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COPYRIGHT & OPEN NORMS IN 7 JURISDICTIONS

Benefits, Challenges & Policy Recommendations

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Knowledge Rights 21

21st Century Access to Culture, Learning & Research

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KNOWLEDGE RIGHTS 21

Knowledge Rights 21 is focused on bringing about changes in legislation and practice across Europe that will strengthen the right of all to knowledge. It is built on a conviction that access to knowledge is essential for education, innovation and research, and that everyone in society should have the possibility to access and use information in both analogue and digital forms. This, in turn, will help Europe deliver on its economic, social, environmental and democratic potential.

NATIONAL EXPERTS FROM THE SEVEN JURISDICTIONS

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- Mr. Tomoaki Watanabe (Creative Commons, Japan)
- Ms. Victoria Owen (University of Toronto, Canada)

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GLOSSARY

Civil law: Legal system typically associated with legal traditions and practices where legal principles are mainly built on and explained by codes or statutory law. Nearly all countries in mainland Europe and some East Asian countries, including Japan and South Korea, are often categorised as civil law countries.

Common law: Legal system typically associated with legal traditions and practices where legal principles are mainly built on and explained by precedents or case law. The UK, the US (except Louisiana, but copyright legislation is at Federal level), New Zealand and Australia are examples of some common law countries.

Hybrid (mixed) legal system: Legal system that is built on the combination of common and civil law traditions and practices, as well as other branches of law, such as religious or local customary law. Countries often classified as having a hybrid (mixed) legal system include Canada, Cyprus, Israel, Malta, Singapore, Sri Lanka and South Africa.

Fair use: A form of copyright exception firstly introduced and developed in the US, which is similar to fair dealing but known to be more open-ended. It has been transplanted worldwide, including Israel, South Korea, Singapore, and Sri Lanka.

Fair dealing: A form of copyright exception firstly introduced and developed in the United Kingdom and often seen in common law jurisdictions that are part of the Commonwealth.

Open norm: A broad and non-exhaustive copyright exception, where its scope is flexibly determined and interpreted through a set of general criteria that is complemented at the level of the courts by a holistic assessment of legal, cultural, societal, and technological developments.

WIPO: The World Intellectual Property Organization, a UN agency based in Geneva, Switzerland whose member states negotiate international agreements in intellectual property (IP) and which administers the international IP treaties.

Berne Convention: The first international multilateral copyright agreement (adopted in 1886, latest amendment in 1971) that provides minimum standards for the protection of copyright works, the rights of authors and national treatment amongst member states. It also permits member states to choose to provide exceptions and limitations to copyright in certain cases, subject to a Three-Step Test (seebelow). The Berne provisions for exceptions and limitations are reflected in a number of subsequent WIPO administered treaties covering copyright and related (also known as neighbouring) rights, including inter alia the WCT (WIPO Copyright Treaty 1996) below, the WPPT (WIPO Performances and Phonograms Treaty 1996) and the Beijing Treaty on Audiovisual Performances 2012.

WCT: WIPO Copyright Treaty. The WCT is the first international agreement on copyright in the digital environment introduced in 1996 as a special agreement to the Berne Convention. WCT transposes the Berne Convention's protections for copyright works, authors' rights, etc. and introduces new rights such as the Communication to the Public Right. It also transposes the Berne optional exceptions and limitations to copyright as well as its Three-Step Test to apply both in the analogue and digital environments.

TRIPS Agreement: Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended 2017), introduced in 1994 by the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement). Any country wishing to be a WTO member state must comply with the TRIPS.

Three-Step Test: One of the key copyright principles enshrined in major international agreements, including the Berne Convention, the WCT, WPPT and the TRIPS Agreement. The Three-Step Test stipulates that (a) copyright exceptions and limitations shall be provided only for certain special cases; (b) they shall not conflict with a normal exploitation of the work; and (c) they shall not unreasonably prejudice the legitimate interests of the rightsholder.

FTA: Free Trade Agreement. Together with multilateral agreements, such as the Berne Convention, the WCT and the TRIPS Agreement, bilateral and multilateral FTAs have been playing a significant role to shape global copyright frameworks, particularly in relation to raising terms of copyright protection beyond the minimum set by international treaties. Examples include the US-Israel FTA, US-South Korea FTA, EU-Canada Comprehensive Economic and Trade Agreement (CETA), and the multilateral Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

National Experts: Participants of the verification workshops for this project from seven jurisdictions (Canada, Israel, Japan, South Korea, Singapore, Sri Lanka, and the US – alphabetical order), with expertise and experience in copyright law and open norms in the respective countries. National Experts encompass professionals from diverse backgrounds, including academics, practitioners, librarians, etc.

EXECUTIVE SUMMARY

This report explores the adoption, use and impact of open norms, as introduced in seven jurisdictions. In particular, the project's aim was to understand the following:

- motivations for the adoption of an open norm;
- how a country has transitioned to an open norm;
- the benefits and challenges of adopting an open norm;
- impact on technology, education, research and library sector as relevant;
- interpretation of open norms by the judiciary; and
- adoption and use of an open norm, during the COVID-19 pandemic.

To achieve this, the countries were divided into two categories (mixed and civil legal systems) before presenting them in alphabetical order within the report. As such, under mixed/hybrid legal systems, Canada, Israel, Singapore and Sri Lanka are explored whilst Japan and South Korea are considered as examples of civil jurisdictions. The report commences with an assessment of the USA's fair use doctrine before moving on to the other jurisdictions.

Applying various criteria for measuring success and through an analysis of the law as well as engagement with National Experts of the relevant countries, the authors demonstrate that introducing an open norm has several benefits. These include, for example, allowing a country's creative, educational and research sectors to progress effectively, and benefit from developments in technology in a timely manner. In particular, the report highlights the benefits experienced by countries such as Canada, Israel, Singapore and Japan, whilst the benefits of the USA's long-standing fair use doctrine have also been captured. Where there have been challenges, these have not been due to the introduction of an open norm *per se*, but, rather due to failings in drafting the legislation (Sri Lanka) or how it has been approached by the judiciary (South Korea). As such, it must be emphasised that the challenges faced by Sri Lanka and South Korea emerged not due to any incompatibility of open norms with a hybrid or civil law system, but rather due to the reasons as outlined above. These are clear lessons that can be learnt by countries wishing to adopt an open norm in the future. As highlighted in the conclusions, challenges associated with legal transplants can be mitigated by varying different strategies including producing guidelines, opinions from legal authorities and paving the way for further regulations as seen in countries such as Israel and South Korea.

Accordingly, the authors recommend the adoption of open norms in other countries around the world, including in European countries. As discussed in detail in this report, there is much to gain and little to lose by adopting open norms in copyright law. Rather than waiting for long periods for a piece of legislation to be introduced that addresses a single issue, open norms present the opportunity for countries to progress their education, research, creative and technological sectors in a timely fashion.

INTRODUCTION

Since the 18th century copyright law has been shaped by successive technological advancements. These advancements have taken into account the need to protect creators' rights on the one hand whilst opening up those works to users on the other, in order to permit access and use of such works.[1] This balance between the interests of rightsholders and users is an essential aspect of copyright, ensuring that activities relating to research, education, libraries, archives, criticism, review, quotation, parody and news reporting, to name a few, can progress without infringing the exclusive rights of rightsholders.[2]

Generally recognised as "defences" or "exceptions" to copyright law, they are also referred to as "limitations" in the US; "exceptions and limitations" in the European Union and at WIPO; "permitted acts" in the UK; and "acts not constituting infringements" in Australia, for example.

There are also different approaches to exceptions in copyright laws. In addition to a more detailed model, establishing specific permissible acts, there are also options which aim to provide more flexibility, including "fair dealing" and "fair use", which are explored in greater depth later in this report.

Within this context, the term "open norm" has been developed to refer to a "general, flexible exception" to copyright.[3] The benefit of an open norm or general flexible exception is that law can "respond quickly to new uses of copyrighted works in a time of rapid technological change, including uses that were not foreseen when the exception was developed, such as text and data mining".[4] Fair use, first introduced in the US and adopted in many other countries since then, is an effective example of an open norm. One of the key features of the US fair use exception, which can be described as a type of "open norm", is that it is an *open-ended limitation* to the exclusive rights granted to rightsholders *(emphasis added)*.[5] At the same time, an open norm can come about in many forms, and not necessarily in that of the fair use doctrine. As long as it paves the way for a general, flexible exception, whether it be open-ended or purpose-specific (i.e. Japan) it can be considered an open norm.[6]

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[1] Abbe Brown and others, Contemporary Intellectual Property: Law and Policy (5th ed.) (Oxford University Press; 2019), chapter 3, para. 2.27.
[2] Ibid., chapter 3, para. 2.24-2.25.
[3] Teresa Hackett, 'Time to Consider Open Norms (Seriously)' (Electronic Information for Libraries, 2015) at https://www.eifl.net/blogs/time-consider-open-norms-seriously See *also*, Brandon Butler, 'Fair Use and Blurred Lines Between Common Law and Civil Law Countries' (Electronic Information for Libraries, 2015) at https://www.eifl.net/blogs/fair-use-and-blurred-lines-between-common-law-and-civil-law-countries
[4] Teresa Hackett, supra n 3.
[5] Brandon Butler, supra n 3.
[6] *See for example*, open norms in Canada and Japan.

In addition, the approach taken by any one country can evolve. For example, certain countries that have adopted these exceptions or defences have modelled their exceptions on the UK "fair dealing" structure before transitioning to the US's broader "fair use" defence – in an attempt to provide more open-ended exceptions for their users.[7] Singapore and Sri Lanka, explored in this report, are examples of two countries which relied on the UK's fair dealing defence before transitioning to the US's fair use model.

Other countries have opted for more flexible structures that nonetheless do not resemble either the UK or the US models; Japan and Canada, explored in this report, are two such examples. Ultimately, whichever term or model is used, exceptions to copyright that are open and flexible are significant in balancing the interests of society, whilst protecting the rights of the copyright owner for a limited duration of time.

There are two key reasons why the adaptability of open norms is significantly more beneficial than specific exceptions.[8] They are:

(1) The time-consuming nature of law-making means the public has to endure long periods of uncertainty when faced with specific exceptions that do not apply to certain scenarios. However, when there is a flexible exception in existence, it can capture those situations, without having to wait for new legislation.

(2) The rapid pace at which technology moves means that specific exceptions can become obsolete very quickly. Open norms allow reasonable adaptation to changing circumstances.

One of the myths concerning open norms is that they are incompatible with the legal frameworks of civil law countries.[9] Butler believes that "this view is largely a result of the historical accident of fair use being developed in the US as a common law, judge-made doctrine over a century before it was codified in the text of the statute in 1976".[10] The fact that it emerged from a common law country has given it a reputation as judge-made, and therefore incompatible with practitioners in civil law countries. However, as Butler argues, the application of law to facts is not unique to common law countries only and as such suggests that it is now time to dispel this myth.[11]

Therefore, in an attempt to do this as well as highlight how other mixed legal systems have adopted open norms, this project explores open norms in seven jurisdictions. Commencing with an outline of fair use in the US, the report moves on to explore mixed and civil law jurisdictions, namely Canada, Israel, Singapore, Sri Lanka, Japan, and South Korea respectively.

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[7] Abbe Brown and others, supra n 1., chapter 3, para. 2.24-2.25.
[8] Brandon Butler, supra n 3.
[9] There are other myths which relate to fair use (or open norms in general). For an overview, *see*, Peter Decherny, 'Communicating Fair Use: Norms, Myth and the Avant-Garde' (2013) 25(1) Law and Literature, 50.
[10] Brandon Butler, supra n 3.
[11] Brandon Butler, supra n 3.

Whilst this report explores these seven jurisdictions (with the US being one of them), it is worth noting that many countries have adopted a fair use provision, and many others that have fair dealing provisions. Band and Gerafi point to "more than 40 countries with over one-third of the world's population [that] *(sic)* have fair use or fair dealing provisions in their copyright laws".[12] However, the present report is only concerned with the US-style fair use type of provisions or other models of open norms and does not delve into the consideration of the fair dealing provision, except in circumstances where the fair dealing provision has been broadened (such as Canada).

To our knowledge there appear to be no prior studies that take an in-depth consideration into how mixed and civil law jurisdictions have adopted open norms. Therefore, this report is the first of its kind to provide a detailed analysis into the countries selected.

METHODOLOGY AND STRUCTURE OF REPORT

In terms of selecting the jurisdictions, the authors picked the relevant countries based on their common, mixed and civil law traditions, thereby providing an insight into how a common law norm, such as the fair use doctrine, can be applied to such legal systems. It also serves to demonstrate how flexible copyright exceptions (apart from the fair use doctrine) can be adopted in mixed and civil law countries.

Through a literature review as well as verification meetings with National Experts from the selected jurisdictions, the report aims to understand how open norms have been adopted and used in the above-named countries as well as the impact they have had. At times, the adoption and impact of open norms can also be affected by economic, cultural and social factors. As such, this report takes an in-depth analysis of open norms in the seven selected jurisdictions, particularly to discover the following:

- motivations for the adoption of an open norm;
- how a country has transitioned to an open norm;
- the benefits and challenges of adopting an open norm;
- impact on technology, education, research and library sector as relevant;
- interpretation of open norms by the judiciary; and
- adoption and use of an open norm, during the pandemic.

In addressing the factors set out above, the report is structured as follows.

The report commences with a review of the fair use doctrine in the US, as an underlying basis for the discussion, before moving on to consider the adoption, use and impact of open norms in the remaining six countries. To achieve this, the countries

[12] Jonathan Band and Jonathan Gerafi, 'The Fair Use/Fair Dealing Handbook' (April 2023) at https://infojustice.org/wp-content/uploads/2023/04/Band-and-Gerafi-April-2023.pdf Band's and Gerafi's handbook sets out the fair use and fair dealing provisions in 49 countries around the world. It is a useful reference point for looking up the fair use or fair dealing provisions in any of these countries.

are divided into two categories (mixed/hybrid and civil legal systems) and presented in alphabetical order within these two main categories as illustrated below:

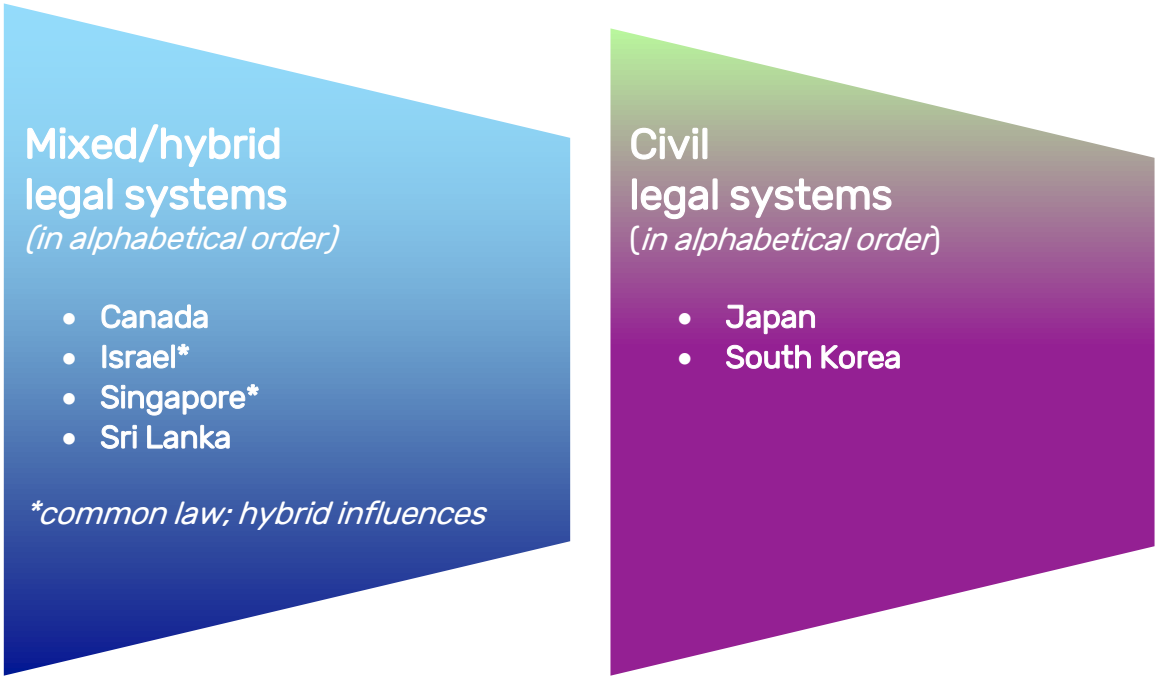

Figure 1: Structure of the report

Each country is then reviewed, firstly through a literature review before moving on to a deeper consideration of these issues through verification meetings with National Experts of the respective countries. These verification meetings were held via Zoom on 9th and 10th February 2023. The National Experts were then sent questions for discussion, ahead of the verification meetings, based on the literature review carried out by the researchers. Following the verification meetings, the experts' answers were transcribed and analysed before being incorporated into the country reports. Through this process, the researchers were able to delve deeper into each jurisdiction in order to capture the successes, challenges and lessons learnt by these countries which could potentially be relevant in discussions around the European copyright framework.

Success in the context of this report is measured from the perspective of how well an open norm has been adopted and used within a jurisdiction. Through the research, the following factors, in particular, were identified as measures of success:

(1) opening up activities for users of copyright works in areas such as research and education; library and archives; Artificial Intelligence (AI) and data mining; parody and satire; documentary film-making etc.;
(2) a growing body of case law providing stronger guidance and clarity;
(3) initiatives to provide further complementing guidance such as regulations to assist the smooth adoption of an open norm in the relevant jurisdiction; and

(4) the extent to which an open norm has been welcomed by the various sectors (i.e. business, technology, education, research, library and archive sectors for example).

The report ends with conclusions, findings and policy recommendations.

As a precursor to the main discussion of each of the jurisdictions, the report presents an **"At-a-Glance"** table which provides a comparative analysis of the countries before summarising each country's findings in turn.

SUMMARY RESULTS: AT-A-GLANCE TABLE

Country/ Type of legal system	Year of intro	Type of open norm	Formulation/ Structure	Motivation	Success or Challenge?	Guidance by judiciary? Conservative or liberal approach?
CANADA (Hybrid)	2004	Broadened interpretation of the scope of fair dealing.	Broadening of existing fair dealing provision under s.29 Copyright Act 1985 through Copyright Modernization Act 2012 and case law.	To provide more inclusivity, flexibility and openness to copyright landscape.	**Success** – activities such as AI and data mining, parody, satire, documentary filmmaking, broad educational and research made possible as a result of this.	Growing body of case law and liberal approach by judiciary has led to more openness.
ISRAEL (Common law/Hybrid influences)	2007	US-style fair use provision.	Commences in section 19 of the Copyright Act which sets out the types of uses (closed list). This is followed by a US-style non-exhaustive four-factor model.	To avoid stagnation in copyright and provide greater interpretive freedom.	**Success** – rich body of case law has helped the successful adoption and use of the fair use provision whilst providing clear guidance and clarity. Furthermore, ability for a Minister to make regulations prescribing conditions as to when a use be deemed a fair use is also noteworthy in this context.	Rich and growing body of case law. 55 cases on fair use during a 10-year period (2008–2018) had helped provide precedent as well as clarity and guidance. Conservative approach by the courts has countered the assertion of fair use leading to a situation of uncontrolled use of copyright works.

