyright owner, leaving this balance as a matter for national legislation<sup>117</sup>.

Lastly, the '*does not unreasonably prejudice the legitimate interests of the author*' specifically addresses and tries to protect the authors interests (not the right-holder), concluding that, while the phrase '*legitimate interests*' covers all the interests (economic and noneconomic) of authors, this is not an unqualified or absolute conception<sup>118</sup>.

Overall, the three-step test structure can be a means for gradually approximating the core of copyright and authors rights balance. The first step is the furthest from the core and has a generally nature, as '*certain special cases*' is a necessary criterion to copyright and authors rights limitations. The second step is more precisely delineated, as the condition '*conflict with a normal exploitation is not permissible*' does not require additional instruments. The third step is the closest to the copyright and authors rights limitation cores and where the divergent interests finally meet, as the prejudice has to be '*unreasonable*' and the interests of the author '*legitimate*'. To establish a balanced proportion between the interests at stake, the L&E depend particularly on the last criterion.<sup>119</sup>

There are other specific provisions of the Paris Act of Berne that are also relevant to limitations and exceptions: news of the day and press information; political speeches;

---

<sup>115</sup> Idem.

<sup>116</sup> Idem

<sup>117</sup> Ibidem. p. 26

<sup>118</sup> Ibidem. p. 26/27

<sup>119</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 286/287

quotation and teaching uses; and so on.<sup>120</sup> Each of them impact on the copyright and authors rights system in his specific terms, consolidating more precise rights over each type of use.

It should be noted that the United States stood apart and did not join the Berne Union until 1989. US copyright policy, like that of the United Kingdom, expressed the purposes of government departments determined to secure the best commercial conditions for the nation's publishers, authors and purveyors of recorded music. On the other hand, UK accepted the rhetoric of authors' rights, willingly implementing the compulsory provisions of the Convention, and ruthlessly enforcing preferential trade rules<sup>121</sup>.

### **2.2.2. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations**

Known as Rome Convention<sup>122</sup>, these provisions focus on the protection of three kinds of neighboring rights or rights related to copyright and authors rights: performances for performers, phonograms for their producers and broadcasts for broadcasting organizations. The scope and conditions for the protection of these rights differ considerably, but, as far as L&E are concerned, these are contained in Article 15<sup>123</sup>:

#### Article 15

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic

---

<sup>120</sup> See more on RICKETSON, Sam. WIPO study on limitations and exceptions of copyright and related rights in the digital environment. *Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June, v. 203, 2003.*

<sup>121</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 53

<sup>122</sup> ROME Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. October 25, 1961.

<sup>123</sup> RICKETSON, Sam. WIPO study on limitations and exceptions of copyright and related rights in the digital environment. *Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June, v. 203, 2003. p. 45*

works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.<sup>124</sup>

These permitted exceptions, as mentioned in the quotation above, include specific limitations in the article 15(1) and in the article 15(2) equivalent to the ones applicable to copyright and authors rights, in other words, limitations contained in domestic laws. This is an alternative and parallel set of allowable limitations, which must be in accordance with the protection of copyright or authors rights in literary and artistic works in domestic laws. The latter is a reference to the Berne Convention, on the basis that domestic laws need to be consistent with the provisions of that Convention so far as permissible limitations and exceptions are concerned<sup>125</sup>.

### **2.2.3. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**

This international agreement<sup>126</sup> is applied by all member nations part of the World Trade Organization (WTO) and protects different IP considering the multilateral trading system.

First of all, TRIPS requires that members comply with the Berne Convention (articles 1-21), regardless of whether the country in question is a member of that convention (except for the provisions concerning moral rights). So far as limitations and exceptions to the protection are concerned, TRIPS deals with these in several sections<sup>127</sup>:

TRIPS article 9(1) obliges members to provide exceptions for quotations (mandatory exception under Berne). With respect to the other mandatory exceptions, there is no requirement for any of these L&E to be recognized, but, if they are, then the conditions contained in the relevant Berne Convention articles must be observed<sup>128</sup>.

---

<sup>124</sup> ROME Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. October 25, 1961.

<sup>125</sup> RICKETSON, Sam. WIPO study on limitations and exceptions of copyright and related rights in the digital environment. *Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June, v. 203, 2003. p. 45*

<sup>126</sup> TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights. April 15, 1994.

<sup>127</sup> RICKETSON, Sam. WIPO study on limitations and exceptions of copyright and related rights in the digital environment. *Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June, v. 203, 2003. p. 46*

<sup>128</sup> Idem.

TRIPS' article 13 is the correspondent to the Berne Convention three-step test rule that purports to apply a general formula or template, but this time adopts a slightly modified language<sup>129</sup>.

Article 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<sup>130</sup>

Within the main adjustments, the prominent alteration regards the modification of the Berne word 'author' to the TRIPS 'right holder' in the end of the sentence. While 'authors' and 'right holders' may frequently be the same persons, in many cases this will not be so, and this may therefore lead to a significant difference in application. The 'legitimate interests' of authors may include non-monetary (moral) interests as well as monetary ones, while right-holders who are not authors will not have moral rights to be protected. Accordingly, it would be possible for an exception to the reproduction right that was allowable under TRIPS to contravene Berne if, for example, it did not require attribution of authorship or it contravened the right of integrity, and these represented an unreasonable prejudice to the author's legitimate interests<sup>131</sup>.

Ricketson<sup>132</sup> considered some relevant factors regarding the interpretation of the L&E in article 13 under TRIPS. In the first, it is noted that TRIPS is concerned with maximizing the protection of IP rights and that a 'maximalist' pro-rights interpretation should be taken, wherever necessary. Next, when interpreting TRIPS provisions in their context and in the light of its object and purpose, it will be necessary to adopt a more balanced approach between the interests of rights holders against competing public interests, such as educational and developmental concerns (which confront with the maximalist pro-rights view above)<sup>133</sup>.

Even though TRIPS permit a more generous range of exceptions because of the balancing process, the non-derogation of the Berne Convention could restrict the L&E (because it is

---

<sup>129</sup> Idem.

<sup>130</sup> TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights. April 15, 1994.

<sup>131</sup> RICKETSON, Sam. WIPO study on limitations and exceptions of copyright and related rights in the digital environment. Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June, v. 203, 2003. p. 49

<sup>132</sup> Ibidem.

<sup>133</sup> Ibidem. p. 48

only possible to use L&E to the right of reproduction of works in the Berne Convention). However, given the near universal membership of the Berne Convention, it covers virtually all states that are also parties to TRIPS, and because the Berne Convention and TRIPS allow a special agreement among the member states that does not conflict with the convention/agreement, L&E for the reproduction of works remains protected by the Berne Convention as a standard and the remaining provisions are referred in TRIPS<sup>134</sup>.

#### 2.2.4. WIPO Copyright Treaty (WCT)

WCT<sup>135</sup> is a 1996 agreement connected to the Berne Convention which focus on the protection of works and the rights of authors in the digital environment, granting them certain economic rights.

In the agreed statement concerning WCT article 1(4) that applies Berne Convention articles 1 to 21 and the appendix, it indirectly elucidates some L&E for the digital environment:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, apply fully in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.<sup>136</sup>

However, it also states an explicit L&E under the WTC Article 10:

10(1) 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.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided therein to 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.<sup>137</sup>

---

<sup>134</sup> Ibidem. p. 48/49

<sup>135</sup> WCT WIPO Copyright Treaty. December 19, 1996.

<sup>136</sup> Idem.

<sup>137</sup> Idem.

As seen in the above provisions, the WCT expands the L&E international arrangement to also apply the three-step test rule also to the digital environment, emphasizing the rights in copyright and authors rights works such as computer programs and compilations of data, including the right of distribution and the right of rental.

Efforts to adopt a multilateral regime to protect transmissions of copyrighted works over the Internet were stymied by the need to address the role of L&E in a manner acceptable to stakeholders. Only when the permitted uses under existing domestic and international copyright and authors rights laws were made formally available to all signatory countries did it become possible to codify an agreement that obliged these same countries to respect the electronic fences destined to surround copyright and authors rights protected works transmitted online under the WCT<sup>138</sup>.

### 2.2.5. WIPO Performances and Phonograms Treaty (WPPT)

WPPT<sup>139</sup> is a WIPO copyright and authors rights treaty that targeted the performers and phonograms producers in 1996. Regarding the L&E, the article 16 establishes:

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting parties shall confine any limitations or exceptions to rights provided for in this treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.<sup>140</sup>

WPPT, similarly to WCT, entailed the three-step test rule in the provisions, granting to the performer or the producer of the phonogram rights correlated to author rights in regard to

---

<sup>138</sup> REICHMAN, Jerome H. The Limits of “Limitations and Exceptions” in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 294/295

<sup>139</sup> WPPT WIPO Performances and Phonograms Treaty. December 19, 1996.

<sup>140</sup> Idem.

L&E, with special attention to provide the same kind of L&E to authors, performers or phonogram producers in the national legislation.

#### 2.2.6. International provisions considerations

As seen by the selected most important international treaties on the copyright and authors rights subject, the three-step test rule has a major role in shaping the copyright and authors rights system for the countries. Originally considered a test of limited application under the Berne Convention, it was a general template for L&E under the TRIPS Agreement, the WCT and the WPPT. Taken as a ready-to-use formula at the time of the TRIPS negotiations, it was almost inevitable that it would be used as the general test in subsequent conventions<sup>141</sup>.

At the beginning, the three-step test did not attract much academic attention, but when it started to become widespread in international copyright and authors rights legislations by making its way not only into the Berne Convention but also the TRIPs Agreement and the WIPO '*Internet*' Treaties<sup>142</sup>, it became a regulatory instrument which determined the shape of copyright and authors rights limitations to come in the digital environment<sup>143</sup>.

The different provisions embodying the three-step test rule are to be qualified as limbs of the same unitary body. As such, they add different connotations and may assign different functions to the three-step test rule<sup>144</sup>. Either way, the delicate balance between grants and reservations meant to reconcile the divergent interests of authors and users as the central field of application of the three-step test rule<sup>145</sup>.

Furthermore, the three-step test rule has to accomplish the task of preventing copyright and authors rights legislations from considering only the protection of the authors' right as the exclusive rights that gives authors the opportunity to control the dissemination of their

---

<sup>141</sup> RICKETSON, Sam. WIPO study on limitations and exceptions of copyright and related rights in the digital environment. *Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June, v. 203, 2003. p. 65*

<sup>142</sup> SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004. p. 1

<sup>143</sup> Ibidem. p. 2

<sup>144</sup> Idem

<sup>145</sup> Ibidem. p. 2/3

works and enable their exploitation, but also privilege the free uses which create breathing space for socially-valuable ends<sup>146</sup>.

The three-step test is a control mechanism safeguarding the delicate balance between grants and reservations of copyright law. However, it may only be invoked after, firstly, exclusive rights have been conferred to the authors and, secondly, limitations are about to be imposed on those rights<sup>147</sup>

This provision was introduced to pave the way for the formal recognition of the general right of reproduction *jure conventionis* and accomplishes two opposite tasks. On one hand, the envisioned general right of reproduction had to be protected from the potential corrosive effect of the numerous limitations to be found in domestic legislation. On the other hand, it also leaves untouched the margin of freedom which the Berne Convention member countries considered indispensable to satisfy social and cultural needs<sup>148</sup>.

Every time an amendment of international copyright law gives rise to the question of permissible limitations, a wide variety of currently existing exemptions is brought to the fore which are all declared indispensable for reacting adequately to a country's specific social, cultural and economic needs<sup>149</sup>.

Specifically in the TRIPs Agreement, the abstract formula was apparently perceived as a kind of materialization of the standard of protection reached in the Berne Convention. It is no longer confined to the general right of reproduction. By contrast, the three-step test in the rights newly granted under TRIPs gave a standard of control to be met by national legislation. In other words, domestic legislation wishing to impose a limitation on a right granted in the Berne Convention must not only ensure compliance with the specific norms of the Convention itself but also, in addition, observe the TRIPs three-step test rule<sup>150</sup>.

The comprehensive applicability of the three-step test rule to all kinds of limitations was consolidated in WCT which neither reduces nor extends the scope of those provisions permitting limitations under the Berne Convention. WCT expressly embraces the three-step

---

<sup>146</sup> Ibidem. p. 5

<sup>147</sup> Idem. 5

<sup>148</sup> Ibidem. p. 284/285

<sup>149</sup> Ibidem, p. 1

<sup>150</sup> Ibidem. p. 285

test as a guiding principle for the adjustment of traditional limitations to the digital environment and a basis for the development of new limitations to come<sup>151</sup>.

While the Berne Convention emphasizes the natural law foundation of copyright and authors rights laws, the TRIPs Agreement points in the direction of utilitarian considerations, such as the economic rationale and corresponding industry policy. The WCT, ultimately, reflects not only the desire to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible but also the outstanding significance of copyright protection as an incentive for literary and artistic creation<sup>152</sup>.

In concern of the development study, the Berne Convention logic was the harmonization so as to grant the same minimum rights to authors irrespective of levels of evolution and maturity. With progressive harmonization as its fundamental organizing principle, the international copyright and authors rights framework intentionally restricted national discretion to adapt copyright and authors rights laws to specific institutional and cultural conditions<sup>153</sup>.

Historically, the international system has not emphasized the central importance of limitations and exceptions to the fulfillment of copyright and authors rights goals, which led to a presumption that L&E weaken the system rather than strengthen its capacity to promote public welfare<sup>154</sup>.

The early design of international copyright included two forms of L&E: delineated subject matter of authorial rights and preserved space for a country to express domestic priorities by imposing its own additional boundaries on authors' rights. The idea of a national public interest was then introduced into the international copyright and authors rights framework.

---

<sup>151</sup> Ibidem. p. 285/286

<sup>152</sup> Ibidem. p. 10

<sup>153</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 705

<sup>154</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006. p. xi/xii.

States determined expressive content and the need for further conditions in national law for the exercise of those rights<sup>155</sup>.

Okediji reinforce the necessity of the international system to more explicitly recognize, emphasize, and promote the L&E role in ensuring creativity and promoting diverse forms of creative engagement. L&E is essential to promote public welfare not only for users of creative goods, but for creators as well. Without the appropriate balance, the international copyright and authors rights system not only impoverishes the global public but, ultimately, undermines the ability to sustain and reward the creators for the long-term<sup>156</sup>.

In this context, Roberto Caso elucidates that, even at the level of treaties and international agreements, to have a more flexible IP regime is acceptable and an incentive for the development of creative works and innovative ideas<sup>157</sup>.

Thereby, internationally recognized L&E should be more than just an assistant to the copyright and authors rights law's internal balancing act, it should be viewed as an important component of modern economic development and growth strategy<sup>158</sup>.

In 130 years since the Berne Convention, those who determine copyright policy and laws have shown small inclination to reduce the scope of laws<sup>159</sup>. It has been easier to give owners exclusive rights over all kinds of copying and then try to restrict justifications for L&E or what have euphemistically been described as flexibilities<sup>160</sup>.

At the international level, limitations and exceptions must be: i) more carefully considered for their efficacy in promoting access, use, and dissemination of copyrighted goods; ii) more consistently emphasized as an important feature of the copyright system; iii) more explicitly integrated into the fabric of the

---

<sup>155</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 700/701

<sup>156</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006. p. xii.

<sup>157</sup> CASO, Roberto; GUARDA, Paolo. Copyright Overprotection Versus Open Science: The Role of Free Trade Agreements. In: *Free Trade Agreements*. Springer, Singapore, 2019. p. 36.

<sup>158</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 705

<sup>159</sup> ATKINSON, Benedict; FITZGERALD, Brian. Short History of Copyright. Springer International Pu, 2016. p. 135

<sup>160</sup> FRANKEL, Susy; GERVAIS, Daniel. Evolution and equilibrium: an introduction. In: *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 4

international copyright regime; and iv) more rigorously enforced as a requisite for follow-on innovation and economic development.<sup>161</sup>

In an international law perspective – and in many ways, this is reflected in domestic law settings – copyright and authors rights is structured to evolve. Definitions can be adapted, laws can be changed and provisions can be reinterpreted by courts, but all this presupposes a good understanding and the desire to reach balanced outcomes<sup>162</sup>.