Country/ Type of legal system	Year of intro	Type of open norm	Formulation/ Structure	Motivation	Success or Challenge?	Guidance by judiciary? Conservative or liberal approach?
SRI LANKA (Hybrid)	2003	US-style fair use provision.	Open norm is set out under section 11 of the IP Act 2003 but is subject to an exhaustive closed list in section 12.	Due to entering into a Free-Trade Agreement with USA.	**Challenge** – the manner in which the open norm has been drafted has led to it being undermined by a closed/ exhaustive list of "activities of fair use".	No cases to date on fair use. In terms of seeking guidance and clarity this has been an issue.
SINGAPORE (Common law /Hybrid influences)	2004	US-style fair use provision.	Detailed open norm set out in multiple sections (§190-194) in Division 2 of the Copyright Act (updated in 2021).	Initially due to a Free-Trade Agreement with USA and later, for building an environment conducive to the development of creative works.	**Success** – detailed open norm complemented by clear guidance and provisions in multiple sections. Positive impact on education and creative sector.	No cases to date on fair use. However, a few cases from the first iteration of the fair use exception in 2004 (prior to the amendment in 2021) can provide some guidance for the future.

Country/ Type of legal system	Year of intro	Type of open norm	Formulation/ Structure	Motivation	Success or Challenge?	Guidance by judiciary? Conservative or liberal approach?
JAPAN (Civil)	2018	Rejected US-style fair use provision and instead introduced two open norms.	Two open norms enumerated in Art. 30-4 and Art. 47-4 of the Japan Copyright Act, amended in 2018. 'Purpose' in the form of enjoyment and incidental use are at the heart of both open norms.	Desire to support Japanese businesses in new technology markets.	**Success –**welcomed by businesses and the technology sector. However, openness of the norms restrained by over-arching 'purpose' of the provisions.	No cases to date. The open norms were introduced in 2018 – and therefore are relatively recent.
SOUTH KOREA (Civil)	2011	US-style fair use provision.	Open norm is set out under Art. 35-5 and consists of two paragraphs. Art 35-5(1) sets out a general exception and Art 35-5(2) sets out an open norm.	Aim to increase flexibility of copyright exceptions.	**Challenge** – co-existence of the quotation and fair use exceptions and the lack of clear judicial guidelines from courts have led to overlap, creating uncertainty and complexity.	Approx. 60 cases since 2011, however an extremely conservative approach and lack of review of those cases by the Seoul Supreme Court has led to lack of precedent and clarity. In 2020, the Korea Copyright Commission published fair use guidelines to enhance the legal certainty of fair use.

UNITED STATES OF AMERICA AND THE EMERGENCE OF FAIR USE

INTRODUCTION

Fair use is a legal doctrine (or a copyright exception) that was first statutorily introduced in the US Copyright Act 1976.[13] However, fair use doctrine had existed for 135 years in the US jurisprudence even before the codification, and thus it is considered the culmination of existing US case law, rather than an abrupt departure from its own law. In this sense, National Experts interviewed as part of the preparation of this study emphasised that fair use closely reflects the US legal history and culture, whilst highlighting that it is not merely a copyright exception, but "a built-in accommodation between the First Amendment and copyright protection", which promotes and protects freedom of expression.

THE SCOPE AND REQUIREMENTS OF FAIR USE

The scope and requirements of fair use are enshrined in section 107 of the US Copyright Act. The provision allows a person to use a copyrighted work, such as "reproduction in copies or phonorecords, or by any other means" laid out in sections 106 and 106A of the US Copyright Act.[14]

Fair use can be only engaged for limited purposes and under certain circumstances. Section 107 provides that criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research are examples of such purposes. It also sets out various factors and circumstances to be considered to determine whether the use of a copyrighted work qualify as a fair use. These include (a) the purpose and character of use, including whether such use is of a commercial nature or is for non-profit educational purposes; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (d) the effect of the use upon the potential market for or

[13] Copyright Act 1976. Published no. 94-553 (codified as amended at 17 U.S.C. 107).
[14] Section 106 US Copyright Act provides the scope of the copyright owner's exclusive rights in the copyrighted work, such as reproduction, distribution, performance and display of the copyrighted work in copies or phonorecords and preparation of derivative works based on the copyrighted work, whereas section 106A lays out the statutory framework for moral rights. Phonorecord is "a material object in which sounds are fixed and from which the sounds can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device, … which includes a cassette tape, an LP vinyl disc, a compact disc, or other means of fixing sounds." Whist sound recording (or phonogram) indicates "a work that results from the fixation of a series of musical, spoken, or other sounds, regardless of the nature of the material object in which they are embodied". https://www.copyright.gov/help/faq/definitions.html

value of the copyrighted work.[15]

The US four-factor test is compliant with the international copyright standard for copyright limitations and exceptions, known as the Three-Step Test.[16] The Three-Step Test broadly refers to a set of requirements laid out in Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement and Article 10 of the WIPO Copyright Treaty (WCT). The wording of these provisions is not exactly the same, but they provide, in essence, that (a) use of works must be permitted in certain special cases; (b) such use must not conflict with a normal exploitation of the work; and (c) it must not unreasonably prejudice the legitimate interests of the right holder.[17] The declared purpose of the Three-Step Test is to ensure the balance in the interests of copyright holders and users, and member states of the treaties have a duty to keep their domestic law to conform to it.[18]

In applying the four-factor test, US courts have shown a tendency to put some emphasis on the first factor in determining fair use.[19] In particular, US courts have been considering whether the defendant's use of a copyrighted work is transformative since the US Supreme Court case in *Campbell*.[20] Souter J noted in the judgment that the core question in the test of transformative use is "whether a new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[21] Then, he went on to say that "the more transformative the new work, the less will be the significance of other factors … that may weigh against a find-

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[15] 17 U.S.C. 107.

[16] Pamela Samuelson and Kathryn Hashimoto, 'Is the US Fair Use Doctrine Compatible with Berne and TRIPS Obligations?' in Tatiana Eleni Synodinou (ed), *Pluralism or Universalism in International Copyright Law* (Kluwer Law International 2019). (Regarding the critique that the openness of US fair use renders it incompatible with the first step of the Three-Step Test, namely that the exceptions must be invoked in certain special cases, the authors argue that the development of fair use case law provides sufficient clarity and predictability as to what types of activities should be deemed "certain special cases" *per se*, and this fulfils the requirement of the first step of the Three-Step Test).

[17] It is notable that the Three-Step Test enshrined in these international treaties are similar in respect of their key aspects, but their wording is not exactly the same. For more discussion on the potential impact of such differences, *see* Christophe Geiger, Daniel Gervais, and Martin Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29 American University International Law Review, 581, 583-591. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356619

[18] Nikos Koutras and Haydn Rigby, 'A Scientific Analysis of the Three-Step Test: Through the Lenses of International and Australian Laws' (2022) 38 Publishing Research Quarterly, 503, at https://link.springer.com/article/10.1007/s12109-022-09898-x#Fn10

[19] Barton Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019' (2020) 10 New York University Journal of Intellectual Property and Entertainment Law, 1, 6.

[20] *Campbell v Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994). For more detailed discussion of the doctrine of transformative use in US courts, *see* Jiarui Liu, 'An Empirical Study of Transformative Use in Copyright Law' (2019) 22 Stanford Technology Law Review, 163.

[21] *Campbell v Acuff-Rose Music, Inc.,* supra n 20, 579.

ing of fair use."[22] Following the *Campbell*, the test of transformative use has been at the heart of the US fair use doctrine, serving as the leading factor.[23]

The second factor – the nature of the copyrighted work – is considered to have a relatively little impact on the court's determination on fair use, compared to the first factor. That said, it is suggested that the two sub-factors of the second factor, namely whether the copyrighted work is creative or factual and whether it is published or unpublished, play an important role for the court to find fair use.[24]

As for the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole is a relevant criterion to consider by the court, but it does not negate the possibility that reproduction of the whole work is still deemed fair under certain circumstances, as was held in *Sony v Universal City Studios*.[25] It is not the rarest kind of decision, as US courts have been willing to render more decisions parallel to that in recent years. To illustrate the point, a recent study demonstrated that the fact that the defendant took the entirety of the claimant's work had exerted no significant impact on the court's overall decision on fair use. The study analysed all US federal court opinions (a total of 579 opinions from 435 cases) that extensively discussed the four-factor test, rendered from 1978 to 2019. It noted that there were 148 opinions where the court found the defendant took the claimant's entire work, and yet in more than 40% of these opinions, such uses were found to be fair.[26]

The fourth factor asks the court to consider the effect of the use upon the potential market for or value of a copyrighted work, in determining fair use. The same study discussed above provides empirical evidence that the court decided against fair use in majority of the cases where the fourth factor disfavoured fair use, whilst the court found fair use in majority of the cases where the fourth factor favoured fair use.[27] As such, the fourth factor has been also regarded as one of key factors together with the first factor, that has a strong correlation with the overall outcome of fair use.

APPLICATION OF FAIR USE: BENEFITS AND CHALLENGES

Fair use has been received as an opportunity for many, including the creative, technology, and education industries in the US. National Experts noted that the creative sector has been one of the biggest beneficiaries of fair use; for instance, the entertainment industry relies heavily on fair use for their business, even though some often

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[22] Ibid., 579.
[23] David Tan, 'The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the Transformative Use Doctrine Twenty-Five Years On' (2016) 26 Fordham Intellectual Property, Media & Entertainment Law Journal, 311; Barton Beebe, supra n 19.
[24] Barton Beebe, supra n 19, 30-31.
[25] *Sony Corp. v Universal City Studios*, 464 U.S. 417 (1984), 449-50. (The Supreme Court held time-shifting a televised copyrighted audiovisual work was fair, although it was the reproduction of the entire work).
[26] Barton Beebe, supra n 19, 31-32.
[27] Ibid., 33-36.

claim fair use as a threat. The experts pointed out that criticism by the creative sector often revolves around specific judicial decisions and their interpretation of copyright law, rather than a wholesale rejection of the concept, at least in the US context.

There is a strong view that fair use has been also extremely beneficial for the development of technology in the US. One of the National Experts opined that fair use has been *absolutely essential* for the development of the US tech industry. This has become one of the leading industries in the world, owing to the fact that fair use has been filling in where Congress has proven incapable of acting in a timely fashion. The US technology market has an almost 33% share of the global market with the leading tech companies including former start-ups Facebook, Amazon, and Google.[28] A report by the Computer & Communications Industry Association (CCIA) highlighted that start-up firms in the US largely benefit from the openness and adaptability of fair use, which provides the breathing space for innovative firms to thrive, facilitating experimentation with and development of new technologies, such as search engines and AI.[29]

US Supreme Court decisions, such as in the *Betamax* case,[30] offer good legal precedents that illustrate how important the role of fair use has been not only in driving the US tech sector, but also in allowing the creative sector to grow, enticing tremendous investment.[31] In a nutshell, the Betamax case concerned whether unauthorised home videotaping of TV shows for later viewing, also known as time-shifting, was permissible under fair use. In its ruling, the court focused notably on the fact that the use of the Betamax machine for time-shifting was of non-commercial nature and that no presence of preponderant evidence was there to suggest that there would be a likelihood of future harm. In view of that, the court concluded that the action in question amounted to fair use.[32]

The electronics industry and consumers alike praised the decision as a major victory, notwithstanding the fact that the creative industry stakeholders, such as movie studios and film makers, expressed concerns that this could harm the market and creators.[33] Yet the Betamax decision catalysed the exponential growth of the video cassette recorder (VCR) market in the US, which then led to the emergence of a vast new market for the movie industry in the rental and sale of videos for home use. On the contrary to the dreadful predictions of the movie industry, it turned out that the

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[28] Mark Minevich, 'Can Europe Dominate In Innovation Despite US Big Tech Lead?' (Forbes, 2021) at https://www.forbes.com/sites/markminevich/2021/12/03/can-europe-dominate-in-innovation-despite-us-big-tech-lead/

[29] *Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use* (CCIA; 2017) at https://www.ccianet.org/fairusestudy/

[30] *Sony Corp. v Universal City Studios*, supra n 25.

[31] Fred von Lohmann, 'Fair Use as Innovative Polity' (2008) 23 Berkeley Technology Law Journal, 829.

[32] *Sony Corp. v Universal City Studios*, supra n 25, 451.

[33] Jonathan Band and Andrew J McLaughlin, 'The Marshall Papers: A Peek behind the Scenes at the Making of Sony v. Universal' (1992) 17 Columbia-VLA Journal of Law & the Arts, 427.

proliferation of VCR brought huge benefits to them and in fact, the rental and sale market became the largest source of revenue in around the 2000s.[34]

Indeed, the Computer & Communications Industry Association (CCIA) has been publishing reports on the economic impact of fair use since 2007, with the latest edition issued in 2017.[35] As an overall observation, the CCIA highlights that the US fair use industries have expanded exponentially for the past two decades and exerted a profound impact on the US economy.

According to the latest report, the total revenue of the fair use industries, such as manufacturers of consumer devices that allow individual copying and recording, educational institutions, software developers and Internet search and web hosting providers, increased by $1 trillion between 2010 and 2014, amounting to $5.6 trillion in 2014. The fair use industries contributed $2.8 trillion to US GDP, whilst employing 1 in 8 US workers by providing roughly 18 million jobs.[36]

The importance of fair use in the education sector has also been a key theme in the development of US fair use, as is evident in the legislative history of section 107 of the US Copyright Act. As seen above, the US fair use provision was exceptionally broadly worded on purpose to provide flexibility.[37] Nevertheless, the statute specifies *teaching, scholarship and research* as some of the purposes for which the fair use doctrine may be invoked. Moreover, it explicitly introduces *non-profit educational purposes* as one of the factors to be considered by courts in the application of fair use. The wording within the provision, as it stands, illustrates that education was one of the most topical applications of fair use at the time of the legislative process, and it was, in fact, a hard-earned compromise resulting from the long debate between copyright owners (i.e. publishers and writers) and educators.[38]

Nonetheless, as Souter J highlighted in *Campbell*, it should be noted that courts should make a determination on fair use by considering various factors as laid out in the statute and more if necessary, and therefore the mere fact that a use is educational does not in itself preclude the use from constituting infringement.[39] In fact, in earlier decisions on fair use, such as those decided until the early 2010s, the defendant's having a teaching or educational purpose tended to be regarded as not at all

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[34] Edward Lee, 'Technological Fair Use' (2010) 83 Southern California Law Review, 797, 799-800.
[35] *CCIA report*, supra n 29.
[36] Ibid.
[37] *House of Representatives Report on Copyright Law Revision No. 94-1476 94th Congress 2d Session* (The Committee on the Judiciary; 1976) 65-66.
[38] David Izakowtiz, 'Fair Use of the Guidelines for Classroom Copying – An Examination of the Addison-Wesley Settlement' (1985) 11 Rutgers Computer & Technology Law Journal, 111, 116-17. For further discussion on the historical development of educational fair use, *see* Randall P Bezanson and Joseph M Miller, 'Scholarship and Fair Use' (2010) 33 Columbia Journal of Law and the Arts, 409.
[39] *Campbell v Acuff-Rose Music, Inc.,* supra n 20, 584.

affecting the outcome of ruling.[40] However, as will be illustrated below, the trend is changing as courts have begun to favour the presence of educational purposes as a factor that can lead to positive outcome on fair use decision.[41] Such developments offer educators much more educational freedom and certainty when teaching and researching, and as one of the National Experts put it, "knowing that they have fair use in their back pocket gives them a great deal of comfort".

As a display of its flexibility, fair use has allowed for the updating of understanding of what activities are legal in the face of technological advancements. The types of activities enabled for education and research purposes have evolved significantly; for example, digital materials and online distance learning have been introduced in classrooms, together with mass digitisation of works, led by libraries and research institutions. Online repositories or reserves have been increasingly used to store those digital works. In this regard, National Experts added that fair use would have not been envisaged to accommodate such digital technologies when it was codified in the 1976 Act, given that technologies themselves had not been envisaged by lawmakers. However, its flexibility still allows it to stretch to cover such new technologies as preservation or distance learning. This represents a significant benefit of fair use.

Mass Digitisation and Digital Libraries

The applicability of fair use to the digitisation of existing copyrighted works has been one of the most debated areas in recent years. In particular, there have been major attempts by some universities and firms to digitise copyrighted books and use them in limited ways without additional authorisation of copyright owners of the books, which eventually led to lawsuits. *Authors Guild v HathiTrust*[42] and *Authors Guild v Google*[43] are seminal decisions that considered the transformative nature of digitised books as part of the application of the fair use doctrine. In these two cases, the US courts found in favour of the defendants, on grounds that that the digitisation of copyrighted books and use of digital copies for certain purposes constituted fair use.

In *Authors Guild v HathiTrust*, the issue under discussion was whether the defendant's uses of the copyrighted works in its repository amounted to fair use. The defendant – HathiTrust – was an organisation founded by a number of US universities seeking to digitise the books in their collections and to create a digital repository, permitting its users to do certain acts, such as (a) full-text search without showing any portion of the searched book; (b) access the full text of the copyrighted works for

[40] Samuelson Law, *An Empirical Analysis of Learning-Promoting Fair Use Case Law* (Samuelson Law, Technology & Public Policy Clinic; 2009) 16-17.
[41] *See* further discussion of recent US case law on educational fair use in section below: *Online repositories*.
[42] 755 F.3d 87 (2d Cir. 2014).
[43] 804 F.3d 202 (2d Cir. 2015).

patrons with certified print disabilities (i.e. blindness); and (c) creation of a replacement copy of the copyrighted works on strict conditions.[44]

The District Court found all three uses above were transformative, and therefore fell under fair use.[45] The Court of Appeals (2nd Cir.) partially affirmed the District Court's decision, albeit with disparate reasoning and conclusions on some of the defendant's uses of the copyrighted works.[46] As for full-text search, agreeing with the District Court, the Court of Appeals held that "the creation of a full-text searchable database is a quintessentially transformative use". It justified this by arguing that "the result of a word search is different in purpose, character, expression, meaning and message from the page (and the book) from which it is drawn".[47] However, the defendant's second use (expanding access to the print disabled) was not transformative in the court's eyes, and yet it found the defendant's use fair, on grounds that providing equal educational opportunities for those with disabilities is one of fundamental aims of fair use, as affirmed by the Supreme Court and reflected in legislative history.[48]

Authors Guild v Google concerned the legitimacy of the defendant's actions, conducted as part of the Google Books and the Google Library Project, without authorisation of copyright owners. These entailed digitisation and indexing copyrighted books and making them available to the public via the Google Books search engine. Based on the facts of the case, the District Court held, *inter alia*, that the uses by Google were transformative, and therefore amounted to fair use, and the Court of Appeals (2nd Cir.) affirmed the District Court's judgment. In its reasoning, the Court of Appeals pointed out that the purpose of Google's digital reproduction of copyrighted books was parallel to that identified in the *HathiTrust* case, namely that Google made available digitised books to enable the public so that they could search and obtain significant information about the books, and therefore the use was highly transformative in nature.[49]

Meanwhile, the court also considered two significant disparities with the *HathiTrust* decision. Firstly, it noted that the search function by Google Books search engine displayed a proportion of copyrighted works via "Snippet view", whereas no texts other than the search terms were made visible in the *HathiTrust* decision (at least as concerned the search function). The court held that the Snippet view assists the searcher with identifying the right information in the right context by providing tiny snippets, and therefore serves highly transformative purposes. Then, it went on to say that the snippet function can lead to some loss of sales, but it is unlikely that the snippet func-

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[44] *Authors Guild v HathiTrust* 755 F.3d 87 (2d Cir. 2014), 91-92.
[45] *Authors Guild v HathiTrust* 902 F.Supp.2d 445 (S.D.N.Y. 2012).
[46] Court of Appeals (2nd Cir.) only discussed the first and second use by the defendant in its ruling and rejected to rule on the defendant's third use as the court believed the claimants were not entitled to bring an action regarding the third use.
[47] *Authors Guild v HathiTrust*, supra n 44, 97-98.
[48] Ibid., 101-102.
[49] *Authors Guild v Google* 804 F.3d 202 (2d Cir. 2015), 214-17.

tion will serve as a sufficient substitute for the original works, producing a meaningful or significant effect upon the potential market for or value of the copyrighted work.[50] The court was also informed by the claimants that it had to consider Google was a profit-orientated commercial corporation, whilst the HathiTrust was a non-profit educational institution. However, it highlighted that the mere existence of Google's overall profit motivation does not preclude the defendant from enjoying fair use, especially where the defendant's uses of copyrighted works are highly transformative with the absence of significant substitutive competition, as found in the facts of the case.[51]

Online Repositories

Digital technologies and the Internet have transformed how academic works are distributed and delivered to students. A good example is the introduction of online repositories or reserves. *Cambridge University Press v Patton*[52] discussed the copyright liability of the defendants' (officials at Georgia State University and others) interpretation of copyright policy, allowing members of the university to reproduce and use digital excerpts of the claimants' books and distribute them to students via electronic reserve systems or e-reserves. The crux of the e-reserves in question was to enable members of the university to upload excerpts of copyrighted works onto the systems and to allow students, via hyperlink, to access, print, or save the excerpts on their computer. The systems were password-protected and only accessible by students until a course ends.

The claimants brought the proceeding for alleged copyright infringement caused by seventy-four individual actions by the defendants, the majority of which were held to be non-infringing under fair use. The court held that the defendants' use of excerpts of the claimants' works was not transformative both in its nature and purpose. However, it highlighted that one of the crucial legislative goals of the Copyright Act was to promote educational fair use under proper circumstances, and that the use at issue was made by a non-profit educational institution for teaching purposes favoured a finding of fair use.[53] Meanwhile, it noted that non-transformative use of copyrighted works could cause some significant threat to market substitution, but it held that was not the case in this judgment, based on the facts of the case.[54]

Another interesting case arose during the pandemic, which is anticipated to shed some light on the application of fair use in a world of remote access. In 2020, the Internet Archive, a non-profit organisation, announced the launch of The National

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[50] Ibid., 217-18 and 223-25.
[51] Ibid., 218-20.
[52] 769 F.3d 1232 (11th Cir. 2014).
[53] *Cambridge University Press v Patton* 769 F.3d 1232 (11th Cir. 2014), 1261-68.
[54] Ibid., 1275-81 (in its reasoning, the court considered, *inter alia*, that small excerpts of the claimants' work did not substitute for the full books, and the mere fact that a licensing market exists did not demand a finding against fair use).

Emergency Library.[55] The National Emergency Library was a digital library where users could borrow digital books from the collection of the Internet Archive's existing Open Library, which it had created by scanning and digitising existing hard copies of books available either in the market or in the public domain. It is worth noting that no compensation is paid to authors for loans, in the form of a public lending right in the US in general.

It allowed users to browse the entirety of digital books they borrow, without the need for them to join a waitlist. This was because, unlike in the case of the Open Library, the one-copy-one-user model was suspended (which limits the number of users at any one time to the number of physical copies held by the Internet Archive).[56] Publishers, led by Hachette, launched a lawsuit, arguing that providing access to digital reproductions in this way – both under the unlimited National Emergency Library model and the most typical Open Library models should only take place with consent or licence from the relevant copyright holders. In July, the District Court for the Southern District of New York handed down the judgment, deciding against the Internet Archive. The court held in essence that all four factors favoured the claimant publishers, whilst highlighting that the defendant's copying and unauthorised lending of the claimant's copyrighted works was far from transformative.[57] The Internet Archive has underlined its doubts about the judgment, and has announced their intention to continue to fight. It remains to be seen how this case will unfold in the future.[58]

FAIR USE DURING THE COVID-19 PANDEMIC

The pandemic has significantly affected the educational landscape, in which virtually all educational and academic activities are compelled to take place at distance, and therefore online teaching has become a new default format globally.[59] In the US, despite the existence of the Technology, Education and Copyright Harmonization Act of 2002 (TEACH Act),[60] which provides exceptions for online teaching, many educators

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[55] National Emergency Library (Internet Archive) at https://blog.archive.org/national-emergency-library/

[56] Chris Freeland, 'Announcing a National Emergency Library to Provide Digitized Books to Students and the Public' (Internet Archive, 24 March 2020) at https://blog.archive.org/2020/03/24/announcing-a-national-emergency-library-to-provide-digitized-books-to-students-and-the-public/

[57] *Hachette Book Group, Inc v Internet Archive* No. 1:20-cv-04160-JGK-OTW (S.D.N.Y. March 24, 2023).

[58] Chris Freeland, 'The Fight Continues' (Internet Archive, 25 March 2023) at https://blog.archive.org/2023/03/25/the-fight-continues/

[59] Marketa Trimble, 'COVID-19 and transnational issues in copyright and related rights' (2020) 51 International Review of Intellectual Property and Competition Law, 407.

[60] Public Law 107-273 (amended and codified as 17 U.S.C. 110(2) and 112(f)). For further discussion of the TEACH Act, *see* Holland Gormley, 'TEACHing from a Distance and Copyright Considerations' (US Library of Congress, 17 March 2020) at https://blogs.loc.gov/copyright/2020/03/teaching-from-a-distance-and-copyright-considerations

still strongly believe fair use is a vital exception that should primarily apply to online teaching.[61]

TRENDS IN FAIR USE LITIGATION

A recent empirical study on US copyright fair use judicial opinions rendered between 1978 and 2019 demonstrates that the annual number of District Court opinions has significantly increased since 2010, with an exponential increase especially in the number of motions for summary judgment and motions to dismiss. Beebe explains such a trend suggests that "litigants and courts have become more comfortable in the past decade with addressing the defence in the summary judgment posture."[62] This may imply that a certain level of predictability and certainty has been reached in the fair use jurisprudence. The study pointed out that an increased number of conflicts involving unauthorised appropriation of photographs in the digital context had in part caused the increase in the overall number of litigations. A more interesting finding from the statistics is that the overall reversal and dissent rates by higher instance courts have been on a downwards trend, implying again that fair use is becoming a reasonably predictable and stable area of US copyright law.[63]

Beebe highlighted that the judgments analysed in the study were mostly cases that may not be as far-reaching as the headline-making cases. And yet, when taken together, such cases form a body of case law that informs the application of fair use in daily life. He argued that fair use was often depicted as convoluted, unstable, and unpredictable in the leading high-profile cases, but the teaching of the study was that that was not always the case, and fair use was more predictable and stable than the leading cases might suggest.[64]

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[61] Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research (13 March 2020) at https://tinyurl.com/tvnty3a
[62] Barton Beebe, supra n 19, 9.
[63] Ibid., 7-11.
[64] Ibid., 37.

MIXED LEGAL SYSTEMS: CANADA, ISRAEL, SINGAPORE AND SRI LANKA

This part of the report takes an insight into four mixed legal systems, namely, Canada, Israel, Singapore and Sri Lanka, in an attempt to uncover how these countries have approached the adoption of an open norm. With the exception of Canada, the other jurisdictions have transplanted the US-style fair use provision into their legal systems. Transplanting a provision from a common law system into a mixed legal system can pose challenges – and this part of the report considers how these countries have adopted the fair use provision and whether it has been a success. In this context, it should be noted that Israel and Singapore are primarily common law countries with hybrid influences.

As mentioned above, Canada did not opt for a US-style fair use provision, but instead took steps to broaden their fair dealing provision over a number of years. Commencing in 2004, Canada progressed towards providing a more flexible and open fair dealing exception, through the courts' liberal interpretation of fair dealing on the one hand and through amendments in the *Copyright Modernization Act 2012* on the other.

As will be seen from the research and country reports set out in the following pages, the adoption of an open norm or broadening of an existing provision has led to varied results. Some countries such as Israel, Canada and Singapore have all experienced success to a greater or lesser extent, with Israel and Canada experiencing significant success, while Sri Lanka has faced several challenges as detailed below. Part of Sri Lanka's challenges have arisen due to the manner in which the open norm and resulting "acts of fair use" has been drafted. These challenges as well as the lessons which can be learnt from a country such as Sri Lanka are captured in the following pages.

However, with the exception of Sri Lanka, the research reveals a positive outlook for these mixed legal systems which have adopted an open norm in recent times. It demonstrates that an open norm brings many benefits which can have a positive impact on the education, research and creative sectors in particular.

Each of these countries are considered in turn.

CANADA

INTRODUCTION

Canada's legal system is based on a mix of common law and civil law traditions, influenced by the English and French legal systems.[65] The first Copyright Act was enacted in 1921, and has gone through a few phases of reform to reach the current form of copyright legislation.[66]

The Copyright Act (R.S.C.,1985, c. C-42), as last amended on 27 April 2023, is the current primary copyright legislation in Canada. Part III of the Act includes provisions regarding infringement of copyright and moral rights and exceptions to infringement, and in particular includes a copyright exception, fair dealing, which is enshrined in sections 29, 29.1, and 29.2.

Historically, the scope of fair dealing was interpreted narrowly within the confines of the restrictive interpretation of fairness and limited purposes for which it can be used. However, recent case law and legislative developments have significantly shifted the traditional stance, broadening the traditional conception of fair dealing into a more inclusive, flexible, and open-ended exception.[67]

The Supreme Court highlighted that the fair dealing exception is an integral part of the Canadian Copyright Act as a user's right, rather than a mere copyright defence. It further noted that fair dealing is an essential tool to maintain the proper balance between the interests of copyright owners and users, and therefore it must not be interpreted restrictively to safeguard the achievement of the goal of copyright, namely promotion of the public interest.[68]

In 2012, the Copyright Modernization Act reformed Canada's Copyright Act 1985, to a large extent incorporating changes that had already been introduced by the courts. The new reforms contributed towards creating an education and research-friendly environment, to allow educators, students and libraries to make greater use of copyright material. As part of the reform, the scope of fair dealing has been broadened with

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[65] Canada's System of Justice (Department of Justice Canada, 2015) at https://www.justice.gc.ca/eng/csj-sjc/just/img/courten.pdf

[66] History of Copyright in Canada (Government of Canada, 2017) at https://www.canada.ca/en/canadian-heritage/services/history-copyright-canada.html

[67] Carys J. Craig, *'Appendix Three: Educational Fair Dealing in Canada' in Code of Best Practices in Fair Use for Open Educational Resources* (Pressbooks; 2021).

[68] *CCH Canadian Ltd. v Law Society of Upper Canada* [2004] SCC 13; [2004] 1 SCR 339 at https://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] SCC 36; [2012] 2 SCR 326 at https://www.canlii.org/en/ca/scc/doc/2012/2012scc36/2012scc36.html For more discussion of these Supreme Court decisions and their impact on Canadian fair dealing jurisprudence, *see* Myra J. Tawfik, 'The Supreme Court of Canada and the "Fair Dealing Trilogy": Elaborating a Doctrine of User Rights under Canadian Copyright Law' (2013) 51 Alberta Law Review, 191.

inclusion of three additional purposes for which fair dealing can be invoked, such as education, parody, and satire.[69]

FAIR DEALING IN CANADIAN COPYRIGHT LAW

Section 29 of the Copyright Act (as amended) provides that fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright. Fair dealing for the purpose of criticism or review,[70] and news reporting[71] also does not constitute copyright infringement. However, in the case of the latter, it is mandatory that acknowledgement of the source and, where possible, the name of the creator or performer of a work be given, although it is seen as good practice to ensure acknowledgement in all of the cases identified above.

Along with the meaning of fairness and other statutory terms, the test for fair dealing has been established and consolidated by a number of prior Supreme Court decisions, such as *CCH Canadian Ltd v Law Society of Upper Canada,*[72] *SOCAN v Bell Canada,*[73] and *Alberta (Education) v CCLA*.[74] The test consists of two steps. The first step is to determine whether the dealing is for the purpose of research, private study, education, parody, or satire, and the second step is to assess whether the dealing is fair.[75]

In applying the test, the Supreme Court has adopted a liberal approach in interpreting the meaning of the statutory purposes to ensure that users' rights are not unduly constrained. For the assessment of fairness of the dealing, it considered a number of non-exhaustive factors such as (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the market for the work.[76] However, it is important to note that, as National Experts who attended the project's verification meetings highlighted, these criteria are not prescriptive, and courts are not required to, and, in fact, do not consider all factors when determining a fair dealing.[77] This results in fair dealing in Canada being flexible. Such an approach is distinctive to how the four-factor test is applied in the US.

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[69] Copyright Modernization Act (S.C. 2012, c. 20).
[70] The Copyright Act 1985 (as amended), s 29.1.
[71] Ibid., s 29.2.
[72] *CCH Canadian Ltd. v Law Society of Upper Canada*, supra n 68.
[73] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, supra n 68.
[74] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [2012] SCC 37; [2012] 2 SCR 345 at https://www.canlii.org/en/ca/scc/doc/2012/2012scc37/2012scc37.html
[75] The test involving purpose limitations as the first step is structurally different to the US fair use doctrine. However, the legislative reform expanding allowable purposes under section 29 and the Supreme Court's liberal interpretation of the meaning of these purposes have made Canadian fair dealing as broad and open-ended as the US counterpart. For more discussion, *see* Michael Geist (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press; 2013) 176-180.
[76] *CCH Canadian Ltd. v Law Society of Upper Canada,* supra n 68, [51]-[60].
[77] Canadian National Experts at the project verification meeting held on 10th February 2023.

APPLICATION OF FAIR DEALING: BENEFITS AND CHALLENGES

The transformation of fair dealing into a more open-ended exception has not been without its challenges. National Experts who attended the verification meetings of this project[78] noted that in the past, lower courts had been extremely conservative, being mostly in favour of creators and collective management organisations, whilst higher instance courts are becoming more progressive since the *CCH* decision by the Supreme Court[79] and a group of five Supreme Court decisions (often referred to as "copyright pentalogy").[80]

The transformation has significantly changed the way users perceive and interact with copyright law, *whilst providing considerable opportunities that would have been otherwise impossible (emphasis added),* for various areas including documentary film making, AI and data mining, and the education and research library sector. As will be illustrated below, the Supreme Court's decisions focused on fair dealing particularly in the context of education and libraries, and one of the National Experts emphasised such developments have contributed to the community of educators and researchers to build their own standard, user-centric practice that effectively self-regulates the sector.[81]

Swartz et al. point out various empirical studies over the past decade provide probative evidence on that point.[82] They argue that most Canadian educational institutions did not have experts or specialists who are dedicated to copyright matters or copyright education, and this was evidenced by the 2010 study by Horava[83] where it was identified that there were only four relevant posts available across the country. However, the landscape has completely changed; the 2016 study by Patterson[84] demonstrated that at least one copyright specialist had been hired by most Canadian institutions, and the 2017 study by Graham and Winter[85] further affirmed a paradigm shift taken place in this landscape whereby the importance of the role of individual copyright experts in those institutions had increased, whilst the role of central adminis-

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[78] Canadian National Experts at the project verification meeting held on 10th February 2023.
[79] *CCH Canadian Ltd. v Law Society of Upper Canada*, supra n 68. *See also*, Dinusha Mendis, *Universities and Copyright Collecting Societies* (T.M.C. Asser Press; 2009), ch. 4.
[80] Michael Geist (ed), supra n 75.
[81] Canadian National Expert at the project verification meeting held on 10th February 2023.
[82] Mark Swartz and others, 'From Fair Dealing to Fair Use: How Universities Have Adapted to the Changing Copyright Landscape in Canada' in Sara Benson (ed), *Copyright Conversations: Rights Literacy in a Digital World* (American Library Association 2019).
[83] Tonay Horava, 'Copyright Communication in Canadian Academic Libraries: A National Survey' (2010) 34 Canadian Journal of Information and Library Science, 1.
[84] Erin Patterson, 'The Canadian University Copyright Specialist: A Cross-Canada Selfie' (2017) 11 Partnership: The Canadian Journal of Library and Information Practice and Research at https://journal.lib.uoguelph.ca/index.php/perj/article/view/3856
[85] Rumi Graham and Christina Winter, 'What Happened After the 2012 Shift in Canadian Copyright Law? An Updated Survey on How Copyright Is Managed across Canadian Universities' (2017) 12 Evidence Based Library and Information Practice, 132.

trative offices had reduced.

As already mentioned above, the *CCH* decision by the Supreme Court in 2004 and a group of five Supreme Court decisions known as "the copyright pentalogy" have played a significant role to shape the current copyright landscape in Canada, including the scope of fair dealing. The report will introduce the rulings of the CCH decision, *Alberta (Education) v CCLA* – one of the decisions in the copyright pentalogy – and a more recent case *York v CCLA* in the following paragraphs.

The Supreme Court decision in *CCH* concerned whether providing an on-demand photocopy service involving reproduction of copyright works by a library on a strict single-copy basis policy constituted fair dealing under section 29 of the Copyright Act.[86]

The appellant – the Law Society of Upper Canada – was a non-profit corporation that maintained and operated a reference and research library. The library offered an on-demand photocopy service for selected groups of users including its members and other authorised researchers. When requested, the library reproduced legal materials and delivered them by mail or facsimile to the requester. The respondents – CCH Canadian and others – were publishers of law reports and other legal materials. The respondents brought an action against the appellant for copyright infringement by, amongst other things, reproduction of their copyright works.

The court rejected the respondents' infringement claim and held the appellant's dealing with the works amounted to fair dealing for the purpose of research. As for the first step of the fair dealing test, it interpreted the meaning of research broadly, by stating that research is not limited to non-commercial or private contexts and therefore, conducting research in the business of law for profit, such as research for the purpose of advising clients, giving opinions, arguing cases etc., qualifies as research.[87] It noted that the retrieval and photocopying of copyright works by the library were not research in and of themselves; however they were necessary conditions of research, as in helping legal professionals access legal materials to conduct research, and therefore part of the research process. Then, it considered six criteria for assessing fairness of the appellant's dealing and concluded the appellant's dealing was fair, especially owing to its employment of a strict policy serving as appropriate safeguards to control and limit the type of copying by the appellant.

Alberta (Education) v CCLA (Access Copyright) is another crucial Supreme Court decision that cast light on the application of fair dealing in the research and education context. The crux of the decision was whether photocopying and distributing short

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[86] *CCH Canadian Ltd. v Law Society of Upper Canada*, supra n 68.

[87] The Supreme Court has been consistently interpreting the scope of research broadly in other cases. For example, the Supreme Court in *SOCAN v Bell Canada* held that providing previews of music in the form of streaming by commercial online music services amounted to a fair dealing for the purpose of research. *See Society of Composers, Authors and Music Publishers of Canada v Bell Canada,* supra n 68, [15]-[30].

excerpts of textbooks and other literary works at teachers' initiative for the purpose of class instruction, rather than upon students' request, amounted to fair dealing.[88]

The respondent was a collective management organisation for authors and publishers of literary and artistic works. Upon failing to reach a royalty agreement with the appellants – province of Alberta et al. – it requested the Copyright Board to intervene to certify a royalty in the form of a tariff. The Copyright Board imposed a tariff on copies of works (i.e. short excerpts from textbooks) made at the teachers' initiative, based on its decision that the copying by teachers at their own initiative, such as without students' request, did not amount to fair dealing. The appellants sought a judicial review on the Copyright Board's decision.