### 2.3. Fair Use Approach

The first legal doctrine for L&E to copyright and authors rights that will be discussed here is called Fair Use. It is the L&E doctrine used by United States of America and, because of that, it is a practice instituted by many companies in their business models which ends up influencing the international market, although it is not widely applied in other national copyright and authors rights systems.

Historically, the first federal legislation on copyright in the US was the 1790 Copyright Act<sup>163</sup> that had the encouragement towards learning as its primary purpose. Based upon the freedom of expression, the legislators strengthened the dissemination of ideas and knowledge by the copyright law for securing the benefit of both author and public<sup>164</sup>.

Thereafter, the Copyright Act of 1831<sup>165</sup> amend the US Copyright Law but did not modify it in terms of L&E. A decade later, an 1841 US case set a new path for the L&E in the country by defining criteria for determining the circumstances in which copying of a protected creative work did not constitute infringement. In *Folsom v. Marsh*<sup>166</sup>, the judge Joseph Story decided the case involving a copy of George Washington letters among other

---

<sup>161</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006. p. xi

<sup>162</sup> FRANKEL, Susy; GERVAIS, Daniel. Evolution and equilibrium: an introduction. In: *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 4.

<sup>163</sup> UNITED STATES OF AMERICA. Copyright Act of 1790. An Act for the encouragement of learning, by securing the copies of maps, Charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.

<sup>164</sup> ATKINSON, Benedict; FITZGERALD, Brian. Short History of Copyright. Springer International Pu, 2016. p. 32

<sup>165</sup> UNITED STATES OF AMERICA. Copyright Act of 1831. An Act to amend the several acts respecting copyrights.

<sup>166</sup> UNITED STATES OF AMERICA. United States Circuit Court for the District of Massachusetts. *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841).

documents from one author's biography of the former president, which was inserted in another author's work<sup>167</sup>.

Justice Story found infringement on the basis that although the defendant copied less than 4% of the appellant's work, the copying involved 'clear invasion of the right of property', one that harmed the value of the work from which the pages were copied. He stated that to determine whether copying could be called fair abridgement, a court must 'look to the nature and objects of the selection made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work<sup>168</sup>.

After stating the essential elements that set the main concepts for the US L&E called Fair Use, US courts continued to apply it and to influence the codification in the Copyright Act of 1976<sup>169</sup> and still do it until today. While some observers see it as a preservation of the public's liberty to use copyright material freely without authorization in certain circumstances, the doctrine of fair use has also been criticized by Story's inference that the copyright monopoly encompassed a right to restrain the copying of portions of a work<sup>170</sup>.

More recently, the Digital Millennium Copyright Act of 1998<sup>171</sup> embodies the WCT and WPPT treaties into US legislation. The impact over the digital rights management created more rights to the copyright holder – as seen in the last section – which can be perceived as a constriction to the Fair Use doctrine in the US.

In the end, the US Copyright Law has become long and strong. With all mentioned legislation changes, the owners gained more power over third parties and the culture, and fair use has become an important instrument in enabling other creators to exercise their creativity<sup>172</sup>.

---

<sup>167</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 38/39

<sup>168</sup> *Idem*

<sup>169</sup> UNITED STATES OF AMERICA. Copyright Act of 1976. An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

<sup>170</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 39

<sup>171</sup> UNITED STATES OF AMERICA. Digital Millennium Copyright Act of 1998.

<sup>172</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 33

### 2.3.1. Conceptualizing Fair Use

The fair use doctrine is considered as a standard body of rules that sets out the objectives and bounds of L&E to copyright protection in the US. Moreover, it provides an easily deployed rational policy as a guideline to the L&E of the US copyright system<sup>173</sup>.

As already mentioned, the codified norm for the fair use is in the Copyright Act of 1976, specifically in section 107:

17 U.S. Code § 107. Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors<sup>174</sup>

When claiming a fair use of a copyrighted material, the US copyright law identifies four factors to be analyzed in the case: i) the purpose and character of the use; ii) the nature of the use; iii) the amount and substantiality of the use; and iv) the effect of the use on the main or potential markets of the work. Because this rule is subject to interpretation in the US courts, the importance and decisions about each factor may differ in each case and the courts may also include other factors to determine if the use in question is fair.

---

<sup>173</sup> HUGHES, Justin. Fair Use and Its Politics – at Home and Abroad. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 237

<sup>174</sup> UNITED STATES OF AMERICA. Copyright Act of 1976. An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

The four US fair use factors stated above already indicate what the court needs to analyze when there is a discussion on the matter. But no factor is decisive, and each one contains some different characteristics to interpret and unravel as follows.

First of all, the purpose and character of the use is the only factor that does not deal with the work being used or from which something is being copied (which we will call ‘*the source work*’). Purposes that favor fair use may include: education, scholarship, research, and news reporting, as well as criticism and commentary. Non-profit purposes also favor fair use (especially when coupled with one of the other purposes above mentioned). But when considering the commercial or for-profit purposes, this part tends to weigh against fair use (this creates one of the main discussions over the fair use in works for-profit educational users)<sup>175</sup>.

The nature of the original work involves considerations such as if the source work has been published or not (it is less likely to be fair to use elements of an unpublished work, which may seem like unauthorized appropriation), and whether the source work is more ‘*factual*’ or more ‘*creative*’ (creative works are more valued than factual ones in this analysis, because they encompass a greater creative effort from their authors)<sup>176</sup>.

The amount of the portion used is a proportional element that favors towards fair use if a smaller amount of the source work has been used, and it is usually more likely to weigh against fair use if a larger amount has been used. The substantiality of the portion used concerns, fundamentally, whether you are using something from the core of the work (less fair), or whether what you are borrowing is more peripheral (and consequently fairer)<sup>177</sup>.

Lastly, the effect of the use upon the potential market for the source work or the value of the source work is a more challenging factor as it questions if the derivative work is substituting a transaction that the source work’s owner would otherwise make. Courts tend to favor source work’s owners when markets exist or are actually developing, but it is possible for a use to be fair even when it causes market harm<sup>178</sup>.

---

<sup>175</sup> UNDERSTANDING FAIR USE. University of Minnesota. 2019.

<sup>176</sup> *Idem*.

<sup>177</sup> *Idem*.

<sup>178</sup> *Idem*.

Overall, fair use traditionally balances the second author's new expressive use of the source work against the first author's returns for her intellectual labors. The role of the public interest lies on advancing through care for the second author and feeding of the first. Generally speaking, this approach can be seen as a promotion to the authorship ecosystem<sup>179</sup>.

However, fair use encourages secondary creativity if it does not unreasonably compromise the first author's exploitation of markets for the source work<sup>180</sup>. This is an important factor because of the variable analysis in each specific case, creating discussions in the doctrine and in court on how to better address it.

Depoorter and Parisi state that, in order to guide and constrain the application of the fair use doctrine, several critical variables should be identified. They include: "(a) the number of copyright holders; (b) the degree of complementarity between the copyrighted inputs; (c) the degree of independence between the various copyright holders in the pricing of their licenses; and (d) ability to price discriminate"<sup>181</sup>.

Another significant aspect is that all of the copyright owner's monopoly rights are excepted by the fair use, including the owner's right to control adaptation, distribution, and performance. It sends an important message as it demonstrates the need to share culture in the interest of getting more of it<sup>182</sup>.

Consequently, the culture element of the fair use is an example of a policy in the public interest. The doctrine seeks to protect the freedom of expression and the capacity of the culture to develop, not centering around the interests of an individual or group<sup>183</sup>.

In sum, the original contribution of the new work enhances the public interest aspect of copyright's social bargain as it encourages the production and dissemination of new works. These components favor the learning and promotion of the public welfare and together,

---

<sup>179</sup> GINSBURG, Jane C. Exceptional authorship: the role of copyright exceptions in promoting creativity. In: FRANKEL, Susy; GERVAIS, Daniel (Ed.). *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 19

<sup>180</sup> Ibidem. p. 19/20

<sup>181</sup> DEPOORTER, Ben; PARISI, Francesco. Fair use and copyright protection: a price theory explanation. *International Review of Law and Economics*, v. 21, n. 4, p. 453-473, 2002. p. 453/453

<sup>182</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 18

<sup>183</sup> Ibidem. p. 26

contributes for a robust public domain and an appropriately delineated copyright doctrine accordingly to Pappalardo and Fitzgerald<sup>184</sup>.

Meanwhile, Hughes describes fair use as the ‘*negation*’ of copyright because a successful use of the doctrine simply put aside the copyright. It offers only a ‘*blunt response*’ to situations in which full-blown copyright protection would not advance the purposes of the system<sup>185</sup>.

Regardless of each description, the US decisions on fair use are made case-by-case whenever someone wants to use a protected work and (reasonably or unreasonably) does not want to get the copyright owner’s permission. Thus, fair use is considered as a serial mechanism for establishing new exceptions – and it is precisely that nature that alarms copyright owners<sup>186</sup>–, which leads to many discussions over the US courts.

### 2.3.2. Courts Role

When considering the current US Copyright Act<sup>187</sup>, there are no explicit instructions as to how the court is to weigh each of the four factors. It is, therefore, left to the judges to further develop and elaborate the substance of the doctrine<sup>188</sup>.

In general, the factors implicitly direct courts to identify both the social need for the use and the possible impact on the author's economic expectations. But there is an ambiguity of the fair use doctrine and its statutory formulation that obscure the underlying issues and make it difficult to achieve consistency and predictability<sup>189</sup>.

---

<sup>184</sup> PAPPALARDO, Kylie and FITZGERALD, Brian. Copyright, Fair Use and the Australian Constitution. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 143

<sup>185</sup> HUGHES, Justin. Fair Use and Its Politics – at Home and Abroad. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 273

<sup>186</sup> Ibidem. p. 274

<sup>187</sup> UNITED STATES OF AMERICA. Copyright Act of 1976. An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

<sup>188</sup> DEPOORTER, Ben; PARISI, Francesco. Fair use and copyright protection: a price theory explanation. *International Review of Law and Economics*, v. 21, n. 4, p. 453-473, 2002. p. 455

<sup>189</sup> GORDON, Wendy J. Fair use as market failure: A structural and economic analysis of the Betamax case and its predecessors. *J. Copyright Soc'y USA*, v. 30, p. 253, 1982. p. 1604

Nevertheless, US has created a rich body of fair use case law with prior decisions that often include operative facts similar as other disputes before the court. This leads to courts' decisions on the section 107 not only based on the statutory language and the facts of the case, but also on previous judgments applicable until today<sup>190</sup>.

Accordingly to Ginsburg, US courts inquire into whether the plaintiff is currently exploiting the market used in the defendant work, or whether the market is one that similarly situated copyright owners would normally exploit<sup>191</sup>. This statement is important to comprehend that the court needs to dwell on the specific case conditions involving the work, its use – and potential use – and its market.

Consequently, US Congress arguably adopts incomplete policies and relies on court-created legal norms more than comparable nations, not depending exclusively on the copyright law when it comes to fair use<sup>192</sup>.

### 2.3.3. Transformative Use of a Work

Transformative use is an important concept to understand the US copyright system, specially relating to fair use. As already mentioned, this doctrine established in the US copyright law since 1976 has widened the scope of this '*liberating*' tool and allowed courts to provide case by case adjustments to all the exclusive rights of authors<sup>193</sup>.

But the transformative use is a relatively new addition to fair use law, having been first raised in a Supreme Court decision in 1994<sup>194</sup> and is sometimes described as a fifth factor.

---

<sup>190</sup> HUGHES, Justin. Fair Use and Its Politics – at Home and Abroad. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 250

<sup>191</sup> GINSBURG, Jane C. Exceptional authorship: the role of copyright exceptions in promoting creativity. In: FRANKEL, Susy; GERVAIS, Daniel (Ed.). *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 19

<sup>192</sup> HUGHES, Justin. Fair Use and Its Politics – at Home and Abroad. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 254

<sup>193</sup> REICHMAN, Jerome H. The Limits of "Limitations and Exceptions" in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 293

<sup>194</sup> UNITED STATES OF AMERICA. United States Court of Appeals for the Sixth Circuit. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

A work is defined as transformative if it uses a source work in a completely new or unexpected way, like in parodies, production of new technologies, etc<sup>195</sup>.

Ginsburg teaches on how the US courts deal with the fair use cases considering the transformative use:

US fair use cases involving follow-on authorship largely turn on the ‘transformative’ character of the contribution, as well as on economic impact, though courts sometimes conflate the two factors: courts tend to equate ‘transformative’ works or purposes with those that do not substitute for the copyright owner’s normal markets for the work.<sup>196</sup>

It is necessary to highlight that in recent cases the courts tend to drift from ‘*transformative work*’ to ‘*transformative purpose*’. This means that, in the latter instance, copying of an entire work, without creating a new work, may be excused if the court perceives a sufficient public benefit in the appropriation. One example is the use of images as documentary or ‘*historical artifacts*’<sup>197</sup>.

#### 2.3.4. Fair Use *versus* Three-Step Test

Since the fair use doctrine is considered an open-ended L&E rule, this leads to discussions of the compliance to the three-step test rule of the Berne Convention which impact throughout the international IP system. For some scholars, the three-step test rule has become the ‘*evil twin*’ of fair use. The three-step test rule is normally seen as a tool to prevent the erosion of copyright protection through exceptions and limitations. But because it favors copyright owners, the three-step test rule has been criticized by many scholars and activists<sup>198</sup>.

---

<sup>195</sup> UNDERSTANDING FAIR USE. University of Minnesota. 2019.

<sup>196</sup> GINSBURG, Jane C. Exceptional authorship: the role of copyright exceptions in promoting creativity. In: FRANKEL, Susy; GERVAIS, Daniel (Ed.). *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 19

<sup>197</sup> GINSBURG, Jane C. Exceptional authorship: the role of copyright exceptions in promoting creativity. In: FRANKEL, Susy; GERVAIS, Daniel (Ed.). *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 21

<sup>198</sup> HUGHES, Justin. Fair Use and Its Politics – at Home and Abroad. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 235

The conformity or not of the fair use to the three-step test rule creates a tension between different sides as explained by Hughes in his article *Fair Use and Its Politics – at Home and Abroad*:

The two sides of this struggle tend to adopt different strategies in relation to their chosen doctrines. On the one side, low protectionists cheer when new jurisdictions adopt fair use and copyright holders tend to oppose any expansion of fair use to other countries, just as they are bound to oppose expansive interpretations of fair use when it is litigated in court. On the other side, since the three-step test has already promulgated through the international IP regime, copyright holders defend the three-step test(s) already in situ and use it to oppose widening exceptions and limitations. As a counter-measure, those concerned about copyright law's expansion promote their own reinterpretations of the three-step test.<sup>199</sup>

When evaluating the US fair use factors, the section 107 does not conflict with the second and third part of the three-step rule because, individually and in conjunction, factors (1), (3) and (4) of the fair use doctrine embrace the “conflict with a normal exploitation of the work” nor “unreasonably prejudice the legitimate interests of the author” of the three-step test rule. But the first part “in certain special cases” is considered the main issue<sup>200</sup>.

An investigation of the intention of the first part of the three-step test, the preface of the panel state that exceptions must be “particularized” but “there is no need to identify explicitly each and every possible situation to which the exception could apply”. So, when EU argument that the fair use is imprecise, US defend that, in common law, judges weigh the different factors slightly differently in making their individual decisions, which favors the defense of the fair use as an evolution of home-style standards that would not exclude from being a “certain special case”<sup>201</sup>.

The low protection activists promote interpretations of the three-step test rule that allow fair use as an open-ended L&E. However, copyright owners defend an interpretation of the three-step test as restrictive as possible that still permits the fair use doctrine (because it is a central pillar of US copyright law) with a century of precedential guidance behind it<sup>202</sup>.

---

<sup>199</sup> Idem.

<sup>200</sup> Ibidem. p. 242

<sup>201</sup> Ibidem. p. 247

<sup>202</sup> Ibidem. p. 248

Reichman also interprets the problem by considering that, apart from the difficulties of exporting fair use to other countries, the doctrine can have uncertain implications of the three-step test rule in international copyright and authors rights laws as an outer limit on domestic copyright legislation. He provides the example of a contract overriding any L&E applicable regarding the digital locks that publishers may impose on scientific works transmitted online<sup>203</sup>.

In the end, the US government argues that US fair use meets the three-step test, especially regarding the certain special case rule, because the existing case law makes the ‘scope’ of fair use adequately ‘*known and particularized*’<sup>204</sup>.

### 2.3.5. Fair Use Adaptation to New Technologies

The fair use doctrine stands out from others L&E approaches as it is conceptually an open-ended disposition of the negation of copyright protection<sup>205</sup> and, because of it, it has a better ability to adapt under changes of the new technologies. The fair use is often the justification of a wide range of conducts enabled by new technologies in United States<sup>206</sup>.

In comparison to other L&E approaches, US fair use on a case-by-case approach is commonly seen as better equipped to defend the intermediate copying needs of digitally integrated knowledge discovery tools<sup>207</sup>. The US doctrine can be considered as operating outside digital fences, and it was especially successful in preserving space for the use of search engines. In the end, US fair use has influenced a different legal logic to the digital universe, – that accordingly to Jerome Reichman – rooted in a notice and takedown regime rather than codified limitations and exceptions in US copyright law<sup>208</sup>.

---

<sup>203</sup> REICHMAN, Jerome H. The Limits of “Limitations and Exceptions” in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 299

<sup>204</sup> HUGHES, Justin. Fair Use and Its Politics – at Home and Abroad. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 251

<sup>205</sup> Ibidem. p. 235

<sup>206</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 704

<sup>207</sup> REICHMAN, Jerome H. The Limits of “Limitations and Exceptions” in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 299

<sup>208</sup> Ibidem. p. 295/296

Normally, the proper scope of the fair use in the information age clashes between proponents of new technology and copyright holders. But, even adapting better to the new technologies, the mass popularization of the internet and continued technological advances in information dissemination may make fair use obsolete as one-click technology provides instantaneous communication between copyright holders and users. The copyright holders have the opportunity to charge users of their protected works licensing fees in quasi-automatic fashion, eliminating the transaction cost argument that provides one of the main pragmatic justifications of fair use<sup>209</sup>.

### 2.3.6. Fair Use Economic Justification

Gordon consolidated an economic statement that justifies the US fair use. He created a market failure rationale for the doctrine within the inherent economic logic of US copyright law itself. He proposed that fair use is a '*corrective response*' to the presence of transactional barriers: whenever obstacles to market formation are serious enough to frustrate access by selling, licensing, and other modes of consensual transfer, free copying should be permitted<sup>210</sup>.

Gordon states that is possible to have the same economic considerations that guide the US copyright system being used to suggest modes of resolving the conflicts, providing a method of applying fair use to achieve desirable dissemination and to avoid the erosion of incentives. Thus, it can provide a coherent approach to application of the traditional factors and their emerging companions<sup>211</sup>.

For some intellectual property approach, taxation and centralized purchasing might provide a satisfactory solution for some public goods problems<sup>212</sup>. However, the US copyright law create special property rights for authors by providing means for excluding nonpurchasers. In other words, authors can sell the physical copies of their works and at the same time

---

<sup>209</sup> DEPOORTER, Ben; PARISI, Francesco. Fair use and copyright protection: a price theory explanation. *International Review of Law and Economics*, v. 21, n. 4, p. 453-473, 2002. p. 454

<sup>210</sup> Ibidem. p. 455

<sup>211</sup> GORDON, Wendy J. Fair use as market failure: A structural and economic analysis of the Betamax case and its predecessors. *J. Copyright Soc'y USA*, v. 30, p. 253, 1982. p. 1604/1605

<sup>212</sup> Ibidem. p. 1611/1612

retain legal control over the reproduction and certain other uses of the work embodied in those copies – and that’s how function the market for this intellectual property<sup>213</sup>.

Overall, the copyright market is facilitated by the statute when it creates property rights, lowers transaction costs, provides valuable information, and contains mechanisms for enforcement<sup>214</sup>. Nonetheless, fair use allows a user’s departure from the market. To identify when it is applicable, the court needs to detect flaws in the market that might make reliance on the judiciary’s own analysis of social benefit<sup>215</sup>.

Fair use should be awarded to the defendant in a copyright infringement action when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner. The first element of this test ensures that market bypass will not be approved without good cause. The second element of the test ensures that the transfer of a license to use from the copyright holder to the unauthorized user effects a net gain in social value. The third element ensures that the grant of fair use will not undermine the incentive-creating purpose of the copyright law<sup>216</sup>.

Lastly, Gordon pinpoints that a market failure in fair use cannot justify court intervention whenever the market fails to reach ‘*perfect*’ results, for no market is ever perfect. Fair use should not be used to restructure an entire set of markets to reach ideal goals as the US copyright statute is a focus on individual types of transactions<sup>217</sup>.

The corrective response to the presence of transactional barriers in Gordon’s theory can be considered as a mere extension of the normative Coase theorem as the fair-use doctrine effectively ‘*reallocates*’ ownership rights in order to minimize the negative efficiency consequences of positive transaction costs in the market. Fair use is permitted when the transaction costs that would be necessary for the actual transfer exceeds the surplus from the exchange, which eliminates these transaction-cost impediments and reallocates scarce resources<sup>218</sup>.

---

<sup>213</sup> *Idem*.

<sup>214</sup> *Ibidem*. p. 1612/1613

<sup>215</sup> *Ibidem*. p. 1614

<sup>216</sup> *Idem*.

<sup>217</sup> *Ibidem*. p. 1657

<sup>218</sup> DEPOORTER, Ben; PARISI, Francesco. Fair use and copyright protection: a price theory explanation. *International Review of Law and Economics*, v. 21, n. 4, p. 453-473, 2002. p. 455

Also related to economic justification of the fair use is the concept of the anticommons. As a counterpoint of Hardin's tragedy of the commons – when multiple individuals are privileged to use a given resource without a cost effective way to monitor and constrain each other's use, making the resource vulnerable to overuse. The tragedy of the anticommons discusses the underutilization of a scarce resource that is taken in advantage by multiple owners that have the right to exclude others and no one has an enforceable privilege of use.<sup>219</sup>

Considering the tragedy of the anticommons, Depoorter and Parisi state that fair use retains a valid efficiency justification even in a zero transaction cost environment as it is justifiable and instrumental in minimizing the welfare losses occasioned by the strategic behavior of the copyright holders. Even if copyright licenses can be transferred at no cost (as in the one click technology shown in the end of the *fair use importance*), fair use would mitigate possible deadweight losses created by the strategic behavior of the copyright holders<sup>220</sup>.

The sources of externalities in an anticommons problem has the static (or current) externalities view – in which the exercise of a right of exclusion by one individual reduces or eliminates the value of similar rights held by other individual – and the dynamic (or future) externalities – in which withholding of productive resources today bears its consequences into the future<sup>221</sup>. Thereby, “independent pricing of copyright licenses for the production of a final derivative work will result in a sub-optimal equilibrium”<sup>222</sup>.

Upon this argument, fair use retains a valid efficiency justification even in low transaction- cost environments, minimizing the welfare losses caused by the strategic behavior of the copyright holders. When the protection undermines the viability of the transaction, fair use mitigates the resulting deadweight losses for an optimal functioning of the copyright marketplace in order to promote dispersion of information without drastically reducing the incentives for creativity<sup>223</sup>.

Meanwhile, Cooter divides the economic analysis into two categories that fair use should apply to: (1) when the transaction costs of negotiating with the copyright owner for

---

<sup>219</sup> Ibidem. p. 458

<sup>220</sup> Ibidem. p. 458/459

<sup>221</sup> Ibidem. p. 460

<sup>222</sup> Ibidem. p. 461

<sup>223</sup> Ibidem. p. 463/464

permission to use exceed the private value of the use to the would-be user; and (2) when the individual use is thought to generate some positive externality – such that the net social value of the use exceeds the value to the copyright owner of preventing the use -which in turn may exceed the value of the use to the individual user. He also noted that many possible uses are not conducted because of concerns over incurring attorney's fees and in part to the uncertainty of the fair use application by the courts<sup>224</sup>.

Because fair use relies on users to promote the public interest in the production of those externalities without providing them with a sufficient incentive, the doctrine suffers from an appropriability problem similar to the one that is often used to justify intellectual property protection itself<sup>225</sup>.

When releasing a work to the public, the creator may fail to recoup the value of all or even most of the social value of his creation due to the nonrivalrous nature of information and to the difficulties of excluding others from accessing the work once it has been made public. While the institution of exclusive rights tries to correct this flaw (traditionally seen as the way for potential creators to have financial incentive), fair use intends to permit unauthorized uses that promise substantial social returns that exceeds the harm to the copyright owner, but would-be users are unlikely to incur the risks<sup>226</sup>.

In other words, potential uses that would give rise to positive externalities – in the fair use doctrine – have less-than-optimal incentives to engage as the uses are seen as primarily beneficial to others. In the end, the fair use is underutilized not only because of real world implications such as costs of litigation, potential damages liability in uncertain cases, and risk aversion, but also for the lack of a more positive return to the user and not others in doing so<sup>227</sup>.

---

<sup>224</sup> COTTER, Thomas F. Fair Use and Copyright Overenforcement. *Iowa L. Rev.*, v. 93, p. 1271, 2008. p. 1271

<sup>225</sup> Ibidem. p. 1274

<sup>226</sup> Ibidem. p. 1288/1289

<sup>227</sup> Ibidem. p. 1274/1275

### 2.3.7. Sony Corporation of America v. Universal City Studios Case

A case held in the US court discussed the characterization of private copying of television programs on video cassettes as fair use. The Sony Corporation of America v. Universal City Studios (1984)<sup>228</sup> had a great impact on the US jurisprudence for the scope of permissible copying<sup>229</sup>.

First of all, there were different decisions for this case in different instances, which shows the difficulty of balancing interests when a new technology is involved. The district court favored in having free access to copyrighted works for the interest of the public. On the other hand, the court of appeals favored the interest of the copyright owners in protecting and being compensated for their works. In the end, the supreme court – in a five to four decision – decided over permitting the access to the creative work<sup>230</sup>.

Considering the uncertain impact this technology would have on access to copyrighted works, the US court did not have a unanimous decision, being reluctant to interpret the US Copyright Act in favor of any side. This case shows that, although the fair use problem imposed had many disagreements, there was one convergent point between the majority and the dissent: that the Congress should address the issue<sup>231</sup>.

### 2.3.8. Possible Fair Use Reforms

The fair use is the doctrine that balances the interest of copyright owners and users in the US Copyright Act. A reform of the legislative rights may threaten more interest of both sides rather than resolve the problems, either to govern new technologies or to repeal existing sections of the Copyright Act<sup>232</sup>.

---

<sup>228</sup> UNITED STATES OF AMERICA. United States Supreme Court. Sony Corporation of America v. Universal City Studios, 464 U.S. 417 (1984).

<sup>229</sup> ATKINSON, Benedict; FITZGERALD, Brian. Short History of Copyright. Springer International Pu, 2016. p. 104/105

<sup>230</sup> MILLS, Mary L. New technology and the limitations of copyright law: An argument for finding alternatives to copyright legislation in an era of rapid technological change. *Chi.-Kent L. Rev.*, v. 65, p. 307, 1989. p. 320

<sup>231</sup> Ibidem. p. 321

<sup>232</sup> Ibidem. p. 338

When focusing on the main US copyright problem, the copyright holders have more issues on enforcement against commercial scale piracy than with the fair use doctrine itself. The users, on the other hand, want more statutory exceptions as they can be more transparent than the judge-created doctrines such as fair use. With that in mind, the debate over the doctrine should be treated in a different dynamic in each side, which now is being departed from a well-advised approach for an US domestic copyright reform<sup>233</sup>.

Still, the doctrine itself has limitations to the possible extent of a reform of the fair use. Cooter suggests policymakers to devote greater attention toward more fundamental measures, such as reducing the effective term of copyright through the reintroduction of formalities like the registration requirement or other measures, devising alternative ways to compensate content producers, or limiting copyright rights to cases involving commercial exploitation, and less on remedying fair use<sup>234</sup>.

While some commentators recommend the abolishment of the fair use doctrine because of new technologies, it can be seen as premature act to address copyright infringements. The fair use contributes to the balance of the US copyright law and removing this provision would shift the US copyright in favor of copyright owners<sup>235</sup>.

In addition, even if there is a reform of the fair use doctrine, it would still be an important tool to free up recent culture for referencing in new work. In other words, fair use will still be important to anyone working in the cultural mainstream. That's because culture jamming can be fun (although some culture jammers are actually just employing their fair use rights without knowing it) and most creators, teachers, researchers, students, and people who generally share information do not see themselves as criminals or pirates, as sometimes these people, for example, need to use materials that the copyright owner simply will not license to them<sup>236</sup>.

---

<sup>233</sup> HUGHES, Justin. Fair Use and Its Politics – at Home and Abroad. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 274

<sup>234</sup> COTTER, Thomas F. Fair Use and Copyright Overenforcement. *Iowa L. Rev.*, v. 93, p. 1271, 2008. p. 1275

<sup>235</sup> MILLS, Mary L. New technology and the limitations of copyright law: An argument for finding alternatives to copyright legislation in an era of rapid technological change. *Chi.-Kent L. Rev.*, v. 65, p. 307, 1989. p. 338

<sup>236</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 15

When thinking about expanding the fair use, one of the controversies is whether viewing or not the copyrighted works as cultural goods, which would change copyright doctrines. But other policy goals might warrant more generous fair use standards or more radical changes in copyright such as: maximizing access, public knowledge, political debate, or human health and First Amendment considerations, or relational goals threatened by commodification<sup>237</sup>.

Cooter suggests six different types of possible reforms: (1) increased reliance on liability rules as an alternative to the present reliance on fair use or injunctive relief; (2) changes to copyright damages rules; (3) increased use of penalties such as the copyright misuse doctrine in response to bad faith efforts to block fair uses; (4) changes to the standards used for awarding attorney's fees in copyright litigation; (5) measures designed to increase the accuracy of fair use determinations; and (6) measures designed to increase the predictability of these determinations<sup>238</sup>.

For the author, this package of modest reforms would bring fair use to a social optimum as the doctrine as currently structured is both inherently flawed and not readily susceptible to demonstrable improvement. That's because users would be unlikely to generate the socially optimal amount of positive externalities, given their inability to appropriate the value of those externalities. These externalities are dispersed and amorphous, which makes it difficult to balance the hypothetical social benefits against the social cost of undercutting copyright incentive. In the end, Cooter concludes that "it may be unrealistic to expect the doctrine, either in its current incarnation or in combination with some package of reforms, to induce the optimal amount of positive-externality-generating uses or even some reasonable approximation thereof"<sup>239</sup>.

Overall, Brennan explains that the fair use policy needs to check the tradeoff between the number of works supplied and the number of uses of each work. Expanding fair use could

---

<sup>237</sup> BRENNAN, Timothy J. 'Fair Use' as policy instrument. In: TAKEYAMA, Lisa N.; GORDON, Wendy J.; TOWSE, Ruth. *Developments in the economics of copyright*. Edward Elgar Publishing, 2005. p. 80/81

<sup>238</sup> COTTER, Thomas F. Fair Use and Copyright Overenforcement. *Iowa L. Rev.*, v. 93, p. 1271, 2008.

<sup>239</sup> *Ibidem*. p. 1317

reduce the number of markets reached and be more costly on both efficiency-based and non-economic policy standards<sup>240</sup>.

### 2.3.9. Fair Use International Use

Not only the US uses the fair use as its L&E doctrine. Other countries also implemented the fair use in their domestic copyright and authors rights laws, including the Philippines in 1998, Singapore in 2006, Israel in 2007, and the Republic of Korea in 2012<sup>241</sup>. However, the recent adoption of this system by those countries and the international relevance of the US turns the US into the central example of its application as it is the major influence on the other countries.