The court held that the copying at issue qualified as fair dealing and overturned the Copyright Board's decision. It noted that teachers are there to facilitate the students' research and private study and this is particularly useful for most students who lack the expertise to find or request the materials required for their own research and private study in the first place. It went on to say that photocopying and distributing materials by teachers is therefore an essential part of the research and private study by students and whether there was a prior request from those students is of little significance.

In *York University v CCLA (Access Copyright)*, the parties had had a licensing agreement on use of copyrighted material collectively managed by Access Copyright. Nearing the expiration of the agreement, they started negotiating to renew it but struggled to achieve that goal. Meanwhile, Access Copyright made an application to the Copyright Board of Canada for setting an interim tariff, believing that it would create a mandatory legal relationship between them. In response, York initially paid the royalties based on the tariff, but later decided not to continue to pay, arguing its activities amount to fair dealing.

The Federal Court held in favour of Access Copyright, ruling that the defendant's (York) activities do not constitute fair dealing. The court highlighted that the purpose of dealing by the defendant was not a strong factor in the fairness analysis based on the fact that the goal of the dealing was multifaceted. It noted:

> *Education was a principal goal, specifically education for end user. But the goal of the dealing was also, from York's perspective, to keep enrolment up by keeping student costs down and to use whatever savings there may be in other parts of the university's operation.*[89]

The Federal Court of Appeal allowed the case on the enforcement of the tariff, by holding that a final (or interim) tariff was not enforceable against York, as there was no licence agreement that had to be in place between the parties to form a basis for

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[88] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, supra n 74.
[89] *CCLA v York University*, 2017 FC 669 (CanLII), [2018] 2 FCR 43, [273].

requesting tariff-based royalties. However, the court yet again dismissed the appeal on the aspects of fair dealing. Later, the case was finally appealed to the Supreme Court.

The Supreme Court affirmed the ruling of the Federal Court of Appeal on both points. However, it did not endorse the reasoning taken by the lower courts in terms of the analysis of fair dealing. Technically, the court was not called upon to rule on fair dealing in this decision, as it held, there was no jurisdiction for the court to entertain York's argument on fair dealing, where the case is not a copyright infringement case, and the tariff was already held to be unenforceable. That said, the court took the liberty to consider and correct some erroneous approaches taken by the lower courts. It emphasised that when addressing the fairness factors, especially the purpose of dealing, the court should not gravitate solely towards the institution's perspective. For example, the fact that York has financial purpose in itself should not lead courts to readily deem its dealing as unfair, since such purpose could be eventually for pursing the core objective of education.[90]

FAIR DEALING DURING THE COVID-19 PANDEMIC

The COVID-19 pandemic has significantly increased the demand for online access to resources and e-learning, whilst challenging the feasibility of existing fair dealing guidelines. Despite the presence of fair dealing for education, it is observed that most higher education providers in Canada employ similar guidelines by which a limited portion of resources (i.e. up to 10% of a work or one chapter) is allowed to be reproduced for educational purposes. This has been a constraint for libraries that hinder them from fully taking advantage of fair dealing, even before the pandemic. As reliance on digital copies has increased during the pandemic, however, the situation has become even more complicated and challenging.[91]

A number of library associations and communities, such as the Canadian Federation of Library Associations (CFLA) and the Canadian Association of Research Libraries (CARL),[92] have been making concerted efforts to promote open access to educational material and revision of existing guidelines for the benefit of users. Winter et al. emphasise that the pandemic has clearly shown the weaknesses of the current Canadian copyright framework and its ability to accomplish its missions, highlighting the renewed importance of digital library services that have been the topic of debate that started long before the COVID-19 pandemic.[93]

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[90] *York University v Canadian Copyright Licensing Agency (Access Copyright)* [2021] SCC 32.
[91] Christina Winter and others, 'Canadian Collaborations: Library Communications and Advocacy in the Time of COVID-19' (2021) 5 Journal of Copyright in Education and Librarianship, 1.
[92] *See*, for example, CARL Statement on Optimal Equitable Access to Post-Secondary learning Resources During COVID-19 (CARL, March 2020) at: https://www.carl-abrc.ca/wp-content/uploads/2020/03/CARL_statement_optimal_equitable_access_COVID19.pdf
[93] Christina Winter and others, supra n 91.

ISRAEL

INTRODUCTION

This overview of Israeli fair use consists of three parts: first, a brief background outlining the codification of fair use into Israeli law, and secondly, a summary of the main jurisprudential developments in Israel that have taken place since the transplant of fair use into Israeli law in 2007. This section is largely based on a recent study undertaken by Niva Elkin-Koren and Neil Weinstock Netinel (Israeli Fair Use Study).[94] The final section will set out activities which are likely to constitute fair use, based on case law, official government opinion, expert opinion derived from workshops and user guidelines developed in 2011 in Israel for academic institutions and researchers.[95]

BACKGROUND, FORM AND MOTIVATION FOR INTRODUCING AN OPEN NORM IN ISRAEL

The law of Israel has been described by Eliezer Rivlin, a former Deputy Chief Justice of the Supreme Court of Israel, as a mixed jurisdiction.[96] While predominantly common law in form, an inheritance from the British during the League of Nations Mandate for Palestine (1922-1948), Israeli law nevertheless displays facets and principles derived from Continental European systems. As shown in the section below, the strong emphasis on moral rights by the Israeli courts in cases involving fair use is arguably just one example of these civil law influences and traditions in practice.[97]

As stated in the 2005 Explanatory Memorandum submitted to Parliament, the intention of the Israeli government in introducing fair use was to "avoid stagnation in copyright … by providing courts greater interpretive freedom to resolve unforeseen uses".[98,99] Thus in 2007, and in the face of vocal lobbying of the Knesset by US trade bodies,[100] the British Copyright Act 1911 and the Copyright Ordinance 1924 were re-

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[94] Niva Elkin-Koren and Neil Weinstock Netanel, 'Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition' (2021) 72 Hastings Law Journal, 1121.
[95] *Forum of Accessible Education: Code of Best Practices for Use of Works in Teaching and Research* (University of Haifa and other institutions; 2011) at https://www.law.utoronto.ca/sites/default/files/users/akatz/Israel-Code_of_Best_Practices%20English.pdf.
[96] Eliezer Rivlin, 'Israel as a mixed jurisdiction' (2012) 57.4 McGill Law Journal/Revue de droit de McGill, 781.
[97] Ibid. For example, Rivlin argues that constitutional law in Israel is influenced by both common and civil law at 784.
[98] Lior Zemer, 'Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use' (2011) 60 DePaul Law Review 1051, 1104.
[99] One of our Israeli National Experts in the workshops viewed that the main use for the introduction of fair use was to "to allow the courts more flexibility into interpreting the law and adapting it to new emerging technologies".
[100] Elkin-Koren and Weinstock, supra n 94. *See* 'US Copyright Industry Opposition to Israel's enactment of fair use' at 1156.

placed with a new Copyright Act of Israel containing a codified fair use provision.[101] This completed the transformation of Israel from a fair dealing country into one with a fully-fledged fair use framework – something which had in fact started a decade and a half previously under the auspices of the Supreme Court in the landmark case *Geva v Walt Disney.*[102]

In common with other fair use jurisdictions, Israeli fair use stands alongside an enumerated list of specific exceptions, and whilst very similar in its codification to its American progenitor, it is not identical. Like US fair use, §19 starts with an open-ended non-exhaustive exposition of the types of uses which may be viewed by the courts as fair:

> §19 (a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.

Following this, is a non-exhaustive four-factor analysis very similar to that seen in the US Copyright Act:

> (b) In determining whether a use made of a work is fair within the meaning of this section, the factors to be considered shall include, *inter alia*, all of the following:
> 1) The purpose and character of the use;
> 2) The character of the work used;
> 3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
> 4) The impact of the use on the value of the work and its potential market.

Of the four differences between the Israeli and US versions of fair use identified by Elkin-Koren and Weinstock,[103] perhaps the most significant is the introduction of a final clause under §19 allowing for further related regulations:

> (c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.

Rather than relying entirely on the judicial decision making that characterises fair use in the United States, the purpose of this further provision facilitating *ex-ante* intervention by the Government, is to reduce uncertainty that could accompany the presence of open-ended general norm in a country's copyright act. If the need to

utilise §19(c) were to arise, it provides the government with the power to provide further legal clarification and interpretational guidance quickly and easily. Thus, it serves

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[101] Israel Copyright Act 2007 (5768-2007) at https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/il/il033en.pdf and https://www.tau.ac.il/law/members/birnhack/IsraeliCopyrightAct2007.pdf
[102] Pursuant to CivA 2687/92 *Geva v Walt Disney Company* 48(1) PD 251 (1993) the Israeli Supreme Court adopted the four fair use factors of §107 of the US Copyright Act, thus acting as precedent for future copyright cases in Israel.
[103] *See* Elkin-Koren and Weinstock, supra n 94, 1154-5.

as a risk mitigation factor, though significantly as of 2020,[104] it is not one that the government had yet deemed it necessary to rely on. Nonetheless, while §19(c) has not been relied upon, Israeli authorities have resorted to other regulatory mechanisms to clarify whether exploitation of a work in a particular case would constitute fair use. For example in 2022, in a landmark move the Ministry of Justice issued an opinion on AI and machine learning and its status as a fair use activity.[105] Thus, even if codified fair use add-ons such as §19(c) are not utilised, other regulatory mechanisms are available to the government to provide interpretational guidance to businesses as well as other organisations, members of the public and the courts.

As to the desirability of issuing further regulations under §19, as Yu has noted, it may well be self-defeating, negatively affecting the flexibility which fair use is by design intended to provide.[106] Whether or not this is the case however will inevitably depend on the form any such regulation were to take. For example, as with the open norms introduced in Japan in 2018 (see section on Japan),[107] if regulations were simply to provide a non-exhaustive list of examples of the types of use that were permissible, it would serve to clarify for users and the courts lawful fair use activities with little if any of the potential down-sides highlighted by Yu.

Rather than simply seeking to avoid confusion, another reason for introducing further regulatory oversight of fair use in this manner could be political. Given the long arm of US copyright organisations who lobby vociferously against the foreign transplantation of fair use, supplementary regulatory provisions such as §19c can serve as a relatively easy means to increase political support from within the legislature for the transition of domestic copyright laws to a more flexible system.[108]

THE ISRAELI EXPERIENCE OF ADOPTING THE FAIR USE EXCEPTION: BENEFITS AND CHALLENGES

This section seeks to highlight some of the main findings from Elkin-Koren and Weinstock's Israeli Fair Use Study and the verification meetings undertaken as part of this project, and as such serves to reiterate the facts and legal realities of transplanting fair use into the laws of another country.

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[104] Ibid., 1155.
[105] Ministry of Justice Opinion on Machine Learning (Ministry of Justice, 18 December 2022) at https://www.gov.il/BlobFolder/legalinfo/machine-learning/he/machine-learning.pdf
[106] Peter K Yu, 'Customising Fair Use Transplants' (2018) 7 Laws, 1.6.
[107] Japan Copyright Act (Act No.48 of 6 May 1970 as amended), Arts 30-4 & 47-4.
[108] For example, US copyright organisations have opposed the adoption of open norms in Canada, Japan, South Korea, Chile, Taiwan, Sri Lanka, Israel, Australia, Ecuador, and South Africa. *See* Elkin-Koren and Weinstock, supra n 94, 1145-6. US trade organisations and the European Union have also recently been active opposing the introduction of fair use. *See* How the U.S. and European Union pressured South Africa to delay copyright reform (Politico, 28 June 2020) at https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101

Elkin-Koren and Weinstock's analysis of fair use cases ruled on in Israel between 19 May 2008 and 18 May 2018 is highly illuminating as to the likely jurisprudential impact of transplanting fair use into the laws of another country. The period studied saw a total of 55 reported rulings in Israel and compares them with 185 rulings reported in the same period in the United States.

Whilst US-based trade bodies and more recently the European Union[109] have opposed the adoption of flexible exceptions, anchored in theoretical arguments that a lack of a fair use tradition will lead to a situation where there is an uncontrolled use of copyright works, the study from Elkin-Koren and Weinstock helpfully grounds the debate in empirical evidence. Although the study is specific to Israel, it is posited that the broad trends it depicts are highly likely to be universal in their application, and therefore serves as a useful tool to predict the likely outcomes of codifying fair use into the laws of other countries.

In terms of the volume of relevant cases in the first ten years after the codification of fair use into Israeli law in 2007, two features in particular stand out. First, there has been a notable increase in the number of reported cases. Prior to May 2008 (i.e. while fair dealing was in place), there were 32 cases in total referred to use of copyright exceptions, while after the introduction of fair use, the courts heard 55 cases in a period of ten years. While no reason for this is given by Elkin-Koren and Weinstock, it seems most likely that complex historical developments combined with the move away from the precise and circumscribed nature of British fair dealing as codified into the 1911 Act[110] may well explain the comparative increase in cases after 2008.[111] Second, as a relatively small country, the number of fair use cases reported in Israel vis a vis the United States stands out. Rather than this being the result of the introduction of fair use, the study suggests that the relatively much lower cost of litigation in Israel is the prime factor explaining this discrepancy. Elkin-Koren and Weinstock suggest that higher costs for litigation acts not only suppress the total number of copyright cases in the US, but encourages out of court settlements as the parties seek to avoid

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[109] Ibid. *See* additionally a letter from the Ambassador to the European Union to the South African Government (Ref. Ares(2020)1713531 – 23/03/2020) at https://www.eeas.europa.eu/sites/default/files/20200320_copyright_regime.pdf

[110] *See* Ariel Katz, 'Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?' in Shyamkrishna Balganesh, Ng-Loy Wee Loon and Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge University Press, 2020) (outlining how the 1911 Act's codification of a closed list of five fair dealing acts curtailed previously existing judicial freedoms).

[111] *See* Michael D Birnhack, 'Mandatory Copyright: From Pre-Palestine to Israel, 1910-2007' in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar, 2012) (outlining reasons for a historical lack of engagement with copyright law in Israel owing to a number of factors including a lack of lawyers and legal education in Mandatory Palestine the first half of the twentieth century through to copyright law not being a priority given the many challenges facing the new Israeli state after its establishment in 1948. It is submitted that the fact it took from 1948 until 2007 for the 1911 British Copyright Act to be replaced by an Israeli Copyright Act is also emblematic of the historical lack of emphasis placed on copyright in Israel).

the debilitating costs that accompany litigation and court hearings.[112] In addition to litigation being less costly in Israel, other plausible reasons for this discrepancy may be a more mature copyright environment as the political situation in Israel has stabilised, as well as an inevitable increase in cases linked to the many new tools and opportunities that digital technologies afford users of copyright works.

Israeli Courts – A Conservative and Localised Approach to Fair Use

Regardless of the eschatological warnings that the transplantation of fair use into foreign jurisdictions represents a "fatal flaw" that will lead to "confusion" [113] and "uncertainty",[114] the Israeli experience demonstrates no such outcome. Elkin-Koren and Weinstock conclude that far from fair use creating instability to the detriment of copyright owners, the courts took "a relatively conservative approach that heavily relied on the legal tradition which preceded the … enactment of fair use".[115] Although there is no indication in any of the literature surveyed for this report that Israeli judges received specific training on fair use to accompany the introduction of the 2007 Copyright Act, the Israeli Fair Use Study demonstrates that judges felt perfectly able to mould §19 to pre-existing domestic legal traditions. This has resulted in rulings often quite distinct in nature to those of US courts. Of particular note is that in spite of broad freedoms that §19 provided the Israeli courts and the panorama of new non-substitutive uses that become possible with new technologies, there is not such a marked difference between the level of fair use rulings and those made pursuant to the closed list of permitted acts provided by British fair dealing. The Study reveals that prior to May 2008 Israeli courts rejected fair dealing defences in 84% of cases, compared to fair use defences being rejected in 71% of cases between 2008 and 2018.[116]

Furthermore, in comparison to the United States, analysis of the fifty-five Israeli cases shows the comparative resistance on the side of the Israeli judiciary to find in favour of a fair use defence. Far from creating a free-for-all as alleged by opponents, in only 29% of cases heard did the Israeli courts determine the exploitation of the work to constitute a fair use – in comparison to 49% in the US.

Analysis of the rulings highlights some striking differences in the approach taken by courts in Israel. First, unlike the US, where commercial use is not dispositive in finding against fair use, 47% of the judgments in the Elkin-Koren and Weinstock Israeli Study determined that commercial use weighed against a fair use finding. In addition to giving commercial uses a prominence not seen in the courtrooms of the US, the Israeli

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[112] According to one study only 2.87% of copyright cases analysed resulted in trial. *See* Christopher A Cotropia and James Gibson, 'Copyright's Topography: An Empirical Study of Copyright Litigation' (2013) 92 Texas Law Review, 1981.
[113] *Special 301 Report on Copyright Protection and Enforcement* (IIPA; 2019) at https://www.iipa.org/files/uploads/2019/02/2019SPEC301REPORT.pdf
[114] *See* Elkin-Koren and Weinstock, supra n 94. 1147, 1149.
[115] Ibid., 1181.
[116] Ibid., 1160 (Fig 1); *See* also footnote 221.

authorities also tend to give a strong weight to moral rights,[117] and in particular the right of attribution.[118] Although attribution is not required by §19 and is hardly a feature at all of US rulings,[119] in 21 of the 31 (68%) reported cases that declared the author's right of attribution had been infringed, the court rejected a fair use defence.

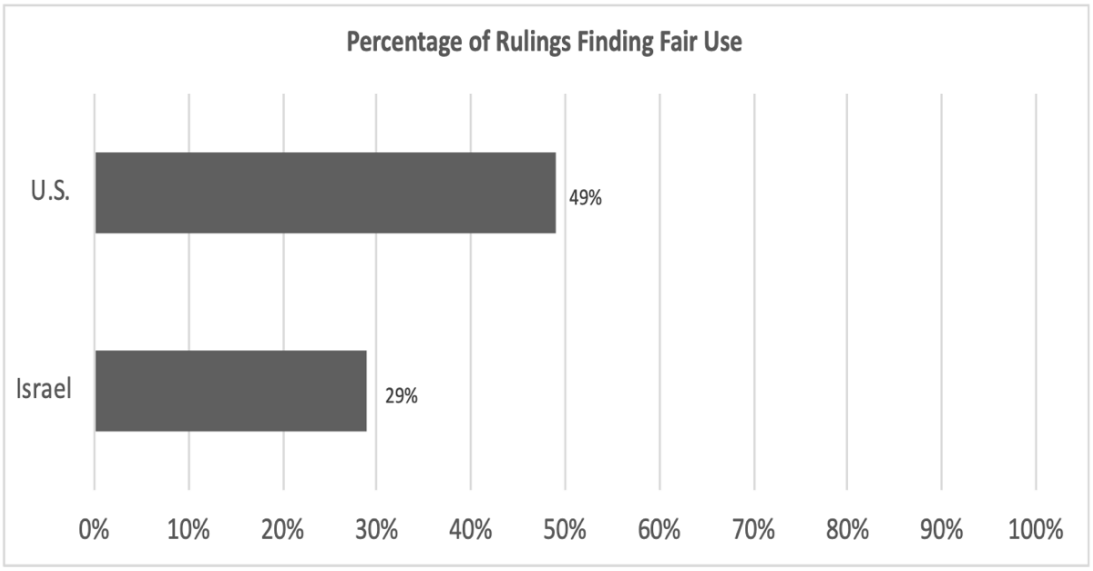

Figure 2: Source - Niva Elkin-Koren and Neil Weinstock Netanel, Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition

Third, §19(a) has assumed an importance in the Israeli Copyright Act not afforded the preamble to US fair use upon which it is modelled. Examination of the case law informs that it has become a "purpose test"[120] which needs to be complied with before a use is subsequently deemed to be fair under §19(b). Thus, it constitutes a required first step that the courts must consider, before any weighing of the four fair use or other factors can commence. Furthermore, in spite of the open-ended nature of §19(a) which potentially renders as fair, uses "*such as:* private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution"(emphasis added), the courts in Israel have overwhelmingly treated the enumerated activities as a closed list.[121] In other words, if the activity falls outside of the specific uses listed in the preamble in §19(a) it is not recognised as fair use. Although evidently not required by the 2007 Act, and arguably something that future courts will take issue with, Elkin-Koren and Weinstock postulate that this literal approach to §19(a) is linked to judicial customs emerging from the 1911 British Act with its closed list of precisely enumerated exceptions.[122]

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[117] Chapter 7 Moral Right. Israel Copyright Act 2007 (5768-2007).
[118] Ibid., §46(1).
[119] Only 1.1% of US cases in the Elkin-Koren and Weinstock study stated that a failure to attribute can result against a rejection of fair use.
[120] CivA 3425/17 *Société des Produits Nestlé v Espresso Club* Ltd 31 (2019).
[121] Of the 19 cases where the courts observed the use was not listed in §19(1), in 17 the defendants' fair use defence was rejected.
[122] *See* Elkin-Koren and Weinstock, supra n 94, 1178.