Even though some of the mentioned countries are using the fair use doctrine, in trade and/or IP negotiations, the US focuses on exporting US standards for IP protection, but does nothing to export this L&E doctrine, which is one of the criticisms to the US government. Nevertheless, US has once signed a balanced view of L&E with open-ended exceptions in the international negotiation of the Trans-Pacific Partnership (TPP)<sup>242</sup>, which included in the article 18.66 different purposes of L&E (like criticism and research) and not limiting to those described in this agreement – which would create a flexible standard of L&E to be adopted by other countries in accordance to each particular copyright and authors rights systems<sup>243</sup>.

## 2.4. Fair Dealing Approach

One other L&E doctrine called Fair Dealing consists of a different type of approach on the subject that is used by many countries around the world. The main influential countries that

---

<sup>240</sup> BRENNAN, Timothy J. 'Fair Use' as policy instrument. In: TAKEYAMA, Lisa N.; GORDON, Wendy J.; TOWSE, Ruth. *Developments in the economics of copyright*. Edward Elgar Publishing, 2005. p. 83

<sup>241</sup> BARKER, George Robert. Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age. In: *2013 Annual Congress of the Society for Economic Research on Copyright Issues (SERCI) held in MINES ParisTech, Paris (France)*. 2013. p. 5

<sup>242</sup> TPP Trans-Pacific Partnership Agreement. February 4, 2016.

<sup>243</sup> HUGHES, Justin. Fair Use and Its Politics – at Home and Abroad. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 263/264

use this approach and will be further detailed are: United Kingdom (UK), Canada, and Australia –known as commonwealth nations.

Fair dealing is a L&E doctrine that specifies the situations in which the national statute applies for acceptance of a copyrighted material use, but also accordingly to specific factors. In other words, for a use in fair dealing to be considered fair, the common interpretation is that the use needs to combine two different aspects: it must match an exception on the statute, and also attend appropriate conditions/purposes of use.

Because of that, it is difficult to correctly define when a use is considered fair dealing. It is necessary to evaluate each case aspects such as: the number and extent of the quotations and extracts; the purpose of a comment, criticism or review use of the source work; the presence of a rival purpose to convey the same information; the proportions analysis (take long extracts and attach short comments). But, overall, is a matter of perception<sup>244</sup>.

By associating the specific exceptions with the weighing of factors similar to those at work in US fair use, the fair dealing covers only some kinds of uses, like those related to news reporting, education or scholarship, and private study. Thus, an inclusion of a new kind of use broadens the fair dealing scope and is more useful to creators. This also means that some uses are not typically covered, such as uses undertaken by artists, remixers, video makers, and even documentary filmmakers<sup>245</sup>.

As already introduced before, the fundamental difference between the US fair use and the fair dealing doctrine is that the US doctrine can apply potentially to any purpose, while the fair dealing could only apply to those purposes enumerated in the statute. This may indicate that even if a use is fair by the analysis of the purposes, fair dealing will not apply. But according to Katz, this application is false as the UK Parliament codified the doctrine of fair use a century ago and enacted the fair dealing provision, having no intention to restrict or limit its application, adaptation and adjustment by the courts. Nevertheless, the UK courts

---

<sup>244</sup> D'AGOSTINO, Giuseppina. Healing Fair Dealing-A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use. *McGill Lj*, v. 53, p. 309, 2008. p. 30/31

<sup>245</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 180

did not recognize the fair dealing as an open, flexible, and general standard, stagnating the doctrine by this interpretation<sup>246</sup>.

By misinterpreting the UK Copyright Act of 1911<sup>247</sup>, UK and other commonwealth countries adopted a narrow and restrictive view of fair dealing, while the US fair use, however, remained uncoded for most of the twentieth century<sup>248</sup>. It means that US doctrine emerged as an open, flexible, and general approach comparing to the more rigid and restrictive doctrine in other commonwealth countries<sup>249</sup>.

Considering the more recent codified fair use language of section 107 of the US Copyright Act, the exemplification of the purpose of use states: "...for purposes such as criticism..."<sup>250</sup>. The words '*such as*' illustrate the nature of the purposes, ensuring that US fair use could apply to other purposes as well<sup>251</sup>. Other countries in fair dealing does not have the word, which lead to a different interpretation than the existent in the US approach.

There are three other arguments to differentiate the fair dealing from the fair use. The first is that fair use is an US concept developed by its courts being constructed apart from the UK legal fair dealing traditions. Next, distinct histories and origins may have created disparate conceptions of copyright and its rules. Finally, the term '*dealing*' and '*use*' have fundamental differences<sup>252</sup>.

Neither fair use or the fair dealing were born by statute, they were case law creations. At first, it seems to pose a great influence on a potential difference between the doctrines, but

---

<sup>246</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming Comparative Aspects of Limitations and Exceptions in Copyright Law, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018. p. 1

<sup>247</sup> UNITED KINGDOM. Copyright Act of 1911. An Act to amend and consolidate the- Law relating to Copyright.

<sup>248</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming Comparative Aspects of Limitations and Exceptions in Copyright Law, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018. p. 2

<sup>249</sup> Ibidem. p. 2/3

<sup>250</sup> UNITED STATES OF AMERICA. Copyright Act of 1976. An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

<sup>251</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming Comparative Aspects of Limitations and Exceptions in Copyright Law, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018. p. 5

<sup>252</sup> Ibidem. p. 6

the approaches were mutually influenced and cross-referenced. There are documents by several scholars that prove it<sup>253</sup>.

Regarding distinct histories and origins, this argument is misconceived as US and UK are both descendants of the Statute of Anne<sup>254</sup> – which will be better explored in the UK section – and the jurisprudential developments that followed in both countries<sup>255</sup>.

Lastly, the terminology difference should also not be considered. That's because, until 1911, UK often used in their courts the term '*fair use*' to describe the country L&E, but switched it to '*fair dealing*' in the codification, with no evidence on the sought intention to that change<sup>256</sup>.

In Katz opinion, the UK judges that created fair use should not necessarily be seen as protectors of only users' rights and the public interest. The fair use should be recognized as an expansion of the copyright scope of protection, beyond tradition exclusive rights<sup>257</sup>.

Regardless of the intention to differentiate the fair dealing – as a rigid framework – from the fair use – as more flexible structure –, generally they are both very similar on the most part<sup>258</sup>. But when considering the courts decisions, it is possible to distinguish different weights for the factors from each jurisdictional judgment, including different positions between the fair dealing countries like UK and Canada<sup>259</sup>.

---

<sup>253</sup> Ibidem. p. 12

<sup>254</sup> UNITED KINGDOM. Statute of Anne of 1710. An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

<sup>255</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming Comparative Aspects of Limitations and Exceptions in Copyright Law, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018. p. 7/8

<sup>256</sup> Ibidem. p. 13/14

<sup>257</sup> Idem.

<sup>258</sup> D'AGOSTINO, Giuseppina. Healing Fair Dealing-A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use. *McGill Lj*, v. 53, p. 309, 2008. p. 47/48

<sup>259</sup> Idem.

### 2.4.1. UK

The UK is one of the most important countries regarding the copyright and authors rights laws in the world. Not only did copyright originated there, but also the first decisions on L&E to the authors' exclusive rights.

#### 2.4.1.1. UK Fair Dealing Legislations

Back in 1710, UK originated the first copyright and authors rights framework with the Statute of Anne<sup>260</sup>. It recognized an author's – not bookseller's – right to control the reproduction of books for a period of 14 years from publication and could be renewed for another period of 14 years. This legislation is the foundation for the modern copyright and authors rights regulations<sup>261</sup>

It was a response to the printing press technological innovation to mass-production books. To prevent secondary producers who purchased books for the sole purpose of copying them and reselling the copies to consumers, the Statute of Anne granted exclusive property rights after which the protected works would be in the public domain<sup>262</sup>.

There was no codification on the L&E in the Statute of Anne of 1710. It was a case law creation that developed the doctrine in the eighteenth and nineteenth centuries. The approach started with the term fair abridgments, but over time it broadened to include other derivative uses. To be considered as fair use' back then (the fair dealing term only appears in 1911), the defendant needed to prove an original contribution to the resulting work as a productive use that did more than shorten or alter the original work for the purpose of evading liability<sup>263</sup>.

---

<sup>260</sup> UNITED KINGDOM. Statute of Anne of 1710. An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

<sup>261</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 23

<sup>262</sup> MILLS, Mary L. New technology and the limitations of copyright law: An argument for finding alternatives to copyright legislation in an era of rapid technological change. *Chi.-Kent L. Rev.*, v. 65, p. 307, 1989. p. 312

<sup>263</sup> PAPPALARDO, Kylie and FITZGERALD, Brian. Copyright, Fair Use and the Australian Constitution. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 138

As already mentioned before, it was only in the beginning of the twelfth century that UK codified the L&E from the courts to the Copyright Act of 1911<sup>264</sup>, altering the name from fair use to fair dealing, without any specific intention. The provisions are in the Section 2(1)(i):

Infringement of copyright

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

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary<sup>265</sup>

Overall, the Section 2(1)(i) of the 1911 Act only codified an already-existing principle from the case law. Although it does not have the term ‘*such as*’ like in the US provision, Katz interprets the Copyright Act of 1911 as not excluding others from making fair use of a work and describing infringement as the making an unfair use of the work. However, the UK courts have narrowed this interpretation down to a more restrict perception of the law<sup>266</sup>.

The current copyright act in UK is the Copyright, Designs and Patents Act 1988 (CDPA)<sup>267</sup>. The fair dealing provision is in the Chapter III *Acts Permitted in Relation to Copyright Works*, specifically on the sections 29, 29A, 30, 30A and 32, as the following purposes: (1) research and private study; (2) copies for text and data analysis for non-commercial research, (3) criticism, review, quotation and news reporting; (4) caricature, parody or pastiche; and (5) illustration for instruction.

Some of these exceptions were included recently in the UK legislation, especially by the Copyright and Rights in Performances ‘*Quotation and Parody*’ and ‘*Research, Education, Libraries and Archives*’ Regulations on 2014. It has followed the recommendation from a

---

<sup>264</sup> UNITED KINGDOM. Copyright Act of 1911. An Act to amend and consolidate the- Law relating to Copyright.

<sup>265</sup> *Idem*.

<sup>266</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming *Comparative Aspects of Limitations and Exceptions in Copyright Law*, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018. p. 16

<sup>267</sup> UNITED KINGDOM. Copyright, Designs and Patents Act of 1988. An Act to restate the law of copyright, with amendments.

government study not to amend the fair dealing provision, but to carve out specific exceptions, notably the ones that did not attract any controversy like parody<sup>268</sup>.

#### **2.4.1.2. Per Se Exception versus Rule of Reason**

Taking into account the UK method to deal with the fair dealing approach, it can be suggested as a per se exception while the US fair use applies the rule of reason. The terms of the antitrust law and economics showcase that the US rule of reason require courts to carry out an analysis to see whether an action should be permitted as in the public interest while the per se rights and wrongs are defined in the statute or case law references<sup>269</sup>.

UK actually applies the rule of reason, but has not develop it as much, compared to US, because of the statutory limitation of the fair dealing, which has been favoring the original copyright holders to control the derivative works<sup>270</sup>. This limitation over the rule of reason is caused by the permitted purposes in CDPA 1988, which create a fair dealing doctrine exception that has not got an equity-based variation in the approach taken in practice by the courts<sup>271</sup>.

#### **2.4.1.3. UK Final Considerations**

While in 2006 and 2010 some commissioned reports recommended a more flexible approach to exceptions in UK, judicial decisions have endorsed more flexibility in interpreting existing ones. In 2014 the law recognized the already mentioned quotation rights but also expended its range to cover data mining<sup>272</sup>.

This recent exception created in the UK – the enactment of a data-mining exception – is a move to a more pro-science reform in the UK copyright law that directly enables the use of

---

<sup>268</sup> D'AGOSTINO, Giuseppina. *Healing Fair Dealing-A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use*. *McGill Lj*, v. 53, p. 309, 2008. p. 26/27

<sup>269</sup> DNES, Antony. *A Law and Economics Analysis of Fair Use Differences Comparing the US and UK*. *Hargreaves Review of Intellectual Property and Growth*, HMSO: Intellectual Property Office, London, 2011. p. 10

<sup>270</sup> *Idem*.

<sup>271</sup> *Ibidem*. p. 16

<sup>272</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 180

automated knowledge discovery tools, which was a legislation reform adopted without recourse to the US fair use four factor exception<sup>273</sup>. This means that, even when a country has no open-ended L&E, nor a developed rule of reason in court, it can still be aware of the technological changes and be responsive to new demands of society.

In the end, it is important to notice that UK being part of the European Union lead to an integration and harmonization to EU jurisprudence. Even trying to adapt to the EU- orientated regulations, UK's fair dealing is still applied based on the rule of reason<sup>274</sup>, having distinct speed and focus in the harmonization process compared to EU copyright law<sup>275</sup>, which is likely to continue to drift apart after the implementation of the Brexit.

#### **2.4.2. Canada**

For most Canadian history, the same UK provisions were imported by the country regarding the fair dealing. In the recent years, Canada decided to change how L&E are treated in the legislation and in courts, bringing many improvements that will be discussed hereinafter.

##### **2.4.2.1. Canada Fair Dealing Legislations**

Like the UK Copyright Act of 1911, a decade later Canada enacted the Canadian Copyright Act of 1921 that remained with the same UK term language for the fair dealing: "Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary"<sup>276</sup>

---

<sup>273</sup> REICHMAN, Jerome H. The Limits of "Limitations and Exceptions" in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 299/300

<sup>274</sup> DNES, Antony. A Law and Economics Analysis of Fair Use Differences Comparing the US and UK. *Hargreaves Review of Intellectual Property and Growth*, HMSO: Intellectual Property Office, London, 2011. p. 15

<sup>275</sup> GRIFFITHS, Jonathan. Infopaq, BSA and the 'Europeanisation' of United Kingdom Copyright Law. *Media & Arts Law Review*, v. 16, 2011. p. 13

<sup>276</sup> CANADA. Copyright Act of 1921. This Act may be cited as The Copyright Act, 1921.

Meant to be a codification to improve more dynamic and evolving common-law principles, this Act had only a few amendments, with the CA fair dealing experiencing almost a hundred years of solitude and stagnation<sup>277</sup>.

The colonial copyright past of UK influenced the CA provisions in the beginning, but the restrict interpretation of the fair dealing from the UK law did not transmit the same path to Canada<sup>278</sup>. The CA fair dealing was not interpreted to restrict or limit its application, adaptation and adjustment by the courts. Unlike the UK courts, the Supreme Court of Canada started the twenty-first century deciding for a more flexible standard for the CA fair dealing<sup>279</sup>.

#### **2.4.2.2. CCH Canadian Ltd. v. Law Society of Upper Canada Case**

In the first-ever case involving fair dealing in the Supreme Court of Canada in 2004<sup>280</sup>, the court declared that fair dealing is a users' right, which is as integral part to copyright law as the rights of copyright owners, and therefore should be given large and liberal interpretation. This is not a stand-alone decision as the court had reaffirmed its holdings from CCH and clarified that they applied to a wider range of activities<sup>281</sup>, which makes Canada the only country in the world where the highest court has positively (and repeatedly) affirmed the principle of users' rights within copyright law<sup>282</sup>.

Although it seems revolutionary in very narrow historical perspective, Katz reminds that "viewing it with a longer historical gaze suggests that if CCH departed from earlier case

---

<sup>277</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming Comparative Aspects of Limitations and Exceptions in Copyright Law, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018. p. 2

<sup>278</sup> Ibidem. p. 4

<sup>279</sup> Ibidem. p. 59

<sup>280</sup> CANADA. Canada Supreme Court. CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13.

<sup>281</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming Comparative Aspects of Limitations and Exceptions in Copyright Law, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018. p. 3

<sup>282</sup> GEIST, Michael. The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 173

law, it only brought back the law to its historical path”<sup>283</sup>. In the end, the CA Supreme Court corrected a century-long misconception of fair dealing and brought it closer to the US more flexible decisions<sup>284</sup>.

In reference to the declaration that fair dealing is a users’ right in the CCH Case, courts and commentators have already referred the ability to use another’s work without permission as a users’ right before, and also employing the term ‘*the right of fair user*’<sup>285</sup>.

The referred decision also set out factors for the CA fair dealing application: the purpose of the dealing; the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the work; the effect of the dealing on the work. The CA Supreme Court went even further by stating that other factors can be considered to help the court decision if a specific dealing is fair<sup>286</sup>.

#### **2.4.2.3. Copyright Modernization Act of 2012: the Users’ Rights**

During the period between the CCH Case in 2004 and the Copyright Modernization Act of 2012, it was uncertain which path Canada would take for the fair dealing: stay with the burdensome UK model or embrace the imperfect US model. But CA did better and improved to a more open-ended feature<sup>287</sup>.

To expand the CA fair dealing, many experts advocate to persuade the courts to interpret the law in a more open portray and technologically neutral manner including David Vaver, Michael Geist, Ariel Katz, Howard Knopf, and Laura Murray. By doing so, Canadian judges started to state the fair dealing as a user’s right<sup>288</sup>.

For a long time, Canada did not stand out regarding the fair dealing as the attempts to reform the CA copyright legislation were normally influenced by the largest lobby groups. The user

---

<sup>283</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming *Comparative Aspects of Limitations and Exceptions in Copyright Law*, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018. p. 15/16

<sup>284</sup> Ibidem. p. 3

<sup>285</sup> Ibidem. p. 14

<sup>286</sup> HARRIS, Lesley Ellen. *Canadian Copyright Law*. John Wiley & Sons, 2013. p. 165/166

<sup>287</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?*. 2018. p. 4

<sup>288</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 181

community was mostly represented by education and library associations which did not have a major influence on the legislators on the 1980s and 1990s<sup>289</sup>.

Canadian government released a series of proposals in 2001 for the CA copyright environment. “To the surprise of many in the government, the consultation attracted more than 700 responses, the vast majority of which came from individuals and user-oriented groups”, providing a sense of the user perspectives on CA copyright<sup>290</sup>.

This led to the creation of the Copyright Modernization Act of 2012<sup>291</sup>, which also had a relevant public participation, especially online. It demonstrates how individuals can use social media to stop restrictive legislative proposals and place the users in the center of copyright policy development<sup>292</sup>.

With the introduction of the Copyright Modernization Act in 2012, Canada rejected the US fair use model and introduced some limited exceptions for user-generated content and specifically recognized fair dealing for educational purposes<sup>293</sup>. The current CA copyright act has many exceptions under the sections 29 to 32, including provisions on: research, private study, education, parody or satire; criticism or review; news reporting; non-commercial user-generated content; and so on<sup>294</sup>.

*Today, Canadian copyright law is best known for having affirmatively adopted the view that exceptions are more properly regarded users' rights, the incorporation of technological neutrality as a foundational principle of copyright law, and the affirmation of an expansive approach to fair dealing, which Canada's highest court views as the most important users' right.*<sup>295</sup>

Concerning specifically the fair dealing in the CA copyright act, there is no definition to the term. While some courts have dealt with the doctrine, there was no clear establishment of

---

<sup>289</sup> GEIST, Michael. The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 170

<sup>290</sup> Ibidem. p. 174/175

<sup>291</sup> CANADA. Copyright Modernization Act of 2012. An Act to amend the Copyright Act.

<sup>292</sup> Ibidem. p. 173

<sup>293</sup> BARKER, George Robert. Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age. In: *2013 Annual Congress of the Society for Economic Research on Copyright Issues (SERCI) held in MINES ParisTech, Paris (France)*. 2013. p. 5

<sup>294</sup> CANADA. Copyright Modernization Act of 2012. An Act to amend the Copyright Act.

<sup>295</sup> GEIST, Michael. The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 173

what it constitutes as it must be determined according to specific factors in each case. Because there is no percentage of use to be considered acceptable, the uncertain nature leaves to the creators, users and IP practitioners to decide for themselves as to whether their activities could be considered fair by a judge in a court of law<sup>296</sup>.

However, there is some guidance as to what constitutes fair dealing. For a use to be considered fair, it must fit the fair dealing list provision in the CA copyright act (research; private study; education; parody; satire; criticism; review; or news reporting) and fit the court factors considering the particular circumstances of the use<sup>297</sup>.

Overviewing the new Canadian context for the copyright, the additional exceptions and fair dealing provisions in 2012 allowed the doctrine to be less restrictive than the past traditional interpretations. But even with this needed correction, some uses are still categorically excluded, considering the present or the future.<sup>298</sup>

#### **2.4.2.4. Canada Fair Dealing versus US Fair Use**

According to Katz, the difference between the US fair use and CA fair dealing has no historic support when claimed that the different constitutional structures reflect divergent ideological views<sup>299</sup>. Also, Canada has now embraced a more open-ended fair dealing, and even without the US ‘*such as*’ terminology, CA can be a more open, flexible, and general fair dealing than it was supposed to be all along<sup>300</sup>.

Besides the legislation, the US and Canadian courts have different structures for the approach’s factors. Canada had considered in the CCH case the six factors and also expected to have other unnamed factors in future cases, which can be seen as more flexible than those in the US<sup>301</sup>.

---

<sup>296</sup> HARRIS, Lesley Ellen. *Canadian Copyright Law*. John Wiley & Sons, 2013. p. 164

<sup>297</sup> *Idem*.

<sup>298</sup> KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming *Comparative Aspects of Limitations and Exceptions in Copyright Law*, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018. p. 1

<sup>299</sup> *Ibidem*. p. 12

<sup>300</sup> *Ibidem*. p. 5

<sup>301</sup> D'AGOSTINO, Giuseppina. *Healing Fair Dealing-A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use*. *McGill Lj*, v. 53, p. 309, 2008. p. 48

Valentino created a didactical comparison table between the US and the CA factors:

Figure 1 - Comparison table between the US and the CA factors

| Fair Dealing                         | Fair Use                                                                                                                            |
|--------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|
| 1. The purpose of the dealing.       | 1. The purpose and character of use, including whether such use is of a commercial nature or is for non-profit educational purpose. |
| 2. The character of the dealing.     |                                                                                                                                     |
| 3. The amount of the dealing.        | 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.                                |
| 4. Alternatives to the dealing       | No fair use equivalent, but parts of factor 4 have some relevance as to alternatives (specifically, the availability of a licence). |
| 5. The nature of the work            | 2. The nature of the copyrighted work.                                                                                              |
| 6. Effect of the dealing on the work | 4. The effect of the use upon the potential market for or value of the copyrighted work.                                            |

Source: DI VALENTINO<sup>302</sup>

Having mapped the two countries fair dealing/use factors, the author affirms that both provisions were drafted with flexibility in mind. By so, Canada's six fair dealing factors provide some guidance to the case-by-case analysis and signs that the fair dealing must not be interpreted restrictively<sup>303</sup>.

Ultimately, the two structural approaches for the factors may not differ significantly between the US and CA jurisdictions. However, the Canadian judicial interpretation reflects a more pro-user tendency in CA fair dealing than in US fair use<sup>304</sup>.

<sup>302</sup> DI VALENTINO, Lisa. *Comparison of Fair Dealing and Fair Use in Education Post-Pentology*, 2013. Work-in-progress presented at the IP Scholars Conference, Cardozo Law School, New York, 2013. p. 8

<sup>303</sup> Ibidem. p. 38

<sup>304</sup> Ibidem. p. 10

#### 2.4.2.5. Canada Lessons by Geist

Geist<sup>305</sup> summarizes various lessons from the Canadian copyright new experiences, including: users as copyright stakeholders; the internet as a tool for participation; the role of academics in the policy process; users' rights have a strong policy foundation; international flexibility allows for users' rights; trade and copyright; and people matter.

First, he states the importance of users as copyright stakeholders. The public was recognized as a stakeholder within the policy process, overcoming barriers against individual participation. By social media, plain language explanations and backgrounds, town halls, online discussion forums, and other techniques allowed the policy to be more open to user participation<sup>306</sup>.

Second, the internet as a tool for participation was perceived by Geist as the public engagement increased with the aid and facilitation of the internet. Not only by being directly engaged to the copyright policy process and speaking out, but also by Canadians becoming informed<sup>307</sup>.

Geist also suggested the importance of the role of academics in the policy process, as academics can play an integral role in advancing the law within both the legislature and the courts. The Canadian copyright scholars influenced the shape and scope of future reforms and caselaw<sup>308</sup>.

In addition, he valued the users' rights strong policy foundation. For the policy change, there was a foundation on the Supreme Court's decisions on user rights and the government's legislative reforms that helped achieve today's CA copyright exceptions and fair dealing<sup>309</sup>.

Geist also emphasized that international flexibility allows for users' rights. Even with critics claiming that Canada was offside of its international copyright obligations, the government

---

<sup>305</sup> GEIST, Michael. The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 200/205

<sup>306</sup> Ibidem. p. 201

<sup>307</sup> Idem.

<sup>308</sup> Ibidem. p. 201/202

<sup>309</sup> Ibidem. p. 202/203

carefully studied and concluded that there is sufficient flexibility to permit these reforms. In other words, international law should not be viewed as a significant barrier to users' rights<sup>310</sup>.

He also concerned with the relation between trade and copyright. Other places like US and EU may try to influence the domestic policy, but the pressure can be overstated. Even knowing that trade negotiations are important to CA copyright process, Canada has demonstrated a willingness to hold firm on key issues, dismissing lobby documents with little credibility<sup>311</sup>.

In the end, Geist stated that people matter. For the Canadian domestic copyright policy, the impact of the individuals is undeniable, which for a long time was often ignored in the debates. In the end, Canada became the world leader in users' rights in the last decade because of individual efforts<sup>312</sup>.

### **2.4.3. Australia**

The Australian concept of copyright that grants to an author of an original work exclusive rights in the exploitation of that work has roots on the UK Statute of Anne and later on the Australian Constitution of 1900<sup>313</sup>.

#### **2.4.3.1. Australia Fair Dealing Legislations**

Coming from the UK experience in copyright law, it is already settled that copyright owners did not have an unlimited power to prevent copying, they had a power to prevent infringing

---

<sup>310</sup> Idem

<sup>311</sup> Ibidem. p. 203/204

<sup>312</sup> Ibidem. p. 204/205

<sup>313</sup> PAPPALARDO, Kylie and FITZGERALD, Brian. Copyright, Fair Use and the Australian Constitution. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 141

copying. This was the notion at the time of the enactment of the Commonwealth of Australia Constitution Act of 1900<sup>314315</sup>.

Regarding the copyright, the AU Constitution of 1900 granted the power to make laws with respect to the subject to the Australian Parliament, which in general legal understanding included the L&E notion<sup>316</sup>. The Part V Powers of the Parliament Section 51 of the Commonwealth of Australia Constitution Act 1900 provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . . (xviii) copyrights, patents of inventions and designs, and trade marks.<sup>317</sup>

Australia's use of the word '*copyrights*' in the constitution incorporates the notion of copyright balance. By doing so, it distinguishes infringing copying and non-infringing copying, granting to the copyright owner only the power to control when there is a copyright infringement<sup>318</sup>.

Even with the legislative power to make laws on the subject, Australia mostly relied on the UK imperial copyright system by adopting the same UK provisions. The AU copyright history only changed with the enactment of the Copyright Act of 1968.

In force until today, the Copyright Act of 1968<sup>319</sup> is the main statute for the copyright under the Australian law. In the time enacted, the sections 36(1) and 101(1) – which are virtually identical – describe when is an infringement of copyright<sup>320</sup>. Section 36(1) provides:

---

<sup>314</sup> AUSTRALIA. Commonwealth of Australia Constitution Act of 1900. An Act to constitute the Commonwealth of Australia.

<sup>315</sup> PAPPALARDO, Kylie and FITZGERALD, Brian. Copyright, Fair Use and the Australian Constitution. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 126

<sup>316</sup> Ibidem. p. 138/139

<sup>317</sup> AUSTRALIA. Commonwealth of Australia Constitution Act of 1900. An Act to constitute the Commonwealth of Australia.

<sup>318</sup> PAPPALARDO, Kylie and FITZGERALD, Brian. Copyright, Fair Use and the Australian Constitution. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 162

<sup>319</sup> AUSTRALIA. Copyright Act of 1968. An Act relating to copyright and the protection of certain performances, and for other purposes.

<sup>320</sup> PAPPALARDO, Kylie and FITZGERALD, Brian. Copyright, Fair Use and the Australian Constitution. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 147

Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.<sup>321</sup>

The significant part here is that the term “act comprised in the copyright” contemplates that there may be acts undertaken that are not comprised in the copyright<sup>322</sup>.

Concerning specifically the fair dealing, the original provision included in the Division 3 (*Acts not Constituting Infringements of Copyright in Works*) sections 40 to 42 of the AU Copyright Act of 1968 three fair dealing groups of purpose of use: research or private study; criticism or review; and reporting news<sup>323</sup>.

A more recent update of the AU Copyright Act of 1968 which includes amendments up to Act No. 157, 2018 – the Compilation No. 58 – has the same three fair dealing group provisions too (now on sections 40/103C, 41/103A and 42/103B). Some additions were made into the AU fair dealing list which includes other purposes of use such as: parody or satire (sections 41A and 103AA); and also access by persons with a disability (section 113E)<sup>324</sup>.

#### **2.4.3.2. Australian Law Reform Commission (ALRC)**

In order to examine if the Copyright Act of 1968 exceptions and statutory licenses were appropriate to the digital environment, the Australian Law Reform Commission (ALRC) was formed. In a 2013 work leading up to a Final Report<sup>325</sup>, the commission proposed

---

<sup>321</sup> AUSTRALIA. Copyright Act of 1968. An Act relating to copyright and the protection of certain performances, and for other purposes.

<sup>322</sup> PAPPALARDO, Kylie and FITZGERALD, Brian. Copyright, Fair Use and the Australian Constitution. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 147

<sup>323</sup> AUSTRALIA. Copyright Act of 1968. An Act relating to copyright and the protection of certain performances, and for other purposes.

<sup>324</sup> *Idem*.

<sup>325</sup> AUSTRALIA. Copyright and the Digital Economy Final Report from the Australian Law Reform Commission (ALRC) of November 2013.

Australia to adopt a fair use exception which could lead to a review of the copyright legislation<sup>326</sup>.

In a Discussion Paper called *Copyright and the Digital Economy*<sup>327</sup>, made before the Final Report, the commission summarized the views expressed in submissions. First, there was the change in the environment that is related to the development of the digital economy and to a more principles-based legislation in Australia. Second, the arguments in favor of fair use for Australia included: flexibility to respond to changing conditions; assist innovation; balancing the copyright system; and meeting consumer expectations. On the other hand, the arguments against fair use in Australia included: is unnecessary; would create uncertainty and expense; it is from a different legal environment; and may not comply with the three-step test<sup>328</sup>.

In a different approach to create foundations to the adoption of the fair use in Australia, the ALRC changed the Discussion Paper structure in the Final Report to, instead of showing the above arguments, only catalogue the benefits to the fair use, which included: it builds on Australia's fair dealing tradition; is flexible and technology-neutral; promotes public interest and transformative uses; assists innovation; better aligns with reasonable consumer expectations; helps protect rights holders' markets; is sufficiently certain and predictable; is compatible with moral rights; complies with the three-step test<sup>329</sup>. To explain why fair use achieves better results on each of these statements, Barker notice that "how the ALRC derives these conclusions is not clear"<sup>330</sup>.

Overall, the recommendation on the Final Report was to express in the AU law that a fair use of copyright material does not infringe copyright, suggesting having a non-exhaustive list of the factors to be considered in determining whether the use is a fair use (*'the fairness*

---

<sup>326</sup> BARKER, George Robert. Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age. In: *2013 Annual Congress of the Society for Economic Research on Copyright Issues (SERCI) held in MINES ParisTech, Paris (France)*. 2013. p. 6

<sup>327</sup> AUSTRALIA. Copyright and the Digital Economy Discussion Paper from the Australian Law Reform Commission (ALRC) of June 2013.