A final distinguishing feature of Israeli fair use jurisprudence, though somewhat less statistically significant than those outlined above, is the question of whether or not the work is being used by the defendant in good faith. Although not a significant factor in the US cases analysed in the Study, in the 16 Israeli rulings that addressed the underlying intentions of the plaintiff, fair use was rejected in all instances where bad faith was evident (12) and accepted in all cases where the defendant had acted in good faith (4).

In considering developments in the courts, the verification meetings with Israeli National Experts held as part of this project revealed that there is "a change in the Israeli atmosphere towards more openness towards understanding copyright law as a mechanism aimed to serve the public interest in enlarging the public domain in encouraging a production of new works and not as a proprietary regime". Thus, the introduction of fair use has acted as a catalyst in Israel for are-evaluation of the purpose of copyright law away from it being a pure proprietary right towards something broader which should be utilised to serve the needs of public welfare.

How Has US Case Law Influenced Israeli Courts?

How far the US fair use precedent has influenced Israeli jurisprudence reveals a clear twin path between lower and higher courts. While lower courts have generally eschewed the citing of US cases,[123] by contrast the Israeli Supreme Court has done so on a number of occasions.[124] Thus, where helpful or needed, judges feel entirely at liberty to rely on the richness of US case law. It functions therefore as an "oven-ready" body of law that can be relied upon to inform and guide rulings in foreign jurisdictions that have supplanted fair use. At the same time, in part informed by the British statutory tradition of enumerated exceptions, civil law,[125] as well as other features expressive of local copyright conditions, the courts have also felt perfectly at liberty to develop their own distinctive fair use norms homegrown from Israeli legal culture and traditions.

In conclusion, Elkin-Koren and Weinstock's findings therefore serve to counter assertions that the transplant of fair use will cause confusion and uncertainty within the legal system at least. Whereas what has taken place outside of court as a result of the introduction of fair use is not addressed in the research, when cases end up in a courtroom, the study proves conclusively that the courts have remained level-headed and balanced in their approach to copyright litigation. Steeped in their own legal traditions,

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[123] Ibid., 1164.

[124] For example pre-dating the 2007 Act: CivA 2687/92 *Geva v Walt Disney Company* 48(1) PD 251 (1993). For other examples *see* Tony Greenman, Fair Use under Israel's New Copyright Act (TGLaw Copyright & co) at https://www.tglaw.co.il/index.php?dir=site&page=articles&op=item&cs=10109&langpage=eng&language=eng After 2007, *see* CivA 9183/09 *Football Ass'n Premier League Ltd v Anonymous* (2012); Civ A 7996/11 *Safecom Ltd v Raviv* (2013); CivA 3425/17 *Société des Produits Nestlé v Espresso Club Ltd* 31 (2019).

[125] *See* Elkin-Koren and Weinstock, supra n 94, 1176.

judges have adeptly relied on their own experience, training and precedent to contextualise fair use. Rather than an overly extensive interpretation of fair use harming the legitimate interests of rightsholders, the Israeli authorities have not only been far more conservative around commercial uses than US courts, norm setting by judges has developed in a uniquely Israeli manner.

This ground-breaking study on copyright legal transplants undertaken by Elkin-Koren and Weinstock demonstrates that trained judges expert in the law do not suddenly become unglued from the core tenets of copyright when required to interpret an open-ended general exception. As is perhaps to be expected, rather than run wild with new normative freedoms, legal training, domestic and foreign precedents, and the pre-existing legal environment they have always operated in serves to adequately ground the judiciary in a mature framework in which to consider the interpretation of a novel open and flexible norm transplanted into the copyright act.

How Has the Introduction of Fair Use Affected Users of Copyright?

While the National Experts were unaware of any negative impact on rightsholders arising from the introduction of fair use, according to the experts the introduction of §19 supports the activities of parts of the economy, such as the technology sector, who are willing to take a legal risk based on their own evaluation of the law.[126] Whereas it was stated that smaller less financially well-off companies and sectors may be vulnerable to the uncertainties of an open norm due to a lack of in-house legal advice, larger organisations are believed to have benefited from the flexibility that fair use has created within Israel.

For the education and research sector, according to one of the participants of the workshop, fair use has also helped compensate for the dearth of appropriate licences as well the frequent lack of clarity that surrounds who to approach for permission to use a copyright work. Thus, fair use has served to remove some of the very evident chilling effects that a predominantly licence-based approach to educational activities had created in Israel prior to 2007.[127]

Another benefit according to the Israeli National Experts invited to attend this project's verification meeting was that it made organisations more proactive around determining what uses of copyright may be lawful. As a result, fair use facilitates active management of copyright works that an organisation has access to in line with their own institutional risk profile. This fair use-based risk management approach to the use of copyright works was further facilitated in 2019 by the adoption of provisions in Israeli copyright law which exempt educational institutions, libraries, archives,

[126] The National Expert explained this was their own impression rather than being based on any research.
[127] It was explained that due to a lack of collective management solutions for the sector education and research permissions had to be sought on an individual basis.

government bodies, and certain other non-commercial actors from statutory damages.[128]

In the case of cultural heritage organisations, fair use was viewed as central to the mass digitisation and making available online of their historical collections. It was explained that, depending on the nature of the work, digitisation may or may not be accompanied by a search for the rightsholders guided by the level of risk involved in making the work available online. Where works were likely to be orphan works or rightsholders were deemed to be unlikely to object, it was stated that fair use could frequently be relied on. For instance, European newspapers from Jewish communities who fell victim to the Holocaust were cited as an example where no rights clearance was attempted as it was determined that the use would be fair.

A further interesting aspect stemming from the introduction of §19 according to one of our National Experts was that it has allowed Israeli cultural heritage institutions to use and adapt pre-existing US GLAM guidelines on fair use to the domestic situation in Israel.[129] This has resulted in cost savings in regards to cataloguing costs as well as the search for rightsholders. This is because it has allowed cataloguers to make a judgement about the nature of the archival materials they were working on for digitisation purposes, rather than having to meticulously record each contributor as a precursor to embarking on a search in order to clear rights irrespective of the likelihood of success.[130] Cost savings more generally around rights clearance were also evident from the discussion, as the cultural heritage sector expert said that compared to an enumerated approach to exceptions, a risk based methodology based on fair use meant the institution could determine the level of rights clearance required. The example given was that whereas European orphan works legislation would frequently require a diligent search even where the prospect of successful search and a response was minimal, a fair use-based assessment would in many instances not require an organisation to embark on rights clearance at all where it was very clear that the use of the work was fair. By extension it can also be implied from these discussions that the flexible regime around digitisation that fair use provides may well result in further governmental or philanthropic funding for cultural heritage organisations, as funders are keen, facilitated by the law, to support access to cultural heritage online.

From a legal perspective, the verification meetings revealed a heavy reliance on transformative use as a legal doctrine supporting the making available of whole collections online. It was explained that this was because in an archival context the exclusion of materials such as unlicensed works, orphan works etc would damage an institution's

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[128] § 56(a). 2019 Amendment No 5 to Israeli Copyright Law, 2019.

[129] *The Code of Best Practices in Fair Use for Academic and ResearchLibraries* (Association of Research Libraries; 2012) at https://publications.arl.org/code-fair-use/

[130] The National Expert explained that much archival material is not created by people for commercial gain and therefore contact information allowing for a rights clearance to commence can very often be absent.

fair use defence because the less complete the collection, the weaker the claim became that use was transformative as historical research. In other words, only with access to the whole archive can the historical context and therefore the transformative use be realised. This in turn, it was said, supported the public function of GLAMs in the digital age, as without the flexibility for the institution to be able to decide what collections to make available online its public interest mission as well as access to cultural heritage for the public would be diluted. By implication therefore, the ability to make a whole collection online irrespective of its copyright status will also minimise any bias or historical interpretational anomalies that may arise from partial digitisation.[131]

ISRAELI FAIR USE – PERMITTED EDUCATION AND RESEARCH ACTIVITIES

In addition to the generic types of uses listed in §19(a) and specific exceptions in Israeli law,[132] in principle the following research and educational activities are likely to constitute fair use subject to the precise modalities of the exploitation.

The proposed uses stem from i) case law, ii) guidelines developed by copyright experts and academics iii) guidance issued from the Ministry of Justice and iv) discussions with the Israeli National Experts at the verification meetings held as part of this project.

Case Law

- copying for educational and learning purposes[133]
- making available online sections of a newspaper article,[134] a photograph[135,136] etc.

Ministry of Justice Opinion[137]

- machine learning where a model is trained on multiple different datasets from more than one author

[131] For example, on this issue *see* Kaspar Beelen, Jon Lawrence, Daniel C S Wilson and David Beavan, 'Bias and representativeness in digitized newspaper collections: Introducing the environmental scan' (2023) 38(1) Digital Scholarship in the Humanities, 1.
[132] § 24 Computer Programs, § 25 Recording for Purposes of Broadcast, § 29 Public Performance in an Educational Establishment, § 30 Permitted Uses in Libraries and Archives (including preservation, replacing lost or unusable copies, document supply.)
[133] CivC 8303/06 *Mejula v Hanan Cohen* (2008).
[134] CivC (DC TA) 57588-05-12 *Danon PR Telecommunications v Shelly Yachimovich* (2012).
[135] CivC 48263-11-13 *Ronen v Let the Animals Live* (2016).
[136] CC 8211-09 *Forgas v Beit Hinuch High School, Western Galilee* (2011).
[137] Ministry of Justice Opinion on Machine Learning, supra n 105.

Code of Fair Use Best Practices[138]

(The Code[139] is an initiative undertaken by the Law and Technology Clinic of the University of Haifa, the Faculty of Law, and the IP Clinic of the College of Management Academic Studies School of Law.[140])

- staff and enrolled student access to analogue and digital reproductions of a full article or 20% of a paper book in an eReserve and/or course pack
- course packs produced on demand may be sold at cost

In addition to the above two activities which a literature review reveals were explicitly part of the settlement agreement between Hebrew University and two Israeli publishers, the guide also suggests the other uses that may constitute fair use. These include:

- use of newspaper articles in an examination
- scanning a whole book which is out of print
- the use of an entire indivisible work, such as a picture, photograph, drawing, table, etc.

Discussion with our National Experts also revealed that during the COVID pandemic Israeli universities adopted a position to extend all permissible activities under the Code to the online environment. Moreover, it was agreed by the universities that the sending of a link should be a non-infringing act.

Verification Meeting

From the verification meeting with Israeli National Experts, the following activities were proposed as being permissible under fair use:

- Use of clips from films by documentary film makers
- Large scale digitisation and making available of historical collections (published and unpublished) from cultural heritage organisations[141]

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[138] The Code was agreed as part of a 2013 settlement between Hebrew University and two Israeli publishers, Bialik Institute Publications and Schocken Books (Penguin Random House). The settlement agreement expired on 31 December 2017 at which point both parties original claims are preserved and the settlement shall not be deemed as creating precedent. Private correspondence with one of the authors reveals that the Code is still in operation and being used by Israeli universities.

[139] *Forum of Accessible Education: Code of Best Practices for Use of Works in Teaching and Research*, supra n 95.

[140] For more information on the background to the project *see* Niva Elkin-Koren, Orit Fischman-Afori, Ronit Haramati-Alpern, Amira Dotan. 'Fair Use Best Practices for Higher Education Institutions: The Israeli Experience' (2010) 57(3) Journal of the Copyright Society of the USA, 447.

[141] One of the National Experts commented that the making available online by CHIs of historical materials was probably a transformative use under fair use. For example, ephemera concerning public health campaigns was for the purpose of protecting citizens but its digitisation and making available was for the purpose of historical research.

SINGAPORE

INTRODUCTION

Singapore is one of the countries that adopts a hybrid legal system based on the traditions and practices of English common law and its own autochthonous development of jurisprudence influenced by civil law and Muslim law.[142]

Until 1987, Singapore was governed by the UK Copyright Act 1911, before the modern Copyright Act (Cap 63) was passed on 10 April 1987. Under the 1987 Act, Singapore opted for fair dealing type provision, based on English and Australian law, which was set out in ss. 35-37 of the 1987 Act.[143] However, the law was amended in 2004 by the Copyright (Amendment) Act (No 52 of 2004)[144] – which led to Singapore opting for a fair use style doctrine for the first time. This amendment aimed to update Singapore's intellectual property rights infrastructure, and to achieve a proper balance between copyright owners and users in the digital environment, by introducing an open-ended copyright exception. However, unlike the US, in its 2004 Act Singapore's fair use provision, which continued to be called "fair dealing", also included a fifth factor.[145]

At present, the Copyright Act 2021 (as amended), which came into force in November 2021, is the current primary copyright legislation in Singapore.[146] Part 5 of the Copyright Act 2021 comprises numerous provisions relating to permitted uses of copyright works and protected performances. Part 5 Division 2 includes five provisions relating to fair use, whilst there are also different Divisions that include further exceptions such as Division 3 (education and educational institutions) and Division 6 (public collections: galleries, libraries, archives, and museums), amongst others.[147]

The new Act of 2021 has also introduced some significant changes to the structure of fair use provisions. For example, the term "fair use" has been adopted in place of "fair dealing". The existing statutory test for fair use under the previous Copyright Act has

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[142] Eugene Tan and Gary Chan, 'The Singapore Legal System' (Singapore Law Watch, 7 February 2019) at https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-01-the-singapore-legal-system

[143] Full text of the Copyright Act 1987 is available at: https://en.wikisource.org/wiki/Copyright_Act_1987_(Singapore)

[144] Full text of the Copyright (Amendment) Act (No 52 of 2004) available at: https://sso.agc.gov.sg/Acts-Supp/52-2004/Published/20041213?DocDate=20041213#pr9-

[145] *See below*, Singapore's motivation for introducing an open norm. *See also*, David Tan, 'The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the "Purpose and Character" of Appropriation Art' (2012) 24 Singapore Academy of Law Journal, 832, 837. For more historical development of open-ended fair dealing in Singapore, *see also Global Yellow Pages Ltd v Promedia Directories Ltd* [2016] SGHC9; 2 SLR 165, [389]-[395].

[146] The Copyright Act 2021 (2020 Rev Ed, amended by Act 31 of 2022).

[147] Full text of the Copyright Act 2021 is available at: https://sso.agc.gov.sg/Act/CA2021?WholeDoc=1 There are 19 Divisions in Part 5.

been reviewed and amended to introduce the current four-factor criteria, very much similar to the US-style fair use provision.[148]

The rest of the discussion on Singapore is presented in three parts. Firstly, the motivation for introducing an open norm in Singapore is set out. Secondly, the report discusses in detail the application of the fair use doctrine in Singapore including the benefits and challenges and its impact on the research and education sector. Thirdly and finally, the report presents an insight into fair use litigation in Singapore before concluding with a view of the use and adoption of the fair use doctrine during the pandemic.

SINGAPORE'S MOTIVATION FOR INTRODUCING AN OPEN NORM

The initial motivation for introducing an open norm in Singapore in 2004 was as a result of aligning Singapore's copyright law with the US-Singapore Free Trade Agreement 2003.[149]

The current motivation for updating the fair use provision in 2021 Act was to pave the way for "future creators (including those in the copyright industries themselves), in reasonable circumstances, to build upon existing works without seeking rights-holders' consent. For Singapore, the key objective of such an exception was to create an environment conducive to the development of creative works, and to facilitate greater investment, research and development in the copyright industries in Singapore".[150]

One of the Singaporean National Experts who took part in the project's verification process, summed up the motivation as follows:

> "The legislators sought a balance which would ultimately contribute to the larger drive to foster innovation. It was a motivation to enable society as a whole to benefit from creative works, but with some controls and checks and balances to ensure that there's no abuse."[151]

It is also interesting to note why Singapore dropped the "fifth factor" from the fair use provision. Originally during the amendment of copyright law in 2004, Singapore had opted for a five-factor model departing from the US four-factor model. The fifth factor included "the possibility of obtaining the work or adaptation within a reasonable

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[148] Copyright Factsheet on Copyright Act 2021 (Intellectual Property Office of Singapore, 24 November 2022) at https://www.ipos.gov.sg/about-ip/copyright/copyright-resources

[149] George Wei, 'A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore: Twenty-Five Years On' (2012) 24 Singapore Academy of Law Journal, 867, 883-885.

[150] Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (Ministry of Law; 2019) at https://www.mlaw.gov.sg/files/news/public-consultations/2021/copyrightbill/Annex_A-Copyright_Report2019.pdf at para 2.6.4. p. 25.

[151] Singapore National Expert at the project verification meeting held on 9th February 2023.

time at an ordinary commercial price".[152] However, the Public Consultation on the Proposed Copyright Bill[153] in February 2021, found this fifth factor difficult to apply, and consequently the draft bill removed the fifth factor from Clause 183 – thereby aligning very much with the US four-factor model.

FAIR USE IN SINGAPORE COPYRIGHT LAW

In contrast to other countries' statutory construction of fair use that is rather simple, often with a single provision that adopts fairly general and broad wording, Singapore copyright law provides more structured and detailed rules on fair use across five different sections.

As mentioned above, Part 5 of the Copyright Act 2021 (comprising Divisions 2-19), sets out a variety of permitted uses of copyright works. Fair use in particular is set out in Division 2, in sections 190-194. Section 191 is the key provision which sets out when a work or a protected performance can be considered to have been fairly used. Section 191 states that all relevant matters must be considered, including the following non-exhaustive criteria, which is largely reflective of the US fair use doctrine:

(a) the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes;
(b) the nature of the work or performance;
(c) the amount and substantiality of the portion used in relation to the whole work or performance; and
(d) the effect of the use upon the potential market for, or value of, the work or performance.

For acts such as news reporting and criticism or review, sufficient acknowledgement must be provided additionally, along with meeting the criteria above, for fair use to subsist.[154] It is also notable that under certain circumstances, such as copying a reasonable portion of an article for research or study[155] it is possible to talk about fair use without a need to satisfy the requirements in section 191.