<sup>328</sup> BARKER, George Robert. Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age. In: *2013 Annual Congress of the Society for Economic Research on Copyright Issues (SERCI) held in MINES ParisTech, Paris (France)*. 2013. p. 8

<sup>329</sup> AUSTRALIA. Copyright and the Digital Economy Final Report from the Australian Law Reform Commission (ALRC) of November 2013. p. 93 to 122

<sup>330</sup> BARKER, George Robert. Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age. In: *2013 Annual Congress of the Society for Economic Research on Copyright Issues (SERCI) held in MINES ParisTech, Paris (France)*. 2013. p. 9

*factors*’) – which is exactly the same use in US – and also having a non-exhaustive list of illustrative uses or purposes that may qualify as fair use (*‘the illustrative purposes’*). The illustrative purposes would include (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<sup>331</sup>.

After much debate in the recent years over whether Australian copyright law should adopt or not the fair use doctrine, Australia remained with the fair dealing. Different from the EU legislation with many carefully limited exceptions (which will be later investigated) and US open-ended fair use formula, Australia has the fair dealing purposes but also a significant number of statutory or compulsory licenses that allow uses in specific cases, subject to the payment of equitable remuneration<sup>332</sup>.

## 2.5. Designated Limitations and Exceptions Approach

In order to better understand the doctrine divisions, Reichman<sup>333</sup> used the term *‘designated limitations and exceptions’* to refer when countries adhere to an approach focusing only on a statutory list of exceptions, without dealing with factors and entrusting the courts with an open-ended case-by-case application. Normally, this doctrine is named in the countries only as *‘limitations and exceptions’*, but for didactic purposes to not mislead with the general application of the term (L&E), it will be referred as designated limitations and exceptions.

The designated limitations and exceptions approach relies under the scope of influence from the Continental Europe and has impacted many international treaties and other countries. As already mentioned, this doctrine uses exclusively specific exceptions and limitations,

---

<sup>331</sup> AUSTRALIA. Copyright and the Digital Economy Final Report from the Australian Law Reform Commission (ALRC) of November 2013.

<sup>332</sup> RICKETSON, Sam. WIPO study on limitations and exceptions of copyright and related rights in the digital environment. *Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June, v. 203, 2003. p. 73*

<sup>333</sup> REICHMAN, Jerome H. The Limits of “Limitations and Exceptions” in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017.

stipulating special treatment for library/educational uses, critical commentary, parody, pastiche, illustration, or quotation, for example<sup>334</sup>.

The cumulative effect of these exceptions may be considerable, and within their narrow grooves, specific exemptions can cut deep uses that are important to contemporary creators<sup>335</sup>

Because it is a ‘*closed*’ list of specific exceptions, the designated limitations and exceptions is considered static, tend to age poorly with social and technological change and often fails to reach some socially desirable uses of works. Another problem, especially in a region like Europe, is that there are the different interpretations to similar exceptions between the countries, like a more narrowly view adopted in France opposed to a broader one used in Netherlands<sup>336</sup>.

### **2.5.1. European Union**

The European Union has notably tried to harmonize the copyright and authors rights by implementing many directives and creating jurisprudence applicable to all countries. The members states have to implement all dispositions regarding copyright and authors rights into their national law, but it also permits somewhat different forms of applications in order to adapt such dispositions into each jurisdiction – including UK fair dealing and other countries with the designated limitations and exceptions.

#### **2.5.1.1. Designated Limitations and Exceptions Legislations in Europe**

Although is not an European Union legislation – which is clear because of the date of creation –, the French National Convention 1793<sup>337</sup> is important because it established the

---

<sup>334</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 181

<sup>335</sup> Ibidem. p. 181/182

<sup>336</sup> Idem

<sup>337</sup> FRANCE. Décret de la Convention Nationale du dix-neuf juillet 1793 relatif aux droits de propriété des Auteurs d'écrits en tout genre, des Compositeurs de musique, des Peintres et des Dessinateurs (avec le rapport de Lakanal).

property in literary and artistic works for the first time as recognized today as the ‘*droit d’auteur*’ or the French authors rights.

The decree does not have many provisions (only seven) and covers only the authors to writings of all kinds, composers of music, painters and illustrators. But it was the main legislation on the subject that lasted throughout the nineteenth century and impacted on the recognition of the moral rights, a consensus reached internationally after many controversies<sup>338</sup>.

Many European writers, including the famous French novelist Victor Hugo, claimed back in the 1880s the moral character of literary property, insisting on the social consequences of ownership while having exclusive rights to control production. The proposals lead to the signature of the Berne Convention in 1886 by various European nations<sup>339</sup>.

Overall, the authors rights protection back then was influenced by Victor Hugo and his supporters to be taken as a primary contribution to the life of nations, insisting on a subordination to public needs. Essentially, the allegation was that the authors needed to be rewarded in order for the culture to survive<sup>340</sup>.

Throughout the last century, the Berne Convention and its revisions had a major impact on the copyright and authors rights laws in Europe. So, the application of the L&E was the three-step test rule with the tendency of exceptions to be narrowly construed, without giving courts much space to expand the rights<sup>341</sup>.

The European Union, similarly to the US with the Digital Millennium Copyright Act, enacted the Information Society Directive of 2001<sup>342</sup> to conform with the WIPO treaty requirements.

---

<sup>338</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 34

<sup>339</sup> Ibidem. p. 50

<sup>340</sup> Idem

<sup>341</sup> REICHMAN, Jerome H. The Limits of “Limitations and Exceptions” in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 295

<sup>342</sup> EUROPEAN UNION. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society .

As far as the designated limitations and exceptions is concerned, the directive in Article 5(3) creates a list of exceptions to the reproduction rights and to the right of communication of the work to the public, which includes: illustration for teaching or scientific research; uses for the benefit of people with a disability; reproduction on current economic, political or religious topics; quotations for purposes such as criticism or review; purposes of public security; political speeches; use during religious celebrations or official celebrations; caricature, parody or pastiche; etc<sup>343</sup>.

The regional level effort to harmonize limitations and exceptions in Europe with the InfoSoc Directive was an enactment to implement the 1996 WCT and the 1994 TRIPS. It created a “deliberately exhaustive list of permissible exceptions and limitations to the exclusive rights of authors that European Union member states may enact at their discretion”<sup>344</sup>. In other words, each country could establish copyright and authors rights exceptions shown in the Article 5 of the InfoSoc Directive, but was not forced to comply with it all, which resulted in different copyright and authors rights structures and/or interpretations by the member states.

The most recent EU directive on copyright and authors rights matter is the Directive on Copyright in the Digital Single Market of 2019<sup>345</sup> that intends to further harmonize the EU applicable law related to digital and cross-border uses of protected content. In contemplation of the L&E, the directive addressed specially the text and data mining; teaching activities and preservation of cultural heritage.

All three exceptions were arranged in the directive Title II – Measures to adapt exceptions and limitations to the digital and cross-border environment. The articles 3 and 4 are related to text and data mining for the purposes of scientific research and for reproductions and extractions of lawfully accessible works. The article 5 is for teaching activities that allows non-commercial illustration for teaching on the condition that it takes place under the responsibility of an educational establishment and is accompanied by the indication of the

---

<sup>343</sup> Idem.

<sup>344</sup> REICHMAN and OKEDIJI, 2012, p. 1381

<sup>345</sup> EUROPEAN UNION. Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

source. Lastly, the article 6 on preservation of cultural heritage authorizes cultural heritage institutions to make copies for purposes of preservation<sup>346</sup>.

### 2.5.1.2. Courts Decisions in Europe

Considered as one of the most important cases in copyright and authors rights, the Infopaq Case<sup>347</sup> consisted in the European Court decision on a case that involved storing an extraction of a protected work comprising 11 words and printing out that extract. It came before the adoption of the Directive on Copyright in the Digital Single Market of 2019, but applied the InfoSoc Directive, which gave important guidelines to the interpretation of L&E in the EU<sup>348</sup>.

The European Court decided that, because the L&E derogate from general granting rights principles in the InfoSoc Directive, they must be strictly interpreted. The court based this statement on the article 5(5) of the directive that replicates the three-step test rule: applied in certain special cases which do not conflict with a normal exploitation and do not unreasonably prejudice the legitimate interests of rightsholders<sup>349</sup>.

Many countries in the continental European jurisdictions already applied this narrow interpretation of the principle regarding the L&E as it is the application of the designated limitations and exceptions approach. However, this restrictive perception is not the intended scope of the three-step test rule and it restrains the courts ability to face with flexibility the economic and technological changes<sup>350</sup>.

The European Court decision also shortened the possibility of having various EU members that use different L&E approaches as it diminished the courts flexibility – important asset to the other doctrines. UK, for example, was part of the EU by the time of the decision and

---

<sup>346</sup> Idem.

<sup>347</sup> EUROPEAN UNION. European Union Court Forth Chamber. Infopaq International A/S v Danske Dagblades Forening. Case C-5/08. Judgment of the Court (Fourth Chamber) of 16 July 2009.

<sup>348</sup> GRIFFITHS, Jonathan. Infopaq, BSA and the 'Europeanisation' of United Kingdom Copyright Law. *Media & Arts Law Review*, v. 16, 2011. p. 4

<sup>349</sup> Idem.

<sup>350</sup> Idem.

had a divergent practice as the fair dealing approach granted the courts a more liberal court application of the L&E and the three-step test rule<sup>351</sup>.

Besides the Infopaq Case, many EU members struggled to use the designated limitations and exceptions approach in a flexible way to allow certain uses in order to protect the general social, cultural and economic interests<sup>352</sup>. Hugenholtz and Senftleben utilized other cases to illustrate some courts attempts to apply a less restricted interpretation to the list of exceptions in which uses, that would normally be considered outside the copyright and authors rights system, were recognized as acceptable: Dior v. Evora; Germania 3; Scientology v. XS4ALL; Google Bildersuche; and Saif v. Google France<sup>353</sup>.

### 2.5.1.3. European L&E versus other approaches

By examining the copyright and authors rights system evolution, it is possible to detect a divergent approach on the authors role status. The civil law tradition countries put authors in a central place in the production process by granting authors rights as a natural right to the creators. Unlike them, the common law tradition countries like US and UK did not believe in it and justified the copyright as public utility<sup>354</sup>. These led to discrepant fundamentals that impacted the L&E in each country and made it difficult to promote the international harmonization, as the EU normally has strict standards compared to fair use or fair dealing more opened approach.

In the process of the lawmaking by the legislature, the vague norms allow more fairly justice in concrete cases but reduce legal security, while the rules better inform citizens of their rights and obligations upfront, having a legal position without needing to resort to the courts. Moreover, open norms delegate to the courts the necessary democratic checks and balances in an inexpensive lawmaking way, but shifts the cost to the justice apparatus<sup>355</sup>.

---

<sup>351</sup> Idem.

<sup>352</sup> HUGENHOLTZ, P. Bernt; SENFTLEBEN, Martin. Fair use in Europe: in search of flexibilities. *Amsterdam Law School Research Paper*, n. 2012-39, 2012. p. 10

<sup>353</sup> Ibidem. p. 10/12

<sup>354</sup> ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016. p. 35

<sup>355</sup> HUGENHOLTZ, P. Bernt; SENFTLEBEN, Martin. Fair use in Europe: in search of flexibilities. *Amsterdam Law School Research Paper*, n. 2012-39, 2012. p. 8

Overall, there is a tradeoff between approving open norms or more restrictive rules, depending on the subject and the legislation intention. While authors rights rely on natural right, there is no intention to leave flexibility to courts; on the other hand, copyright's public utility is difficult to conceptualize leaving the court to balance the rights. This led to the distant court adaptability to the application of the L&E between some countries in continental Europe and other jurisdictions.

#### 2.5.1.4. Proposing Flexibilities to European L&E

The EU designated limitations and exceptions has traditionally not accommodated the technological advances – as proved by the enactment of the InfoSoc Directive of 2001 and the Directive and the Directive on Copyright in the Digital Single Market of 2019. However, it may not be enough in the face of rapid technological developments<sup>356</sup>.

With the narrow interpretation methodology on the EU designated limitations and exceptions, there is a risk of being overwhelmed and discredited, for example, “when faced with the needs of digital science to scrutinize and analyze all published research results pertinent to any major scientific inquiry”<sup>357</sup>. Nonetheless, the legal tradition of the authors rights does not prevent a more flexible regime<sup>358</sup>.

From the Max Planck Institute, the proposition called *Declaration: A Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law*<sup>359</sup> is an attempt from many experts around Europe and the world to contribute to the discussion of the EU restrictive approach to the three-step test rule. In this document, the signatories perceived a wrong restrictive interpretation of the three-step test rule as it does not prevent introducing open ended L&E and courts to apply existing statutory L&E in similar factual circumstances and creating further L&E.

---

<sup>356</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 704

<sup>357</sup> REICHMAN, Jerome H. The Limits of “Limitations and Exceptions” in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 299

<sup>358</sup> HUGENHOLTZ, P. Bernt; SENFTLEBEN, Martin. Fair use in Europe: in search of flexibilities. *Amsterdam Law School Research Paper*, n. 2012-39, 2012. p. 29

<sup>359</sup> GEIGER, Christophe; HILTY, Reto; et al. Declaration: A Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law. *International Review of Intellectual Property and Competition Law*, v. 707, 2008..

Hugenholtz and Senftleben suggest that there is an opportunity to reintroduce a measure of flexibility in the national copyright and authors rights systems of Europe. Historically, the civil law jurisdictions of Europe particularly lost the L&E flexibility. With the self-evident highly dynamic and unpredictable change in the information society and in view of the complex process of law making in the EU, a more flexible copyright and authors rights norms is needed to both EU and at the national level<sup>360</sup>.

With the policy space that currently exists in EU law, EU members can introduce flexible copyright and authors rights norms and it also may help making the EU level more flexible having a new national and internal copyright or authors rights development and practice<sup>361</sup>. After all, EU searches for L&E that guarantee a level of legal security and fairness by having precise norms with sufficient flexibility to allow a fair outcome in hard and/or unpredictable cases<sup>362</sup>.

In conclusion, EU copyright and authors rights has “considerably more room for flexibilities than its closed list of permitted limitations and exceptions *prima facie* suggests”. Either because the EU provisions are more “worded prototypes rather than precisely circumscribed exceptions” or because there is an ample unregulated space in the right of adaption that is still unharmonized<sup>363</sup>.

### 2.5.2. Brazil

Brazil is a country influenced by the European civil law traditions which adopted the authors rights tradition, which led to similar provisions on the L&E as the EU. It is a signatory country to the Berne Convention, Rome Convention and the TRIPS Agreement. Cabral suggests that Brazilian designated limitations and exceptions approach has a social and cultural objective that allows a balance between the private and public interests in the creation of a work<sup>364</sup>.

---

<sup>360</sup> HUGENHOLTZ, P. Bernt; SENFTLEBEN, Martin. Fair use in Europe: in search of flexibilities. *Amsterdam Law School Research Paper*, n. 2012-39, 2012. p. 2

<sup>361</sup> *Idem*

<sup>362</sup> *Ibidem*. p. 9

<sup>363</sup> *Ibidem*. p. 29

<sup>364</sup> CABRAL, Plínio. *A nova lei de direitos autorais: comentários*. São Paulo: Harbra, 2003. p. 70

### 2.5.2.1. Designated Limitations and Exceptions Legislations in Brazil

The right of intellectual property appeared in the Brazilian system already in the first Imperial Constitution of 1824<sup>365</sup>, when it was treated as a fundamental guarantee, as provided in art. 179, item XXVI. The concept has evolved until the current Constitution of the Federative Republic of Brazil of 1988<sup>366</sup>, concerning that the intellectual property right needs to fulfill its social function in the terms of art. 5th, item XXIII, and again is treated as a fundamental guarantee under the art. 5th, item XXIX.

The specific provision regarding the Brazilian system is the Authors Right Law n° 9.610 of 1998 (LDA)<sup>367</sup>. As the most recent amended, updated and consolidated legislation on authors rights in Brazil, it regulates the protected literary and artistic works and also their limitations. In chapter IV (of limitations to the authors rights) between articles 46 to 48, there is a list of designated limitations and exceptions that describes what is not considered an author rights infringement: the use of protected works in news or information articles; public speeches; portraits or visual works made for hire; reproduction of works for the visually impaired; private copies (nonprofit reproduction of small excerpts); quotations; students' lecture notes; exclusive use for customer demonstration; nonprofit theatrical and musical performance when performed in the family home or, for educational purposes only, in educational establishments; to make judicial or administrative evidence; reproduction of small excerpts within the context of a larger work; paraphrases and parodies that are not true reproductions of the original work or imply discredit to the original work; and works permanently located in public places.