In respect of the presumption of fair use, section 194 is particularly relevant in the educational and research context. Section 194(1) states that making a copy of a literary, dramatic, or musical work for the purpose of research or study is deemed to be a fair use, provided that either (a) the work is an article in a periodical publication, or (b) no more than a reasonable portion of the work is copied. However, the presumption is not triggered, subject to section 194(2), where making a copy of an article in a

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[152] Part 5, Division 2 of the Proposed Copyright Bill.
[153] *See*, Proposal 6, section 27 (p. 12 of 29) of Public Consultation on the Proposed Copyright Bill (5 February 2021) at https://www.mlaw.gov.sg/files/news/public-consultations/2021/copyright bill/Copyright_Consultation2021.pdf According to the National Expert, the fifth factor was also dropped as it confused people, rather than clarifying the law.
[154] The Copyright Act 2021 (2020 Rev Ed, amended by Act 31 of 2022), s 192 and s 193.
[155] Ibid., s 194.

periodical publication involves the reproduction of another article in that publication and the copied articles deal with a different subject matter.

HOW HAS IT BEEN RECEIVED IN SINGAPORE? BENEFITS AND CHALLENGES

With the introduction of this open norm, Singapore also introduced some new specific exceptions, such as the text and data mining exception and more open-ended/liberal education exceptions, which was seen as a very positive step forward by the research and education sector in particular.

During the verification process that was carried out with the National Experts of Singapore, it was clear that Division 2 (sections 190-194) has been well received particularly in enabling classroom sharing which in turn has had a positive impact on education.[156]

The impact of the 2021 Act will not be known or felt for a few years to come; however, in reviewing the Act, it is worth noting the clarity of Division 2 where fair use is set out, whilst sections 192-194 are clear in their additional requirements (such as sufficient acknowledgement). Therefore, it appears that this second iteration of the fair use provision, has done away with some of the challenges that were prevalent in the 2004 Act. It has been considered "easier to understand and apply".[157]

Furthermore, the ability to digitise at-risk collections has been hailed as a positive step forward, paving the way for a repository for digitised collections.[158] This is something that could not have been achieved previously and as such reflects a progressive step in Singapore. Following on from this, it is also clear that Singapore has become "bolder" in the number of copyrighted materials that can be held in repositories, exhibitions, and other public fora. All of these amendments have been viewed as a step in the right direction to ensure Singaporean society is "future-ready" in enabling innovation, transformative uses, and parody, to name a few.[159]

APPLICATION OF FAIR USE IN THE RESEARCH AND EDUCATION SECTOR

The criteria for fair dealing laid out in the Copyright Act 1987 (as amended in 2004) were essentially the same as those introduced in the new Copyright Act 2021, except for the fifth factor which was dropped in 2021. Therefore, the application of fair dealing under the previous law offers some guidance in relation to the current law.[160]

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[156] *See*, Division 3, sections 195 – 205.
[157] Copyright Factsheet on Copyright Act 2021, supra n 148.
[158] Research, study or publication – copying or communicating unpublished old material in public collection – s 229.
[159] Singapore National Expert at the project verification meeting held on 9th February 2023.
[160] For discussion of the criteria of fair dealing under the Copyright Act 1987 (as amended in 2004)

For example, section 197 – copying or communicating very small portions of literary or dramatic work for course of education by educational institutions – provides very clear guidance on how much can be copied, as outlined below:

> "… the part of the work that is copied or communicated does not exceed —
>
> (i) if the edition has 500 pages or less – 5 pages;
> (ii) if the edition has more than 500 pages – 5% of the total number of pages in the edition;
> (iii) if the edition is an electronic edition and is not divided into pages —
> (A) 5% of the total number of bytes in the edition; and
> (B) 5% of the total number of words in the edition or, where it is not practicable to use the total number of words as a measure, 5% of the contents of the edition …".

The Act is clear in the guidance that has been provided and in the context of how much can be copied by educational institutions. Whilst this may appear to be restrictive, it has struck a successful balance in allowing for contemporary uses while also making the rules clear and easy-to-use, which has been received well in Singapore.[161]

FAIR USE LITIGATION IN SINGAPORE

According to the Singapore Supreme Court judgments database,[162] there are only a few reported cases on fair use under the Copyright Act 1987 (as amended), and none so far under the new Copyright Act 2021. There are also no clear statistics that demonstrate the changes in the number of cases since the introduction of fair use in Singapore, or evidence that reflects the impact of the introduction of fair use on the education and research sector.[163] Thus, this section aims to discuss a selection of key

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and its application to factual scenarios based on US courts decisions, *see* David Tan and Benjamin Foo, 'The Unbearable Lightness of Fair Dealing: Towards an Autochthonous Approach in Singapore' (2016) 28 Singapore Academy of Law Journal, 124.

[161] Singapore National Expert at the project verification meeting held on 9th February 2023.

[162] In Singapore, the Supreme Court consists of a set of two courts, which are Court of Appeal and High Court. The Court of Appeal sits at the highest level of court hierarchy, hearing criminal and civil appeals. In the High Court, civil appeals are heard, and criminal and civil cases can be commenced. As such, the Supreme Court judgments database covers decisions decided in both lower- and higher-instance courts. The database is available at: https://www.judiciary.gov.sg/judgments/judgments-case-summaries

[163] However, it is notable that an economic analysis of the impact of fair use in the private copying technology industries suggests that a more flexible fair use policy is correlated with faster growth rates in private copying technology industries in Singapore, albeit its impact is evaluated to be rather minor on the growth of the copyright industries overall. *See* Roya Ghafele and Benjamin Gibert, 'A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore' (2014) 3 Laws, 327. For crucial reviews and counterarguments, *see also* George Ford, 'A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore: A Critical Review' (2018) 7 Laws, 34 and Roya Ghafele, 'Reply to George S. Ford's 'A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore: A Critical Review' (2020) 9 Laws, 1.

decisions from some years ago, which can help shed light on how Singapore used the fair dealing provision and how it may now be viewed, with an open norm in place.

For example the case of *RecordTV v MediaCorp TV*[164] concerned whether providing an Internet-based service (or time-shifting service) that allows members of the public to request the recording of free-to-air broadcasts and to view it at their own convenience constitutes fair dealing under the Copyright Act 1987 (as amended).[165] Before deciding on this point, the High Court first held that the action above amounted to copyright infringement by communicating copyright works to the public. The moot point, then, was whether it falls within the scope of fair dealing. Considering how the US authorities discussed time-shifting and fair use, the court placed the emphasis on the statement drawn from a US case, that "while commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain".[166] The court rejected the application of fair dealing in this case, by concluding that the time-shifting service at issue was set up primarily for private profiteering and the social benefit brought by that service had been already provided by other existing time-shifting technologies such as video cassette recorders.[167]

Another noteworthy decision that provides significant guidelines on fair use is *Global Yellow Pages v Promedia Directories*.[168] The decision relates to the reproduction of telephone directories and the potential application of fair dealing under the old Copyright Act (Cap 63).[169] The claimant – a publisher of telephone directories in Singapore – alleged the defendant infringed its copyright by, *inter alia*, copying and referencing the listings and classifications in its directories. The High Court denied copyright infringement by the defendant, and thus there was no need to discuss fair dealing in this case. However, the court observed that even if it were infringement, the acts by the defendant would have fallen under fair dealing. It emphasised that fair dealing for study or research or for any other purposes is not restricted to non-commercial deal-

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[164] *RecordTV Pte Ltd v MediaCorp TV* [2009] SGHC 287.
[165] As mentioned above, the term 'fair dealing' was employed instead of 'fair use' under the old Copyright Act.
[166] *RecordTV Pte Ltd v MediaCorp TV*, supra n 164, [103] referring to *MCA, Inc v Wilson* 677 F 2d 180.
[167] This decision was later overturned in the Court of Appeal. However, the reason for that was the Court of Appeal denied that the time-shifting service constituted copyright infringement in the first hand, and therefore there was no further discussion on the lawfulness of the application of fair dealing defence in the High Court. *See RecordTv Pte Ltd v MediaCorp TV Singapore Ltd* [2010] SGCA 43.
[168] *Global Yellow Pages Limited v Promedia Directories Pte Ltd* [2016] SGHC 9 and [2017] SGCA 28. *See also* journal articles discussing these decisions in various contexts: Wei Xiang Leow, 'Fair Use on Instagram: Transformative Self-expressions or Copyright Infringing Reproductions?' (2019) 31 Singapore Academy of Law Journal, 125; David Tan and Thomas Lee, 'Copying Right in Copyright Law: Fair Use, Computational Data Analysis and the Personal Data Protection Act' (2021) 33 Singapore Academy of Law Journal, 1032.
[169] As mentioned above, the term 'fair dealing' was employed instead of 'fair use' under the old Copyright Act.

ings. Although it was evident that the defendant's printed directories were direct competitors to the claimant's directories, the court viewed that the photocopying of the listings at issue or scanning them into the temporary database by the defendant would have constituted fair dealing for research or other purposes.[170]

The Court of Appeal affirmed the lower court's decision. In assessing the criteria of fair dealing, it highlighted, *inter alia*, that the purpose of the use by the defendant in the case was simply to facilitate the defendant's employees to compare or identify listings not found in its database and to update it; that it was an internal exercise that could be characterised as being incidental to commercial research; and that the scanned or photocopied listings were never publicly distributed. Furthermore, it held that there was no possible harm to the potential market for the claimant, as the claimant's work was distributed freely. Based on this reasoning, the court approved the lower instance court's ruling on fair dealing.[171]

FAIR USE DURING THE COVID-19 PANDEMIC

Similar to other countries, the COVID-19 pandemic brought significant challenges to schools, universities, and libraries, in terms of delivery of teaching, conducting research and facilitating all these educational and research activities. In university libraries, staff and students' demands on online access to e-resources have drastically increased, whilst libraries have been requested ever more to digitise core resources for online sessions and to include more online resources in the reading lists. Amongst many challenges of the pandemic, the absence of emergency copyright exceptions that allow libraries to accommodate increased demands on digitisation has been identified as a significant issue.[172]

There is little to no literature indicating whether fair use has been actually relied on in Singapore during this period as an alternative emergency exception, although it was apparently considered in the library sector.[173] Before and during the pandemic, there was continuing discussion on copyright reform entailing the introduction of broad copyright exceptions, and this eventually culminated in the implementation of the Copyright Act 2021. The new law has introduced the amended fair use provisions, as well as specific copyright exceptions for educational uses by non-profit educational institutions, which are envisaged to regulate, for example, use of freely accessible

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[170] *Global Yellow Pages Limited v Promedia Directories Pte Ltd* [2016] SGHC 9, [387]-[402].
[171] *Global Yellow Pages Limited v Promedia Directories Pte Ltd* [2017] SGCA 28, [72]-[91].
[172] Nazimah Ram Nath, 'Covid-19 and the catalyst to digital: implications on collection development strategy' (Singapore Management University Libraries, 2021) at https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1177&context=library_research
[173] Bethany Wilkes and Nazimah Ram Nath, 'Fair use & the digital environment: Academic libraries, Covid-19, and digital transformation' (Singapore Management University Libraries, 2020) at https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1180&context=library_research

Internet sources and procedures regarding online distribution of educational materials.[174] The new law may have had an impact on the copyright issues faced by libraries, but it remains to be seen to what extent the amended fair use provisions and the specific exceptions have played a role.

[174] Copyright Factsheet on Copyright Act 2021, supra n 148.

SRI LANKA

INTRODUCTION

Until 1979, copyright law in Sri Lanka was governed by the English common law of copyright legislation dating mainly from 1911.[175] However, the introduction of the Code of Intellectual Property Act No. 52 of 1979 changed the intellectual property (IP) including the copyright landscape in Sri Lanka. It is also worthwhile noting that during the drafting of the Sri Lanka's IP laws, the copyright law of Sri Lanka, as reflected in the 1979 Code, was influenced by the Tunis model law on copyright for developing countries.[176]

Almost 25 years since the first IP Act came into being, Sri Lanka introduced the Intellectual Property Act No. 36 of 2003, updating the IP Act of 1979. The 2003 Act remains the most recent law relating to copyright in Sri Lanka.[177] "Fair use" is incorporated in a single provision at section 11 of this Act. This is similar to South Korea, Singapore and Israel, some of the other civil and hybrid legal systems, which have adopted a fair use provision. However in contrast to those jurisdictions, Sri Lanka's 2003 Act also provides an exhaustive list of "acts of fair use" at section 12, as discussed below.

One final point to note is that, under section 13 of the previous 1979 Code, Sri Lanka had a fair use provision. Although titled "fair use", it was very much modelled under the UK's fair dealing provision. Therefore, in the context of an open norm, it is accurate to identify 2003 as the year in which Sri Lanka introduced a fair use provision, designed in step with the US's fair use doctrine.

The discussion on Sri Lanka is presented in three parts. Following this brief introduction, the motivation for introducing an open norm in Sri Lanka is set out. Secondly, the report discusses in detail the application of the fair use doctrine in Sri Lanka, including the benefits and challenges. Thirdly and finally, the report presents an insight into the use and adoption of the fair use doctrine during the pandemic and concludes with fair use litigation in Sri Lanka.

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[175] Before 1979, copyright law in Sri Lanka was mainly governed by the UK Copyright Act 1911. *See*, Indunil Abeysekere, 'Copyright Law and Practice in Sri Lanka' (1998) 29(1) International Review of Intellectual Property and Competition Law, 27, 27.

[176] *Committee of government experts to prepare a model law on copyright for developing countries*, Tunis, 23 February - 2 March 1976. Final Report WIPO/ UNESCO - Annex 1.

[177] Intellectual Property Act No. 36 of 2003 at https://www.gov.lk/wordpress/wp-content/uploads/2015/03/IntellectualPropertyActNo.36of2003Sectionsr.pdf It should also be noted that the IP law of Sri Lanka was amended recently by the Intellectual Property (Amendment) Act 2022, No. 8 of 2022. However, this latest Act helped Sri Lanka establish a national registration system for geographical indications (GIs) at both the national and international level. It does not include any updated provisions pertaining to copyright law. *See* https://www.nipo.gov.lk/web/images/Act/IP-Act-AE.pdf *See also*, Wathsala Ravihari Samaranayake, 'The recent amendment to Intellectual Property Act No. 36 of 2003 of Sri Lanka' (2022) 17(9) Journal of Intellectual Property Law and Practice, 695, 695-699.

SRI LANKA'S MOTIVATION FOR INTRODUCING AN OPEN NORMS

Sri Lanka is a mixed legal system, which has been influenced by English common law and Roman-Dutch civil law. In relation to intellectual property matters historically at least, the laws mainly stemmed from the English common law tradition which later led to the introduction of the US fair use concept in 2003.

The move to introducing an open norm, modelled on US fair use, came about as a result of Sri Lanka adopting the TRIPS Agreement in 1994,[178] and more importantly as a result of Sri Lanka contemplating entering into a free trade agreement with the US during the time the 2003 Bill was going through Parliament.[179] As a result, the fair use provision came about due to an economic interest. During the same time, Sri Lanka's piracy levels were considered to be high, and the 2003 Bill was a further attempt to address this.[180]

THE FAIR USE DOCTRINE IN SRI LANKAN COPYRIGHT LAW: SECTIONS 11 AND 12

It is interesting to note that Sri Lanka's open norm, encapsulated in Section 11 of the 2003 Act, has tones of fair dealing language associated with it, and is very similar to the then copyright law of the UK. For example, section 11(1) states that

> "… fair use of a work, including such use by reproduction in copies 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, shall not be an infringement of copyright."[181]

However, section 11(2)(a)-(d) sets out four factors which should be considered in determining whether the use of a "work" amounts to fair use:[182]

(a) purpose and character;
(b) nature of the copyrighted work;
(c) amount and substantiality of the portion used from the work as a whole; and
(d) effect of the use on the upon the potential market.[183]

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[178] *See*, https://e-trips.wto.org/

[179] Prior to 2003, in 1991 Sri Lanka entered into an agreement with the US with regard to the protection of IPRs. *See also*, Chamila Talagala, 'The Doctrine of Fair Use in Sri Lankan Copyright Law: An Overview' (2013) SSRN Journal at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363975 See also, Chamila Talagala, *Copyright Law and Translation: Access to Knowledge in Developing Countries* (Routledge, 2021), 163.

[180] Gowri Nannayakara, 'Remuneration, Reward and Royalty in Music Copyright: A Developing Country Perspective' (2018) 29(3) International Company and Commercial Law Review, 209, 209-223.

[181] Section 11(1) Intellectual Property Act No. 36 of 2003.

[182] For the US, *see*, §107 Copyright Act 1976.

[183] Section 11(2)(a) – (d) Intellectual Property Act No. 36 of 2003.

A key provision in Sri Lanka's open norm is section 11(3), which states that "the acts of fair use shall include the circumstances specified in section 12". In other words, does it mean it that if an act (of fair use) is not specified under section 12, then the four factors listed under section 11(2)(a)-(d) will not apply? This question remains open and has led to much uncertainty as outlined below. In other words, according to section 11(3), the fair use open norm will only apply if a work falls within the "acts of fair use" detailed in section 12. This means that if a work does not fall within the 10 subsections as set out in section 12, then the open norm in section 11 will fail to apply.

HOW HAS IT BEEN RECEIVED? BENEFITS AND CHALLENGES

Firstly, the wording of section 11 is very similar to the US's fair use provision but varies from the US in the sense that the Sri Lankan Act is subject to an *exhaustive list (emphasis added)* in section 12.[184] In this manner, the Sri Lankan fair use provision differs from the US's provision quite distinctly,[185] as the US allows more discretion to the courts to determine the contours of fair use.[186]

Secondly, to expand on this point, Sri Lankan law does not define what is meant by fair use; on the other hand, it sets out certain "acts of fair use" under section 12. This is a very detailed section with ten sub-sections.[187] Furthermore, section 12 is very clear on what acts *do not* constitute fair use[188] before continuing to detail the acts which do constitute fair use.[189]

The following example is used to illustrate this point further.

For instance, section 12 states that it is possible "to reproduce a short part of a private work, for the purposes of teaching by way of illustration, writing sound or visual recording".[190] However, if this section is read in conjunction with section 11, the purpose of the open norm in section 11 appears lost, and so the provision is ultimately restrictive. In other words, the fact that section 11(2)(a)-(d) is ultimately subject to section 12

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[184] Chamila Talagala and Leanne Wiseman, 'Copyright, open access and translation' (2015) 37(8) European Intellectual Property Review, 498, 499-501.
[185] Chamila Talaga, supra n 179, p. 5.
[186] For example, for the application of fair use in the US to the treatment of parodies, *see,* Dinusha Mendis and Martin Kretschmer, *The Treatment of Parodies under Seven Jurisdictions – A Comparative Review of the Underlying Principles* (London: UK Intellectual Property Office; 2013) at https://eprints.bournemouth.ac.uk/21881/1/ipresearch-parody-report2-150313.pdf
[187] *See* Appendix 1.
[188] Section 12(2)(a) – (e) Intellectual Property Act No. 36 of 2003.
[189] Section 12(3) – (10) Intellectual Property Act No. 36 of 2003. *See also*, Appendix 1.
[190] Section 12(4)(a) – "Notwithstanding the provisions of paragraph (*a*) of subsection (1) of section 9, the following acts shall be permitted without the authorization of the owner of the copyright :—
(a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writing or sound or visual recordings, provided that the reproduction is compatible with fair practice and does not exceed the extent justified by the purpose of such reproduction…"
However, a lack of an effective strategic policy coordination among entities involved in implementation and execution of the Sri Lanka laws has led to pirated and counterfeited products be freely available in Sri Lanka.

– i.e. what does and what does not constitute fair use – leads to a restrictive open norm, which is a drawback of the Sri Lankan copyright system.

At the same time, taking a holistic interpretation of the two sections, it is possible to argue that simply because certain acts do not fall within specific instances in section 12, it is still possible to use the open norm under section 11. However, the manner in which it has been drafted – and interpreted – has led to it being regarded as a concrete, exhaustive list. Therefore, whilst section 11 of the Act provides a broad doctrine, section 12 limits it. As such, it appears that Sri Lanka has got itself tangled in between a fair use/open norm and a fair dealing arrangement.

In terms of how it has been received, it is fair to say that weaving in an open norm, reflecting elements of fair dealing, has left most feeling unhappy. As Sri Lanka's National Expert stated:

> *"currently the doctrine of fair use is very restrictive when you compare it with the original nature and scope of the doctrine and has led to much uncertainty"*.

As such, Sri Lanka is a useful case study in reflecting the challenges a country may face when moving from a fair dealing to a fair use regime as well as the consequences of transplanting law from another country – in this context from the US.[191] It demonstrates that in deciding to introduce an open norm, it is important to select whether to opt for an open-ended, non-exhaustive provision with some indications of concrete *examples (emphasis added)* – similar to Japan – or whether to include a restricted list, which sets out when they are non-exhaustive and when they could be exhaustive. One way of achieving this would be to adopt a section (such as section 11 in the Sri Lankan IP Act 2003) which spells out the general rule that applies in the absence of any of the specific instances set out in the exhaustive list – so that there is always a fall-back open norm provision. Having an open norm which is subject to an exhaustive list, as seen in Sri Lanka, clearly complicates matters.

"ACTS OF FAIR USE" IN THE RESEARCH AND EDUCATION SECTOR

As stated above, the IP Act 2003 lists several "acts of fair use" which are permitted under the Sri Lankan copyright law. Of these, fair use specifically applies to education establishments, libraries and archives in sections 12(4) and 12(5).[192]

Section 12(4) permits (a) "the reproduction of a short part of a published work for teaching purposes by way of illustration, in writing or sound or visual recordings, provided that the reproduction is compatible with fair practice and does not exceed the extent justified by the purpose of such reproduction". Section 12(4) also permits

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[191] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press; 1993).

[192] For a commentary on these sections as well as the challenges, *see,* Damayanthi Gunesekera, 'Copyright Protection and Distance Librarianship: provisions and constraints observed in copyright law of Sri Lanka' (2010) 14(1) Journal of the University Librarians Association of Sri Lanka, 1.

(b) "the reprographic reproduction for face-to-face teaching in any educational institution [for] activities which do not serve direct or indirect commercial gain of published articles, other short works or short extracts of works, to the extent justified by the purpose, provided that the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions".[193]

Section 12(4)(a) – (b) requires that the "source of the work reproduced and the name of the author … be indicated as far as practicable on all copies made under this section".

Section 12(5) permits libraries and archives to make a single copy of a publication through reprographic reproduction for activities which do not serve any direct or indirect commercial gain as long as the copy is used for study, scholarship or private research and is an "isolated occurrence".[194] Similarly the section is invoked in circumstances "where [a] *(sic)* copy is made in order to preserve, and if necessary replace a copy which has been lost, destroyed or rendered unusable in the permanent collection or another similar library or archive" in situations where "it is not possible to obtain such a copy under reasonable conditions" and is an isolated occurrence.[195]

Interpretation of these sections demonstrates that the activities which are permitted are broad in their nature, however, at the same time, it illustrates the challenges present in deciding the amount or percentage which can be reproduced which the country had been familiar with under the previous fair dealing provision under the 1979 Code. Under the 2003 Act, it is of course clear that an entire book cannot be reproduced under the fair use provision, as it clearly states so;[196] however, apart from that, there are many uncertainties which surround the application of the fair use doctrine. Therefore, it is a matter for the libraries and the educational sector to address this issue, using the parameters of the fair use doctrine, as it exists in Sri Lanka.

An example of the restrictive nature of the present fair use provision can be illustrated as follows. Under the previous law, it was possible to translate a work from another language into the native languages of Sri Lanka (Sinhala or Tamil), without any authorisation or infringement, if it had not been translated by anyone from its original language after 10 years of its first publication.[197] However, under the new fair use provision, there is no such leverage and instead of making it more open, it appears to have led to a more closed system.

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[193] Section 12(4)(a)-(b) Intellectual Property Act No. 36 of 2003.
[194] Section 12(5)(a)(i)-(ii) Intellectual Property Act No. 36 of 2003.
[195] Section 12(5)(b) Intellectual Property Act No. 36 of 2003.
[196] Section 12(1)(b) and (e).
[197] Section 15, Intellectual Property Code 1979 (Limitation of right of translation) – "Where any work has not been published in Sinhala or Tamil within ten years from its having been published for the first time in its original language, it shall be lawful to translate the said work into Sinhala or Tamil, as the case may be, and to publish such translation, even without the authorization of, and without any payment to, the owner of the copyright of the work, without prejudice to the application of the provisions of section 11". Available at: https://www.lawnet.gov.lk/code-of-intellectual-property/

APPLICATION OF THE FAIR USE DOCTRINE IN SRI LANKA DURING COVID-19

As mentioned above, under the Sri Lanka Copyright Act, section 12(4)-(5) mentions that the reprographic reproduction facility is available for fair use, but, it can be applied for *face-to-face* teaching environment only and not for other educational environments. This provision has placed constraints on libraries such as the Open University of Sri Lanka (OUSL) library where photocopying cannot be given as a public service due to this particular constraint in the law,[198] even though it has been recognised as an essential service.

Gunesekera's paper from 2010[199] highlights these challenges, outlines the constraints and concludes with some recommendations for the future.

However, what is remarkable is the change which took place during the COVID-19 pandemic. Whilst the constraints posed by the law continued to be in place during the pandemic, Sri Lanka made a rapid transition to online tertiary education during that time. This was facilitated by the Sri Lankan Government entering into an agreement with all Internet Service Providers (ISPs) in Sri Lanka to provide free access for university learning management systems and remote learning facilities through the Lanka Education and Research Network (LEARN).[200] According to a September 2020 Report, of the universities surveyed, nearly 90% of student respondents agreed that they were able to access online education. This rate is comparable to developed countries such as Japan.[201] As one of the National Experts from Sri Lanka stipulated:

> "With education, again, I will say, a premium is attached to education in Sri Lanka. So, particularly during the pandemic, when classrooms were closed, mobile phones including WhatsApp was the main means of education … People who could not afford a laptop would download Zoom on their phone. And that was a means by which classroom activity was conducted."

However, what is striking is that website links beyond university web servers which were utilised to facilitate distance learning were not free, and were charged to those making use of the service. Furthermore, whilst the report is detailed on how access to libraries and education was facilitated, it is silent on the application of copyright law in these circumstances. One point which may shed some light is the report's finding

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See also, Indunil Abeysekere, supra n 175, 37; Chamila Talagala, 'Translation and the international copyright crisis: Sri Lankan experience during the early years of independence' (2017) 39(3) European Intellectual Property Review, 153, 153-162.

[198] Damayanthi Gunesekera, supra n 192, 97-98.

[199] Ibid.

[200] Ryotaro Hayashi and others, 'Online Learning in Sri Lanka's Higher Education Institutions during the Covid-19 Pandemic' (ADB Briefs, September 2020) No 151 at https://www.adb.org/sites/default/files/publication/635911/online-learning-sri-lanka-during-covid-19.pdf

[201] Ibid.

that the students at OUSL (69%) struggled in relation to distance-learning.[202] This finding from 2020, is not dissimilar to the finding by Gunesekara in 2010.

From the above it can be concluded that Sri Lanka intended to introduce an open norm which was broad and wide-ranging,[203] however, it is clear that in practice it has not worked.

FAIR USE LITIGATION IN SRI LANKA

There is a distinct lack of case law invoking the fair use provision in Sri Lanka.[204] Whilst there are some copyright cases relating to local artists,[205] those which relate to fair use, particularly in applying the provisions of the 2003 Act, do not appear in the case law reports. On the other hand, trade mark cases, relating to the protection of geographical indications,[206] which Sri Lanka protects very strongly, seem to arise more often.

One of the reasons which contributes to the lack of copyright case law and an awareness of it in Sri Lanka appears to be the lack of court reporting of lower court decisions, exacerbated by long court delays.[207] For example, on average a case could take between one to five years even at the commercial High Court, and an appeal to the Supreme Court could quite easily take another three to five years. This does mean that cases are not regularly reported even if they were to take place. A scan through the Supreme Court website in May 2023, did not reveal any copyright cases relating to the fair use provision.

[202] Ibid., 5.
[203] Damayanthi Gunesekera, supra n 192, 89-105.
[204] Chamila Talagala, supra n 179.
[205] Gowri Nannayakara, supra n 180, 209-223.
[206] Wathsala Ravihari Samaranayake, supra n 177, 695-699.
[207] Indunil Abeysekere, supra n 175, 183-203.

CIVIL LAW JURISDICTIONS: JAPAN AND SOUTH KOREA

This part of the report takes an insight into two civil law countries, namely, Japan and South Korea in order to understand the manner in which these countries have adopted (an open norm(s) in recent times. South Korea transplanted the US-style fair use provision into its legal system in 2011 whilst Japan rejected the fair use provision in favour of two open norms, to suit its needs. Either way, it is interesting to note that despite US trade bodies and the European Union being critical and opposed to the adoption of fair use (or more broadly speaking, open norms)[208] particularly in civil law countries, South Korea and Japan have both adopted these provisions. In terms of their success, it is varied.

Japan introduced two open norms in 2018 and they have been welcomed and embraced particularly by the business and technology sectors. Furthermore, Japan's careful preparations over ten years in planning for the introduction of these open norms, has paid dividends and is seen as a success. Whilst it may not be as "open" as some other countries, and are considered as "qualified general exceptions", they appear to suit Japan's needs.

South Korea adopted the US-style fair use exception in 2011 and our research demonstrates that the country has faced more challenges than successes. The existence of the quotation exception, which was successfully used and applied in case law for many years, before the introduction of the fair use exception, has meant that there is now an overlap between the two, leading to uncertainty, as detailed below. Furthermore, a very conservative approach by the courts in relation to the interpretation of fair use has also led to further challenges. It is however important to note that these challenges do not arise from the fact that South Korea is a civil law country; instead, to repeat, the challenges can be attributed to the manner in which the courts have approached the quotation and fair use exceptions in their application.

Each of these countries are considered in the following pages.

[208] US trade organisations and the European Union have also recently been active opposing the introduction of fair use. *See* Politico news, supra n 108.

JAPAN

INTRODUCTION

Unlike the majority of other jurisdictions in this study, rather than transpose fair use, Japan stands alone in having elected to introduce two open norms into national law. This section in relation to Japan will first outline the background to the debate, and why the Japanese government chose to introduce two limitations and exceptions providing high levels of flexibility, rather than introduce what had come to be referred as "Japan fair use".[209] Second, the two limitations and exceptions that were introduced in 2018 will be discussed providing a high level outline of their features and characteristics with a particular focus on copyright jurisprudence. The final section will then indicate some of the uses that the two flexible exceptions permit or are expected to permit, based on research undertaken at Waseda University in Tokyo, by one of the authors of this report, as well as verification meetings undertaken as part of the project, with legal National Experts from Japan.[210]

REJECTION OF "JAPAN FAIR USE"

Despite Japan being one of the world's foremost technology innovators, it became a topic of growing interest in the late 1990s and early 2000s that its manufacturing prowess in the analogue world was not being translated into success online.[211] Of particular concern were e-commerce markets where, as in the rest of the world US corporations had come to dominate at the expense of domestic firms. For example, Google now occupies 71.62% of the search market in Japan,[212] and Amazon vies with its domestic competitor Rakuten in e-commerce markets.[213] Social media in Japan is also dominated by Twitter, Facebook and Instagram, with domestic offerings gathering comparatively little traction. The one exception to this is the instant messaging

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[209] The term "Japan Fair Use" was used to indicate that any form of fair use transplant would be modified to fit with Japanese legal tradition and became a term adopted by government circa 2008. For example, デジタル・ネット時代における知財制度の在り方について「検討経過報告」 (Ministry of Education, Culture, Sports, Science and Technology Japan, 29 May 2020) at https://www.mext.go.jp/b_menu/shingi/bunka/gijiroku/013/08062316/003.htm

[210] Neither the legal National Experts from Japan who participated in the project's verification meetings, nor the authors are aware of any case law that relates to Japan's flexible exceptions. Hence the list of permitted uses listed at the end of this chapter being the result of logical application of the principles incorporated in Articles 30-4 and 47-4, as well as activities that have been named as falling under the exceptions in line with the doctrine of authentic interpretation as exercised in Japan.

[211] *See* Nobuhiro Nakayama 著作権法改正の潮流 (2009.6) Kopiraito, 2,13

[212] Search Engines Market Share in Japan (Similarweb, June 2023) at https://www.similarweb.com/engines/japan/

[213] Cyberbridge at https://www.cyber-bridge.jp/en/blog/what-is-the-most-popular-search-engine-in-japan/

service LINE which despite now being co-owned with Japanese companies, originated not in Japan, but in South Korea.[214]

Amongst academic commentators one widely cited reason for Japan's comparatively lacklustre performance in e-commerce markets was its inflexible copyright regime.[215] Unlike the United States and other fair use countries, commentators observed that the enumerated list of prescriptive exceptions in the Japan Copyright Act (Act No. 48 of 1970 as amended JCA) rendered many e-commerce and web-based activities unlawful, thus exposing Japan-based technology companies to both criminal and civil proceedings. This, it was argued, led to Japanese tech companies not only basing some of their activities in the US in order to benefit from fair use, but all but guaranteed the pre-eminence of their American competitors who were able to benefit from the flexible and technology-friendly nature of US copyright law to gain an early foothold in Japan.[216] This in turn has allowed them to capitalise on the network effects characteristic of winner-takes-all online markets, and as a consequence secure market dominance to the detriment of home-grown competition.

In combination with a broader industrial strategy, the failure of Japanese companies to secure control of domestic e-commerce markets led the Japanese government, (the Intellectual Property Strategy Headquarters (IPSHQ)), to recommend the adoption of a more flexible approach to copyright limitations and exceptions. Chaired by the Japanese Prime Minister and comprising the entire cabinet, starting first in 2008 the IPSHQ called for an investigation into how a revised copyright framework could best support Japanese businesses in new technology markets.[217] Despite this and a number of amendments to the JCA in the intervening years, it was not until 2017 that the Japanese Government finally committed to introduce two flexible exceptions to support, *inter alia,* new technological innovations.[218]

Unique amongst the countries which are the subject of this study that have introduced legislation, Japan is the only country which has not adopted fair use. The decision however was not based on concerns relating to a conflict between common and civil law traditions or any other form of legal incompatibility, but rather one

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[214] Line (software) (Wikipedia) at https://en.wikipedia.org/wiki/Line_(software)

[215] *See* Tatsuhiro Ueno (2007.12) Kopiraito,2; Hidetaka Aizawa 著作権法のパラダイムへの小論「知的財産法の理論と現代的課題－中山信弘先生還暦記念論文集」Kōbundō (2005) 334; Keiji Sugiyama フェアユースと教育利用「著作権法と民法の現代的課題－半田正夫先生古稀記念論集」Hōgakushoin (2003) 293.

[216] This was discussed in workshop but is also a feature of the Japanese academic literature also. For example *see* Isao Mizuta 著作権行政をめぐる最新の行動 (2017.11) Kopiraito,2, 8-9. Nobuhiro Nakayama「著作権法第 3 番」Yūhikaku 2020, 502.

[217] デジタル・ネット時代における知財制度のあり方について (Intellectual Property Strategy Headquarters; January 2008).

[218] *See* Report of the Copyright Subcommittee of the Council for Cultural Affairs. 文化審議会著作権分科会報告書 (Copyright Subcommittee of the Agency for Cultural Affairs; April 2017) 68 (recommending the adoption of flexible copyright exceptions).

grounded in practical business considerations.[219] These related namely to the concern that the broad and relatively undefined nature of fair use might not be fully utilised by Japanese companies "as a result of a strong tradition of legal compliance and a desire to avoid litigation".[220]

A key turning point for the Japanese government in its thinking around introducing fair use was a detailed survey commissioned in 2016 by the Agency for Cultural Affairs.[221] Strong support from the business community for an open norm was evident, with 63.8% of listed companies agreeing that a flexible application and interpretation of copyright law combined with case law would make it easier for businesses to adapt to change.[222] However, on the specifics of the formulation itself, only 17% supported an exception that provided no or little guidance as to its application.[223] By contrast, 68.6% favoured a broad exception which enumerated some of the types of acts that may fall within its scope.[224] It was this response, according to senior officials from the Agency of Cultural Affairs, that pivoted the government away from fair use and towards codifying more prescribed, but nevertheless an open set of copyright exceptions.[225]

GENERAL EXCEPTIONS: ART 30-4 AND 47-4

As the culmination of many years of deliberation, on the 18th May 2018 the National Diet amended the Japan Copyright Act with the promulgation of two separate open-ended exceptions:

> **Art 30-4 (Exploitation where the Intention of Enjoying the Thoughts or Sentiments in a Work is Absent)**
>
> *Provided the exploitation would not unreasonably prejudice the interests of the*

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[219] For example, little if any discussion by the Japanese Government of open norms in the context of the Three-Step Test is evident in the reports issued by the Agency of Cultural Affairs between 2008-2018 that discussed the need for open copyright norms.

[220] Isao Mizuta, supra n 216 (an article by the Director of the Japan Copyright Office outlining the evaluation process undertaken by the Agency for Cultural Affairs prior to the 2018 amendments introducing a set of flexible exceptions).

[221] 著作権法における権利制限規定の柔軟性が及ぼす効果と影響等に関する調査研究 (Aoyama Shachū; March 2017). Responses were received from 469 listed companies, 11 trade bodies representing rightsholders, 618 civil society groups (schools, libraries, hospitals, foundations etc) and 20,004 members of the public.

[222] Ibid., Q1-15, 20.

[223] Ibid. The report concludes that only 17% of businesses favoured a fair use provision due to a lack of explanation and guidance provided as to what uses may be non-infringing. Significantly however the questionnaire only lists the four fair use factors and omits the explanatory preamble. Q1-14, 19.

[224] Ibid. Methodologically, it can be observed that the formulation of the questions was highly likely to result in an answer where businesses would select the option of having examples of permitted acts cited in the exception, rather than a provision that provided a fair use like test to establish non-infringing activities.

[225] Isao Mizuta, supra n 216.

copyright owner in light of the use and nature of the copyright work and the manner of its exploitation, it is permissible to exploit a copyright work to the extent deemed necessary irrespective of the means, in any of the following cases, as well as any other cases where such exploitation is not for enjoying, or allowing another person to enjoy, the thoughts or sentiments in a work.

(i) Use in testing for the development, or practical application of technologies concerning audio or audiovisual recordings including other such exploitations of copyright works;

(ii) Use in data analysis (meaning the extraction, comparison, classification, or other analysis of information including but not limited to language, sound and image data, from a large number of copyright works or a large volume of data; the same shall apply to Article 47-5, paragraph (1), sub-section (ii));

(iii) in addition to the uses outlined in the preceding two sub-sections, exploitation of works in the course of data processing by a computer, or any other form of exploitation, that does not involve perception of the expressions in the copyright work by the human senses (with the exception of exploitation of computer programs by a computer which shall be excluded.)