Regarding the above-mentioned Brazilian list of designated limitations and exceptions, Guimarães states that the line between legality and illegality is thin. A case-by-case analysis is fundamental and indispensable to consider an infringement in authors rights<sup>368</sup>.

---

<sup>365</sup> BRAZIL. Constituição Política do Império do Brasil de 25 de Março de 1824. Rio de Janeiro, 1824.

<sup>366</sup> BRAZIL. Constituição da República Federativa do Brasil de 5 de Outubro de 1988. Brasília, 1988.

<sup>367</sup> BRAZIL. Lei n° 9.610 de 19 de Fevereiro de 1998. Altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências. Brasília, 1998.

<sup>368</sup> GUIMARÃES, Jorge Alfredo. *Introdução ao direito de autor*. CBC, 2006. p. 22

### 2.5.2.2. Brazilian Federal Justice Council Legal Understanding

A recent and very important legal understanding was made by the Brazilian Federal Justice Council. Between the 34 new legal understandings in June 7, 2019, the last approved Legal Understanding 115<sup>369</sup> have tackled the interpretation of the Brazilian list of designated limitations and exceptions.

According to the Federal Justice Council, the authors rights limitations set forth in articles 46, 47 and 48 of the LDA must be interpreted extensively in accordance with the fundamental rights and social function of property set forth in art. 5, XXIII of the Brazilian Constitution of 1988<sup>370</sup>.

By promoting this new legal understanding, the Brazilian Federal Justice Council indicates a court tendency to a more open-ended regime of the BR designated limitations and exceptions. It is an important step towards a more flexible adaptive view of the legislation on authors rights to be in compass with the new technological and economic changes.

### 2.5.2.3. Reform Proposals in Brazil

In 2019, the Brazilian Ministry of Citizenship opened a public consultation on reforming the Authors Right Law n° 9.610 of 1998<sup>371</sup>. The goal is to ensure that the authors rights system is working properly towards an economic, social, cultural and legal conducive background not only to creators and entrepreneurs, but also to the society<sup>372</sup>.

In the consultation document, there were some proposals regarding the BR designated limitations and exceptions to ask the society if some propositions should be included in the eventuality of a new legislative proposal. The following themes were cited: limitations and exceptions for museums, libraries, archives and educational and research institutions;

---

<sup>369</sup> BRAZIL. III Jornada de Direito Comercial do Conselho da Justiça Federal, Centro de Estudos Judiciários, de 7 de Junho de 2019.

<sup>370</sup> BRAZIL. Constituição da República Federativa do Brasil de 5 de Outubro de 1988. Brasília, 1988.

<sup>371</sup> BRAZIL. Lei n° 9.610 de 19 de Fevereiro de 1998. Altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências. Brasília, 1998.

<sup>372</sup> ROMEO, Bruno. Ministério da Cidadania abre consulta pública sobre reforma da Lei de Direitos Autorais. Assessoria de Comunicação, Secretaria Especial de Cultura, Ministério da Cidadania, 2019.

limitations and exceptions for persons with disabilities; and also if Brazil should join or not the WIPO Internet Treaties (WCT and WPPT)<sup>373</sup> and, if so, do it with potential reservations.

A 2012 pending draft bill in the Brazilian Congress also tries to engage on a more flexible approach to the three-step test rule. The legislative proposal PL n° 3.133 of 2012<sup>374</sup> would amend Authors Right Law n° 9.610 of 1998 to include in the article 46 of the BR designated limitations and exceptions new possible uses to the list, but also changes the general provision to dismiss prior and express authorization of the rightsholder and the need remuneration by the user when one of the uses of the list occur. One recent suggestion of new legislative proposal by the PL n° 5.674 of 2019<sup>375</sup> is to permit the reproduction of works of art and commercial exploitation of photographs, miniatures or props of monuments or buildings, when the purpose is to promote tourism.

There are other legislation proposals in Brazil that interconnect the creators and users' universes. If approved, these interpretative tools are considered to have the power that "could bridge the divide between the '*fair use*' and the '*designated exception*' approaches generally". The reform would be an experimental synthesis worth testing in practice to better understand if this new approach model would work when executed<sup>376</sup>.

Moreover, the pending Brazilian reforms would go well beyond "fair use" in a concerted effort to exploit the opportunities for a digitally interconnected universe of creators and users. Besides emphasizing the idea-expression dichotomy, along with the flexible fair-use regime described above, these proposals envision: An expanded private use exception; A regime supporting interoperability and portability; Broad exceptions for libraries, science, and education; Explicit measures to prohibit the privatization of public domain works; A liability rule for orphan works; A regime of international exhaustion; Express measures prohibiting Technical Protection Measures from overriding uses permitted by law; Regulatory measures enabling peer-to-peer file sharing in the public interest; And measures limiting the liability of internet service providers.<sup>377</sup>

---

<sup>373</sup> BRAZIL. Consulta pública da Lei de Direitos Autorais. 2019.

<sup>374</sup> BRAZIL. Projeto de Lei (PL) n° 3.133 de 07 de Fevereiro de 2012. Altera a Lei n° 9.610, de 19 de fevereiro de 1998, que "altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências".

<sup>375</sup> BRAZIL. Projeto de Lei (PL) n° 5.674 de 24 de Outubro de 2019. Altera a Lei n° 9.610, de 19 de fevereiro de 1998, que "altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências".

<sup>376</sup> REICHMAN, Jerome H. The Limits of "Limitations and Exceptions" in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 301

<sup>377</sup> Idem

Although there are promising proposals, the reforms on the subject are in discussion for many years in the Brazilian Congress with potential lobby for not passing any flexibility reform in the law. Still, if enacted by the law, it would be an important example to developed and developing countries on how to design a more digital friendly copyright and authors rights system<sup>378</sup>.

Additionally, the Brazilian courts have an important role in the BR designated limitations and exceptions. Examples like the Brazilian Federal Justice Council Legal Understanding 115 give power for a more open jurisprudential interpretation of the BR L&E without any specific statutory authorization, which “echoes the American history of exceptions, in which judges invented fair use”<sup>379</sup>

Overall, the Brazilian infra-constitutional order regulates the institute of authors rights and has an institutional structure that should be able to stimulate the creation of innovations and, consequently, provoke economic development. But the rules set for the authors rights has limitations on the rights of their owners, in particular regarding the access by other individuals<sup>380</sup>.

## 2.6. Limitations and Exceptions: Final Evaluations

Primarily, limitations and exceptions norms and interpretations come from two possible system of regulation: Copyright and Authors Rights. These bases associated with economic rights and moral rights, respectively, have different intentions of prior protection. If the economic rights are more important, the main goal of a L&E should be evaluating the use as commercial nature/nonprofit and the effect upon potential market or value, while the moral rights should be more careful on the nature and the amount/substantiality of the use. Nevertheless, all conditions are necessary to construct the entire system regarding L&E, which make the copyright or authors rights not much relevant to decide the most suitable approach of L&E.

---

<sup>378</sup> Ibidem. p. 302

<sup>379</sup> AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018. p. 182/183

<sup>380</sup> LARA, Fabiano Teodoro. *Propriedade intelectual: uma abordagem pela análise econômica do Direito*. DelRey Editora, 2010. p. 35

On the contrary, the civil law and common law traditions have different rulemaking and rapport with the courts in the law structure that influence the application of a L&E doctrine. As common law countries have a more judicial appreciation *ad hoc*, the L&E approach can depend higher on the courts to have a more assertive decision based on the specific conditions of the cases, which seems suitable to have a fair use approach. On the other hand, the civil law tradition concern with the predictability foster a more complete legislation trying to cover as many outcomes as possible, which leads to a designated limitations and exceptions approach. However, as already stated in this study, both a level of minimum predictability and judicial appreciation *ad hoc* is important to balance the two necessities of the L&E system.

International provisions on the L&E of the copyright and authors rights systems have always had a major challenge to harmonize the different countries systems and needs. The new technologies pressure even further on different aspects the IP agreements signed in the international treaties. The current L&E configuration internationally does not prevent variations of L&E approaches in the national laws. The L&E on treaties can be – and should be – interpret with openness and flexibility so that a minimum harmonization is achieved but also allowing the countries to adapt to the convenient L&E approach in their domestic law according to the economic, social and cultural context.

When comparing the three L&E approaches – fair use, fair dealing or designated limitations and exceptions –, it is possible to conclude that neither doctrine is perfect. The US fair use has the four factors to analyze in a case-by-case approach in a more flexible way (without restrictions to specific uses), but relies much on the courts, not having an ideal predictability and imposing possible high judicial costs to users – ultimately discouraging new uses. On the other hand, designated limitations and exceptions concentrate on a list of L&E, but it does not give flexibility for courts in special cases with a public interest of the use, having to strictly comply to the legislation. In the end, fair dealing has a mix concept of the other two approaches, but how developed the legislation is and how the courts apply the fair dealing can have different effects on balancing the L&E on each country.

Generally speaking, it is impossible to elect a better doctrine. Between fair use, fair dealing or designated limitations and exceptions, they all have strengths and flaws. Even further, each approach can be shaped and have different interpretation that can lead into misconceiving the concepts of the L&E doctrine when considering the application of the

approach in practice. For example, the fair use flexible legislation can be strictly interpreted by the court, while fair dealing can have examples in the legislation and also give more rights to users in the court's application of L&E. It all comes down to the user's and judge's perceptions of the use of the work combined with the legislation provisions.

### 3. FINAL CONSIDERATIONS

So, is there a better approach between Fair Use, Fair Dealing, and Designated Limitations and Exceptions? This study indicated that each doctrine has peculiarities and, overall, what really differ is how each national law applies the copyright and authors rights system and their limitations. What seems to matter today is how to best include the public/users interest to support the country economic and cultural needs.

This means that L&E should adequately address the structural defects of copyright and authors rights laws and include the urges of cultural interest in the digital technology world<sup>381</sup>. Even if the law cannot foresee every situation in advance<sup>382</sup>, copyright and authors rights need to keep pace with the needs and opportunities of digital network and reconnect to the foundational dimensions of human creativity<sup>383</sup>. One example that faced the copyright and authors rights limits was Big Data, as it deals with different works from databases and is an important tool for scientific research today<sup>384</sup>.

One positive aspect originated from the new technologies to the copyright and authors rights system is the potential reduction of transactional costs as the authors can connect directly with potential purchasers without traditional intermediaries<sup>385</sup>. It means that copyright and authors rights laws have an opportunity to accommodate authors interests as they evolve

---

<sup>381</sup> REICHMAN, Jerome H. The Limits of "Limitations and Exceptions" in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 313

<sup>382</sup> FRANKEL, Susy; GERVAIS, Daniel. Evolution and equilibrium: an introduction. In: *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014. p. 3

<sup>383</sup> REICHMAN, Jerome H. The Limits of "Limitations and Exceptions" in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 314

<sup>384</sup> Ibidem. p. 298

<sup>385</sup> Idem

over time and not only the commercial interest of intermediaries as they may no longer contribute to the value of the author's work<sup>386</sup>.

All these copyright and authors rights system challenges demand a specific answer depending on each country. The pressure to harmonize the copyright and authors rights laws often compel jurisdictions to strength the exclusive private rights, which can counteract against the welfare of developing and least-developed countries<sup>387</sup>.

As this study has examined, each country has their own law structure, institutions and application of copyright and authors rights L&E. It is clear that there is no '*one size fits all*' when dealing with copyright and authors rights laws, but the L&E can be an important tool to help shape the country interest accordingly to the economic and cultural context.

This is especially important to help developing countries stimulate local creativity<sup>388</sup>, as the international copyright and authors rights laws do not create enough foundation or flexibility in the L&E for specific local contexts<sup>389</sup>. Leading industrialized countries already has access to cultural goods which built wiliness to strict copyright and authors rights protection and less rely on L&E today, though is not the case for developing countries. In order to accomplish, there is a pathway from access to knowledge to economic development, and this "was precisely the reason for the United States' long-standing abstention from Berne membership"<sup>390</sup>.

Okediji suggests a new set of international L&E that must address different kinds of uses, larger scale of use and the cost of bulk access<sup>391</sup> in order to reach the development copyright and authors rights law goal of facilitating the production of knowledge and access to information and education, as well as assist in the formation of human capital<sup>392</sup>. Her main purposes of international copyright and authors rights law redesign include: strict

---

<sup>386</sup> Ibidem. p. 308

<sup>387</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 736

<sup>388</sup> OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper, n. 15*, 2006. p. xii

<sup>389</sup> OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018. p. 693

<sup>390</sup> Ibidem. p. 704

<sup>391</sup> Ibidem. p. 716

<sup>392</sup> Ibidem. p. 721

enforcement of copyright's boundaries in a local context; harmonization of the education exception; maximizing use of authorial works for human capital formation<sup>393</sup>.

In addition, international copyright and authors rights law needs to permit flexible standard and rule-like of L&E, and when it does not work, to be supplied by the international framework. By doing so, it endorses the multiple faceted types of countries, especially those developing countries with human capital and resource constraints<sup>394</sup>.

Eventually, the goal is for countries to retain sufficient domestic power—with explicit international support—to craft the best balance between institutions and cultural endowments under their domestic copyright laws. What seems clear, however, is that a generalized, “cut and paste” approach – whether to copyright entitlements or to L&Es –cannot adequately support the use of copyright as part of an effective development strategy. Mechanically plugging L&Es into national copyright laws will not achieve sufficient gains in development progress. Allowing for other factors, especially differences in modes of economic organization and whether a specific developing country has restructured its institutions differently from what existed under colonial conditions, will determine how well a country can meaningfully develop L&Es to pursue specific development strategies.<sup>395</sup>

There are also some new international L&E that should be considered mandatory because of the positive externality generated by the access and use of a copyright and authors rights work. This statement is related to mandatory L&Es for cultural institutions, especially for developing and least-developed countries, which include L&E for libraries and archives, education, and persons with disabilities (like the visually impaired persons and persons with print disabilities)<sup>396</sup>.

Further, Olwan and Fitzgerald suggest for developing countries to tailor their IP system to their needs. As practical measures, they propose: (1) educate policymakers and the public on IP and development issues; revise IP laws and adopt a pro development perspective; consider seriously alternative approaches to IP (like Open Source and Creative Commons);

---

<sup>393</sup> See more on Ibidem. p. 724 to 731

<sup>394</sup> Ibidem. p. 730

<sup>395</sup> Idem

<sup>396</sup> Ibidem. p. 731

etc. In the end, they also highlight the importance of taking into account the country's stage of economic development to draft the IP law, particularly in developing countries<sup>397</sup>.

Essentially, all copyright and authors rights work ultimately ends in the public domain in order to promote to other authors the access to culture and knowledge. However, the sooner the user has access to a work without restrains, more works are likely to flourish<sup>398</sup>. This meaningful statement is why, in some cases, it is essential to have L&E conducive to balance the economic interest of the creator with the usually mitigated public interest on cultural and informational access.

In short, changes in technology have challenged the copyright and authors rights balance as authors and rightsholders intent to protect the private economic interests while users seek to have access to culture and knowledge. Considering the IP protection justifications and the social function of the property, the copyright and authors rights require a new interpretation over the limitations and exceptions.

Either using alternative licenses or any of the copyright and authors rights L&E approaches – Fair Use, Fair Dealing, or Designated Limitations and Exceptions – it is crucial that international copyright and authors rights law must allow each country to shape the IP law with flexibility concerning the specific local context. Despite institutions strength or stage of development, this is especially important to foster cultural flourishing and thereupon development and innovation to pluralist societies.

---

<sup>397</sup> See more on OLWAN. Rami; FITZGERALD, Brian. IP and Development: A Road Map for Developing Countries in the Twenty-First Century. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015. p. 89 to 95

<sup>398</sup> REICHMAN, Jerome H. The Limits of "Limitations and Exceptions" in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017. p. 312

## REFERENCES

- ATKINSON, Benedict; FITZGERALD, Brian. *Short History of Copyright*. Springer International Pu, 2016.
- AUFDERHEIDE, Patricia; JASZI, Peter. *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press, 2018.
- AUSTRALIA. Commonwealth of Australia Constitution Act of 1900. An Act to constitute the Commonwealth of Australia. Available at: <http://www.legislation.gov.uk/ukpga/Vict/63-64/12/contents/enacted>. Access on: January 09, 2020.
- AUSTRALIA. Copyright Act of 1968. An Act relating to copyright and the protection of certain performances, and for other purposes. Available at: <https://www.legislation.gov.au/Details/C2017C00180>. Access on: January 09, 2020.
- AUSTRALIA. Copyright and the Digital Economy Discussion Paper from the Australian Law Reform Commission (ALRC) of June 2013. Available at: <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-dp-79/>. Access on: January 09, 2020.
- AUSTRALIA. Copyright and the Digital Economy Final Report from the Australian Law Reform Commission (ALRC) of November 2013. Available at: <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/>. Access on: January 09, 2020.
- BARKER, George Robert. Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age. In: *2013 Annual Congress of the Society for Economic Research on Copyright Issues (SERCI) held in MINES ParisTech, Paris (France)*. 2013.
- BELL, Abraham; PARCHOMOVSKY, Gideon. The Dual-Grant Theory of Fair Use. *U. Chi. L. Rev.*, v. 83, p. 1051, 2016.
- BERNE Convention for the Protection of Literary and Artistic Works. September 9, 1886, and amended on September 28, 1979. Available at: [https://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](https://www.wipo.int/treaties/en/text.jsp?file_id=283698). Access on: January 09, 2020.
- BERNE Convention for the Protection of Literary and Artistic Works Contracting Parties. Available at: [https://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15). Access on: January 09, 2020.
- BRAZIL. Constituição da República Federativa do Brasil de 5 de Outubro de 1988. Brasília, 1988. Available at: [http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm). Access on: January 09, 2020.
- BRAZIL. Constituição Política do Império do Brasil de 25 de Março de 1824. Rio de Janeiro, 1824. Available at: [http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao24.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao24.htm). Access on: January 09, 2020.

BRAZIL. Consulta pública da Lei de Direitos Autorais. 2019. Application form available at: <https://www.museus.gov.br/wp-content/uploads/2019/07/Formul%C3%A1rio-de-consulta-p%C3%BAblica-Direitos-Autorais.docm>. Access on: January 09, 2020.

BRAZIL. III Jornada de Direito Comercial do Conselho da Justiça Federal, Centro de Estudos Judiciários, de 7 de Junho de 2019. Available at: [https://www.cjf.jus.br/cjf/noticias/2019/06-junho/iii-jornada-de-direito-comercial-e-encerrada-no-cjf-com-aprovacao-de-enunciados/copy\\_of\\_EnunciadosaprovadosIIJDCREVISADOS004.pdf/view](https://www.cjf.jus.br/cjf/noticias/2019/06-junho/iii-jornada-de-direito-comercial-e-encerrada-no-cjf-com-aprovacao-de-enunciados/copy_of_EnunciadosaprovadosIIJDCREVISADOS004.pdf/view). Access on: January 09, 2020.

BRAZIL. Lei nº 9.610 de 19 de Fevereiro de 1998. Altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências. Brasília, 1998. Available at: [http://www.planalto.gov.br/ccivil\\_03/leis/19610.htm](http://www.planalto.gov.br/ccivil_03/leis/19610.htm). Access on: January 09, 2020.

BRAZIL. Projeto de Lei (PL) nº 3.133 de 07 de Fevereiro de 2012. Altera a Lei nº 9.610, de 19 de fevereiro de 1998, que "altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências". Available at: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=534039>. Access on: January 09, 2020.

BRAZIL. Projeto de Lei (PL) nº 5.674 de 24 de Outubro de 2019. Altera a Lei nº 9.610, de 19 de fevereiro de 1998, que "altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências". Available at: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2226929>. Access on: January 09, 2020.

BRENNAN, Timothy J. 'Fair Use' as policy instrument. In: TAKEYAMA, Lisa N.; GORDON, Wendy J.; TOWSE, Ruth. *Developments in the economics of copyright*. Edward Elgar Publishing, 2005.

CABRAL, Plínio. *A nova lei de direitos autorais: comentários*. São Paulo: Harbra, 2003.

CANADA. Canada Supreme Court. CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2125/index.do>. Access on: January 09, 2020.

CANADA. Copyright Act of 1921. This Act may be cited as The Copyright Act, 1921. Available at: <http://www.digital-copyright.ca/dcc-static/Copyright1921.pdf>. Access on: January 09, 2020.

CANADA. Copyright Modernization Act of 2012. An Act to amend the Copyright Act. Available at: [https://laws-lois.justice.gc.ca/eng/annualstatutes/2012\\_20/fulltext.html](https://laws-lois.justice.gc.ca/eng/annualstatutes/2012_20/fulltext.html). Access on: January 09, 2020.

CASO, Roberto. Il diritto d'autore accademico nel tempo dei numeri e delle metriche (Academic Copyright in the Age of Numbers and Metrics). *Trento Law and Technology Research Group Research Papers*, n. 36, 2018.

CASO, Roberto. La libertà accademica e il diritto di messa a disposizione del pubblico in Open Access (Academic Freedom and Right of Making Available in Open Access to the Public). *Trento Law and Technology Research Group Research Paper Series*, n. 37, 2019.

CASO, Roberto; GIOVANELLA, Federica. Balancing Copyright Law in the Digital Age- Comparative Perspectives: Preface. *Balancing Copyright Law in the Digital Age- Comparative Perspectives*, Springer, 2015.

CASO, Roberto; GUARDA, Paolo. Copyright Overprotection Versus Open Science: The Role of Free Trade Agreements. In: *Free Trade Agreements*. Springer, Singapore, 2019.

COTTER, Thomas F. Fair Use and Copyright Overenforcement. *Iowa L. Rev.*, v. 93, p. 1271, 2008.

CREATIVE COMMONS LICENSES. Creative Commons. Available at: <https://creativecommons.org/use-remix/cc-licenses/>. Access on: January 09, 2020.

D'AGOSTINO, Giuseppina. Healing Fair Dealing-A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use. *McGill Lj*, v. 53, p. 309, 2008.

DEPOORTER, Ben; PARISI, Francesco. Fair use and copyright protection: a price theory explanation. *International Review of Law and Economics*, v. 21, n. 4, p. 453-473, 2002.

DI VALENTINO, Lisa. *Comparison of Fair Dealing and Fair Use in Education Post-Pentology*, 2013. Work-in-progress presented at the IP Scholars Conference, Cardozo Law School, New York, 2013.

DNES, Antony. A Law and Economics Analysis of Fair Use Differences Comparing the US and UK. *Hargreaves Review of Intellectual Property and Growth*, HMSO: Intellectual Property Office, London, 2011.

EINHORN, Michael A. *Media, Technology, and Copyright: Integrating Law and Economics*. Edward Elgar Publishing, 2005.

EUROPEAN UNION. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>. Access on: January 09, 2020.

EUROPEAN UNION. Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. Available at: <https://eur-lex.europa.eu/eli/dir/2019/790/oj>. Access on: January 09, 2020.

EUROPEAN UNION. European Union Court Fourth Chamber. Infopaq International A/S v Danske Dagblades Forening. Case C-5/08. Judgment of the Court (Fourth Chamber) of 16 July 2009. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0005>. Access on: January 09, 2020.

FISHER, William W. *CopyrightX course lecture transcripts*. 2018. Available at: <http://marc.pelteret.co.za/copyrightx/CopyrightX - Lecture Transcripts Book.pdf>. Access on: January 09, 2020.

FRANCE. Décret de la Convention Nationale du dix-neuf juillet 1793 relatif aux droits de propriété des Auteurs d'écrits en tout genre, des Compositeurs de musique, des Peintres et

des Dessinateurs (avec le rapport de Lakanal). Available at: [http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_f\\_1793](http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_f_1793). Access on: January 09, 2020.

FRANKEL, Susy; GERVAIS, Daniel. Evolution and equilibrium: an introduction. In: *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014.

GEIGER, Christophe; HILTY, Reto; et al. Declaration: A Balanced Interpretation of the 'Three-Step Test' in Copyright Law. *International Review of Intellectual Property and Competition Law*, v. 707, 2008.

GEIST, Michael. The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017.

GINSBURG, Jane C. Exceptional authorship: the role of copyright exceptions in promoting creativity. In: FRANKEL, Susy; GERVAIS, Daniel (Ed.). *The Evolution and Equilibrium of Copyright in the Digital Age*. Cambridge University Press, 2014.

GORDON, Wendy J. Fair use as market failure: A structural and economic analysis of the Betamax case and its predecessors. *J. Copyright Soc'y USA*, v. 30, p. 253, 1982.

GORDON, Wendy J. Intellectual Property. *The Oxford Handbook of Legal Studies*, Peter Cane and Mark Tushnet, eds., Oxford University Press, pp. 617-646, October 2003.

GRIFFITHS, Jonathan. Infopaq, BSA and the 'Europeanisation' of United Kingdom Copyright Law. *Media & Arts Law Review*, v. 16, 2011.

GUIMARÃES, Jorge Alfredo. *Introdução ao direito de autor*. CBC, 2006.

HARRIS, Lesley Ellen. *Canadian Copyright Law*. John Wiley & Sons, 2013.

HUGENHOLTZ, P. Bernt; SENFTLEBEN, Martin. Fair use in Europe: in search of flexibilities. *Amsterdam Law School Research Paper*, n. 2012-39, 2012.

HUGHES, Justin. Fair use across time. *UCLA L. Rev.*, v. 50, p. 775, 2002.

HUGHES, Justin. Fair Use and Its Politics – at Home and Abroad. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017.

KATZ, Ariel. *Debunking the Fair Use Vs. Fair Dealing Myth: Have We Had Fair Use All Along?* 2018. Draft to the forthcoming Comparative Aspects of Limitations and Exceptions in Copyright Law, Shyam Balganes, Wee Loon Ng-Loy, Haochen Sun, eds., 2018.

KATZ, Ariel. Fair Use 2.0: The Rebirth of Fair Dealing in Canada. In: GEIST, Michael (Ed.). *The copyright pentalogy: How the Supreme Court of Canada shook the foundations of Canadian copyright law*. University of Ottawa Press, 2013.

LARA, Fabiano Teodoro. *Propriedade intelectual: uma abordagem pela análise econômica do Direito*. DelRey Editora, 2010.

LITMAN, Jessica. *Fetishizing Copies*. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017.

MILLS, Mary L. New technology and the limitations of copyright law: An argument for finding alternatives to copyright legislation in an era of rapid technological change. *Chi.- Kent L. Rev.*, v. 65, p. 307, 1989.

OKEDIJI, Ruth L. The Limits of International Copyright Exceptions for Developing Countries. *Vand. J. Ent. & Tech. L.*, v. 21, p. 689, 2018.

OKEDIJI, Ruth L.; PROSSER, William L. The International Copyright System: Limitations, Exceptions and the Public Interest. *Issue Paper*, n. 15, 2006.

OLIAR, Dotan; STERN, James Y. Right on Time: First Possession in Property and Intellectual Property. *BUL Rev.*, v. 99, p. 395, 2019.

OLWAN, Rami; FITZGERALD, Brian. IP and Development: A Road Map for Developing Countries in the Twenty-First Century. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015.

PAPPALARDO, Kylie and FITZGERALD, Brian. Copyright, Fair Use and the Australian Constitution. In: FITZGERALD, Brian; GILCHRIST, John (Ed.). *Copyright Perspectives: Past, Present and Prospect*. Springer, 2015.

REICHMAN, Jerome H. The Limits of “Limitations and Exceptions” in Copyright Law. In: OKEDIJI, Ruth L. (Ed.). *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017.

REICHMAN, Jerome H.; OKEDIJI, Ruth L. When copyright law and science collide: empowering digitally integrated research methods on a global scale. *Minnesota Law Review*, v. 96, n. 4, p. 1362, 2012.

RICKETSON, Sam. WIPO study on limitations and exceptions of copyright and related rights in the digital environment. *Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session. Geneva, June*, v. 203, 2003.

ROME Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. October 25, 1961. Available at: <https://wipolex.wipo.int/en/treaties/textdetails/12656>. Access on: January 09, 2020.

ROMEO, Bruno. Ministério da Cidadania abre consulta pública sobre reforma da Lei de Direitos Autorais. Assessoria de Comunicação, Secretaria Especial de Cultura, Ministério da Cidadania, 2019. Available at: <http://cultura.gov.br/ministerio-da-cidadania-abre-consulta-publica-sobre-reforma-da-lei-de-direitos-autorais/>. Access on: January 09, 2020.

SENFTLEBEN, Martin. *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law*. Kluwer Law International BV, 2004.

TPP Trans-Pacific Partnership Agreement. February 4, 2016. Available at: <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>. Access on: January 09, 2020.

TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights. April 15, 1994. Available at: [https://www.wipo.int/treaties/en/text.jsp?file\\_id=305907](https://www.wipo.int/treaties/en/text.jsp?file_id=305907). Access on: January 09, 2020.

UNDERSTANDING FAIR USE. University of Minnesota. 2019. Available at: <https://www.lib.umn.edu/copyright/fairuse>. Access on: January 09, 2020.

UNITED KINGDOM. Copyright Act of 1911. An Act to amend and consolidate the- Law relating to Copyright. Available at: <http://www.legislation.gov.uk/ukpga/Geo5/1-2/46/contents/enacted>. Access on: January 09, 2020.

UNITED KINGDOM. Copyright, Designs and Patents Act of 1988. An Act to restate the law of copyright, with amendments. Available at: <http://www.legislation.gov.uk/ukpga/1988/48/contents>. Access on: January 09, 2020.

UNITED KINGDOM. Statute of Anne of 1710. An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned. Available at: [https://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](https://avalon.law.yale.edu/18th_century/anne_1710.asp). Access on: January 09, 2020.

UNITED STATES OF AMERICA. Copyright Act of 1790. An Act for the encouragement of learning, by securing the copies of maps, Charts, and books, to the authors and proprietors of such copies, during the times therein mentioned. Available at: <https://www.copyright.gov/about/1790-copyright-act.html>. Access on: January 09, 2020.

UNITED STATES OF AMERICA. Copyright Act of 1831. An Act to amend the several acts respecting copyrights. Available at: [https://www.ellenwhite.info/copyright\\_law\\_us\\_1831.htm](https://www.ellenwhite.info/copyright_law_us_1831.htm). Access on: January 09, 2020.

UNITED STATES OF AMERICA. Copyright Act of 1976. An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes. Available at: <https://www.law.cornell.edu/uscode/text/17>. Access on: January 09, 2020.

UNITED STATES OF AMERICA. Digital Millennium Copyright Act of 1998. Available at: <https://www.copyright.gov/legislation/dmca.pdf>. Access on: January 09, 2020.

UNITED STATES OF AMERICA. United States Circuit Court for the District of Massachusetts. Folsom v. Marsh, 9. F.Cas. 342 (C.C.D. Mass. 1841). Available at: <https://h2o.law.harvard.edu/cases/5238>. Access on: January 09, 2020.

UNITED STATES OF AMERICA. United States Court of Appeals for the Sixth Circuit. Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994). Available at: <https://supreme.justia.com/cases/federal/us/510/569/>. Access on: January 09, 2020.

UNITED STATES OF AMERICA. United States Supreme Court. Sony Corporation of America v. Universal City Studios, 464 U.S. 417 (1984). Available at: <https://supreme.justia.com/cases/federal/us/464/417/>. Access on: January 09, 2020.

WCT WIPO Copyright Treaty. December 19, 1996. Available at: <https://wipolex.wipo.int/en/treaties/textdetails/12740>. Access on: January 09, 2020.

WPPT WIPO Performances and Phonograms Treaty. December 19, 1996. Available at: <https://wipolex.wipo.int/en/treaties/textdetails/12743>. Access on: January 09, 2020.