Art 47-4 (Exploitation of Works by a Computer Incidental to the Exploitation of Works)

(1) Provided the exploitation would not unreasonably prejudice the interests of the copyright owner in light of the use and nature of the copyright work and the manner of its exploitation, a person may exploit a work that is made available to be exploited on a computer (this is inclusive of exploitation using information and communication technologies; the same applies hereinafter in this Article), to the extent deemed necessary irrespective of the means, in any of the following cases, as well as any other cases in which the purpose is to make that work available to be exploited incidentally on a computer so that the relevant work can be smoothly or efficiently exploited on that computer:

(i) if the person is exploiting a work on a computer using a copy of that work or is exploiting a work transmitted as a wireless communications or wired telecommunications after having received such a transmission, and if, in the course of the data processing that the computer does in order for that work to be exploited, the person records the work on the recording medium of that computer so that it can smoothly and efficiently perform that data processing;

(ii) if a person that, in the course of trade, makes available an automatic public transmission server for another person to use for automatic public transmissions records a work that has been made available for automatic public transmission on a recording medium in order to prevent delays or failures of that other person's automatic public transmissions or in order to efficiently transmit

a work that has been made available for transmissions so as to relay automatic public transmissions of that work;

(iii) if the person is providing data by a means that applies information or communication technologies and records a work on a recording medium or adapts it in order to undertake the computerized data processing that is necessary to prepare to provide that data smoothly and efficiently.

(2) A person may exploit a work that is made available to be exploited on a computer, in any way and to the extent considered to be necessary, in one of the following cases or in any similar case in which the purpose is to maintain or recover the possibility of exploiting a work on that computer; provided, however, that this does not apply if the action would unreasonably prejudice the interests of the copyright owner in light of the nature or purpose of the work or the circumstances of its exploitation:

(i) if, in order to perform maintenance or repairs on a device that has a recording medium built into it, the person temporarily records a work that has been recorded on the recording medium that has been built in to that device (hereinafter in this item and the following item referred to as a "built- in recording medium") on a recording medium other than the built-in recording medium, and then re-records that work onto the built-in recording medium after the maintenance or repairs;

(ii) if, in order to replace a device that has a recording medium built into it with another device with the same functions, the person temporarily records a work that has been recorded onto that device's built-in recording medium onto a recording medium other than that built-in recording medium, and then records that work on the built-in recording medium of the device with same functions;

(iii) if a person that, in the course of trade, makes available an automatic public transmission server for another person to use for automatic public transmissions records a work on a recording medium for use in recovery in the event that the copy of the work that has been made available for automatic public transmission by that automatic public transmission server is lost or damaged.

In terms of the reception of the new exceptions, in the view of the legal National Experts who participated in the project's verification meetings, the two new exceptions have been well received across all business sectors in Japan.[226] This was put down to the many years of preparation and analysis that the Japanese government had undertaken prior to the 2018 reforms.

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[226] Alongside Sri Lanka and South Korea, it is interesting to observe that the US body the International Intellectual Property Alliance opposed the adoption of fair use in Japan given that "it would be extremely difficult to integrate this common-law doctrine into a civil law copyright system such as Japan's". *See* Niva Elkin-Koren and Neil Weinstock Netanel, supra n 94, 1124, see footnotes 133, 134 and 137.

Before outlining in the below the various acts likely to fall under Articles 30-4 and 47-4, a brief analysis of the construction and the commonalities that exist between these two open norms will at this point prove instructive.

Art 30-4

Both Arts 30-4 and 47-4 comprise a main paragraph establishing a flexible test to be applied to a prescribed typology of use, which is then accompanied by a non-exhaustive list of examples. In the case of Art 30-4 it is limited and restricted to uses which do not invoke intellectual or emotional enjoyment of the original copyright works by the user or other users to whom the works are subsequently shared. Doctrinally speaking, the exception is highly significant as it establishes, within copyright law itself, that the purpose of copyright is the protection of a work when it is enjoyed by others either intellectually or because it evokes a pleasurable response. Where such emotions are absent, any use of the work constitutes a non-infringing act. As Ueno indicates, this element of the law operates "to determine the inherent scope of copyright" by defining the purpose of copyright to be the protection of uses which illicit enjoyment *from* and *of* the author's work.[227] Acts which do not engender enjoyment fall outside the purpose for which copyright exists as defined by the Japanese legislator in 2018, and as a consequence are non-infringing.

In contrast, while the US Copyright Act distinguishes infringing from non-infringing uses through a set of prescribed exceptions as well as an open ended norm in the form of fair use, it is ultimately left to the American constitution to define the purpose of copyright and other intellectual property rights: "the progress of science and the useful arts".[228] As Ueno argues therefore, the limitations to copyright in the US are exogeneous to copyright. Thus, Japan in the form of an open and flexible exception to the exclusive rights of authors, has decided to not only delineate infringing from specific non-infringing acts, but perhaps uniquely by virtue of Art 30-4 define within the Act itself the very objective and purpose of copyright law itself. Thus, as we see in other jurisdictions in this study the implementation of an open norm has provided an opportunity for lawmakers either in the legislature or the judiciary to re-evaluate more broadly the purpose for which copyright law exists.

Art 47-4

Doctrinally less ambitious but conceptually linked to 30-4 the "incidental uses" envisaged by Art 47-4 are computer-based activities related to the "the reproductions and acts of communication involved in running of computers and communication to the public".[229] Of particular note therefore, is that unlike many fair use findings involving

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[227] Tatsuhiro Ueno, 'The Flexible Copyright Exception for "Non-Enjoyment" Purposes: Recent Amendment in Japan and Its Implication' (2021) 70 2 GRUR International, 145.
[228] Article 1, Section 8, Clause 8 of the Constitution of the United States.
[229] *See* Nobuhiro Nakayama supra n 211, 466.

transformative use where the new purpose does not replace or supplant the original *use* of the work, in Japan the emphasis is more that the secondary usage is unrelated to the original *purpose* for which the work was originally created.

Pursuant to Art 47-4, arguably reinforced by Art 30-4, the legislature has designated the mechanical copies produced by a computer as not infringing as the reproductions do nothing to affect or undermine the legitimate interest of rightsholders in being able to control how people enjoy their works. Thus, it is the purpose for which a work is produced in the first place that both these exceptions set themselves in opposition to, rather than the secondary usage to which they are put which tends to be the focus of the many fair use findings that rely on transformative use.

Formulation and Construction

Turning to their legal construction, both Arts 30-4 and 47-4 were created by amalgamating and supplementing a number of pre-existing exceptions under an open-ended introductory paragraph. Within the boundaries of the different typologies of use they describe, both feature a non-exhaustive main paragraph which permits the enumerated activities outlined in the subsequent paragraphs, as well as "*in any other case*". Or, as Art 30-4 (iii) instructs: any other use "*beyond those as set forth in the preceding two sub-clauses*". Thus, as long as the exploitation of the protected work complies with the stated objective of the exception as outlined in the main paragraph, users are not limited to activities enumerated.

Moreover, as long as the use does not "*unreasonably prejudice the interests of the copyright owner*", users have the right to use protected subject matter *to* "*the extent deemed necessary irrespective of the means*". In other words, subject to the purpose of the exception, as long as the legitimate interests of an author or rightsholder are not unreasonably inhibited, users of the work may themselves (or in collaboration with third parties), undertake any of the restricted acts in copyright law without seeking permission. These include copying of any work in any format (Art 30-4 only),[230] physical distribution, adaptation, as well as communication to the public.

Whereas the Japanese flexible exceptions appear on the face of it simpler in their formulation than US fair use, a closer look reveals a number of similarities. As both countries are Berne signatories unsurprisingly the effect of any potential use on the value and market for the copyright work is of prime concern. Reflecting this, Arts 30-4 and 47-4 require that any use of a copyrighted work does not "*unreasonably prejudice the interests of the copyright owner*". Redolent of the first and second US fair use factors, whether an act is deemed as infringing or not will be judged by the courts *"in light of the nature or purpose of the work or the circumstances of its exploitation".*

[230] Art 30-4 allows copying of analogue and digital works. Art 47-4 requires that use is limited to works "made available to be exploited on a computer … so that the work can be smoothly and efficiently exploited on a computer", therefore only born-digital material can be copied, though it does not preclude the distribution and storing of digital content in offline media.

Reflective of the third step of the Three-Step Test and the fourth fair use factor, the effect of the use upon the market is encompassed by the need for beneficiaries to ensure that the interests of the copyright holders are not *"unreasonably prejudice[d]*". Further, whilst no explicit reference to the third fair use factor appears in either Arts 30-4 or 47-4, it seems likely that Japanese court would consider the amount and substantiality of work used in any judgment. Thus, whilst a judge in Japan is not compelled to weigh together a minimum of four factors as is the case in the US, as the exceptions are ultimately framed by the Three-Step Test it can be seen that in their execution Japanese and US norms both contain distinct similarities in how they are to be interpreted.

COVID-19 Pandemic

Neither interviews nor a survey of the literature has revealed that Arts 30-4 and 47-4 were relied on during the pandemic to facilitate use of copyright works. This is probably explained in the main by the fact that both exceptions are primarily aimed at digital uses already and their application within the educational space is limited.

Qualified General Exceptions

As defined by Flynn and Palmedo both Articles 30-4 and 47-4 can be described as "open general exceptions":[231]

- *Openness: the user right can be applied to an open, as opposed to a defined (aka closed), list of purposes, uses, works or users;*
- *Generality: the exception promotes uniform application by applying a single flexible test to a group of uses or purposes.*

Similar to US fair use, the two Japanese exceptions create an open list of permitted activities and apply a uniform flexible test to their application. Nevertheless, unlike fair use they create a codified outer limit to their application and purpose. Whereas the preamble to §107 in the US Code outlines possible applications which are purely illustrative in nature, the scope of Arts 30-4 and 47-4 in the Japanese law are precisely delineated to uses that are for "non-enjoyment" and "incidental to the exploitation of the work". Thus, whereas the Japanese exceptions can be said to be open, in the sense they do not provide a closed list of possible uses, they are ultimately restrained by the over-arching purpose of their respective provisions. In terms of terminology, in order to differentiate the constrained nature of the Japanese limitations and exceptions from fair use, it is therefore proposed they are best described as *qualified* general exceptions. That is to say whereas they feature both an open-ended list of possible applications and are the subject of a single flexible test, nevertheless they differ significantly from US fair use in that they can only be applied to a prescribed type and

[231] Sean Flynn and Michael Palmedo, 'The User Rights Database: Measuring the Impact of Copyright Balance' [2019] Working Paper American University, Washington College of Law, 8.

class of activity.

Furthermore, as explained above, Art 30-4 serves a further definitional purpose not seen in the other countries that are the subject of this study. It acts not merely as a jurisprudential tool to decide whether an act infringes or not, but serves a wider doctrinal objective. Whereas the goal of US intellectual property law is to "*promote the Progress of Science and useful Arts*"[232] as laid out in the US Constitution, by designating the object of protection to be intellectual or sensory enjoyment of a copyright work, endogenous to copyright law, Art 30-4 serves as a tool to frame and define a universal guiding purpose for the application and interpretation of Japanese copyright law.

ACTIVITIES PERMITTED UNDER ARTS 30-4 AND 47-4[233]

As qualified general exceptions both Article 30-4 and 47-4 contain a list of non-exhaustive examples of acts permitted by the exception. The following section describes these, as well as providing additional examples of activities that are not enumerated but based on the CIPPM workshops and research undertaken by the author in Japan represent a good faith interpretation of acts that potentially also may constitute non-infringing acts.

Art 30-4

Enumerated Acts

(i) The use of artistic and musical works to develop new technologies. e.g. cameras, video recorders, monitors, TVs, software etc.
(ii) Artificial intelligence, machine learning, data analytics, and computational analysis for commercial and non-commercial research purposes including the creation and sharing of training data etc.[234]
(iii) Computer processing activities that do not involve the processed contents being perceived by human beings, e.g. caching, dark archiving by companies, malware filtering, network data distribution, mirror servers, indexing by search engines etc.

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[232] Article 1, Section 8, Clause 8 of the Constitution of the United States.
[233] Based in part on discussions with National Experts far as this author is aware, as of December 2022 there is no case law pertaining to either Art 30-4 or Art 47-4.
[234] *See* the following report from the 2019 Copyright Division of the Agency for Cultural Affairs (Copyright Division of the Agency for Cultural Affairs; October 2019) outlining envisaged uses: デジタル化・ネットワーク化の進展に対応した柔軟な権利制限規定に関する基本的な考え方 「著作権法第３０条の４，第４７条の４及び第４７条の５関係」令和元年１０月２４日 文化庁著作権課. *See also* Tsukasa Nakaoka Deputy Director of the Agency for Cultural Affairs, confirming that the sharing of training data with third parties would fall under Art 30-4 in response to questioning on this point from Shigeki Kobayashi in Committee session. The House of Representatives, Education and Science Committee. No 5. 6/4/2018.

Examples of Other Acts Likely to be Non-Infringing[235]

(i) Reverse engineering including but not limited to interoperability purposes*
(ii) Forward engineering
(iii) The use of text-based works to develop new technologies. e.g. OCRing software, printers, scanners etc.
(iv) The use of copyright protected work to develop new paper, film, media etc.*
(v) Reproduction of analogue or digital works for further analysis, including the creation of databases as a service
(vi) Full text search of works, and the display of snippets, titles, bibliographic information, bookmarking etc.
(vii) Plagiarism services
(viii) Creation of 3D images from 2D photographs of a non-artistic nature. e.g. places, health imagery etc.*
(ix) Malware/cryptography/cyber-security analysis
(x) Reproduction of works for practice and training, e.g. music practice with no direct connection to a public performance
(xi) Parody
(xii) Repair of software, update of software, improvement and adaptation of software
(xiii) Use of building plans for reconstruction purposes
(xiv) Photography of buildings, sculptures for town planning purposes
(xv) Use of copyright works for security and public administration purposes
(xvi) Search engine use of thumbnail images
(xvii) Fake news detection
(xviii) Offering services related to medical device data
(xix) Sharing of links

Art 47-4-1

Enumerated Acts

(i) Caching and the saving of copyright works on a computer while processing
(ii) Deploying file transmission technologies, servers and systems including distributed networks that provide for mirroring, backups, forward caching, file transfer etc. to aid in the smooth transmission of data
(iii) Adaptations to copyrighted works including to aid data transfer, social media etc., e.g. compression, file format changes etc.

Art 47-4-2

(i) Temporary back-up of content on different media devices while undertaking repair work, replacement etc.

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[235] Ibid. The examples asterisked are derived from the commentary in the above report.

(ii) Back-up and archiving of content for future use on new replacement hardware
(iii) Back-up services such as cloud services for replacing lost or damaged content

Examples of Other Acts Likely to be Non-Infringing[236]

(i) Any actions related to mechanical computer processing, network distribution, file format change etc. designed to facilitate the efficient running of systems
(ii) Everyday preservation and back up activities by businesses for their own internal purposes, or in the offering of products and services
(iii) Adaptations and communications required in the process of back-up
(iv) Any filtering, virus detection etc related activities on servers designed to support the provision of a stable service

[236] Ibid.

SOUTH KOREA

INTRODUCTION

South Korea is the other civil law country that adopts a general and open clause in its copyright system. As a civil law jurisdiction, the Korean Copyright Act (as amended 2021)[237] provides a list of specific and individual copyright exceptions, which are exclusively applicable to particular user groups and circumstances, and a general exception known as fair use that complements such specific exceptions.

The Korean Copyright Act 1957 (as amended) was updated in 2011 to introduce a US style fair use provision into the domestic law, with a view to increased flexibility of copyright exceptions in the rapidly changing copyright landscape, driven by the proliferation of the Internet.[238] The fair use provision was firstly introduced in Article 35-3, but it was later partially amended and re-codified in Article 35-5, as it stands now.[239] Article 35-5 (fair use of works) serves as a general exception to complement a number of specific exceptions.

Some of the specific exceptions are particularly relevant in the educational and research context. For example, Article 25 (use for purpose of school education), Article 28 (quotation from works made public), Article 30 (reproduction for private use), and Article 31 (reproductions in libraries) are good examples.[240]

Of those exceptions, the quotation exception as laid out in Article 28 is noteworthy. Despite its nature as a specific exception that is supposed to be narrowly interpreted and applied in a specific context, the quotation exception has been applied, in fact, quite broadly in various contexts for the past two decades.[241] In this sense, the quotation exception is often deemed a quasi-general exception as discussed in detail below.[242]

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[237] Korean Copyright Act (Act No. 18162, 18 May 2021).
[238] Explanatory note for the amendment of the Korean Copyright Act (Act No. 11110, 02 December 2011).
[239] In its initial implementation, Article 35-3 introduced specific examples of purposes for which the provision can be triggered, such as reporting, criticism, education and research etc., The Korean Parliament viewed that the explicit reference to such specific purposes, even though they are there only for illustrative purposes, could cause the scope of fair use provision to be restrictive and ambiguous, and therefore undermine the aim of the fair use exception. As such, the 2016 amendment removed such wording.
[240] For full text of these provisions in English, *see* the translated Korean Copyright Act provided by Korean Law Information Centre. Available at: https://www.law.go.kr/LSW/eng/engLsSc.do?menuId=2&section=lawNm&query=copyright+act&x=0&y=0#liBgcolor0
[241] Supreme Court Decision 2005Do7793 delivered on 9 February 2006.
[242] Seung Jong Oh, 저작권법 (Pakyoungsa, 2020).

MOTIVATION FOR INTRODUCING AN OPEN NORM IN KOREAN COPYRIGHT LAW

National Experts noted that the introduction of fair use in South Korea did not suffer from much political or industrial opposition. Having had considerable interests in US fair use, Korean academics and practitioners had actively produced publications on the development of US case law on fair use, informing policy makers and other stakeholders. Governmental officials and relevant industry stakeholders recognised potential benefits of fair use in the Korean copyright landscape, especially believing that dynamics and flexibility provided by fair use would contribute to achieving the fundamental purpose of copyright law, namely "contribution to the improvement/development of culture and related industries".

FAIR USE AND QUOTATION EXCEPTION IN KOREAN COPYRIGHT LAW

The construction of Article 35-5 (fair use of works) is fundamentally the combination of the Three-Step Test of the TRIPS Agreement and US fair use provision as laid out in section 107 of the Copyright Act 1976. Article 35-5 consists of two paragraphs. Article 35-5(1) states that where a person does not unreasonably undermine an author's legitimate interest and does not conflict with the normal exploitation of works, he or she is entitled to use such works, without prejudice to other statutory exemptions provided in the Act. Article 35-5(2) provides a list of four criteria to consider in determining fair use of a copyright work, which is virtually identical to the criteria provided in the US fair use provision.

Article 28 (quotation from works made public) states that "works already made public may be quoted for news report, criticism, education, research, etc., in compliance with the fair practices within the reasonable extent". Traditionally, the scope of the quotation exception was rather narrowly interpreted by the Korean Supreme Court. The court adopted, so-called, *the primary-ancillary relationship test*, whereby in order for the quotation to be in compliance with fair practices within a reasonable extent, the nature of the use of the quoted work must remain strictly ancillary to the quoting work in such ways as the quoted work is used to provide complementary examples or additional explanations etc.[243]

However, the Korean Supreme Court adopted *the holistic approach test* in later decisions and expanded the scope of the quotation exception. The holistic approach test is that the court must holistically consider various factors in determining the application of Article 28, such as (1) the purpose of the quotation; (2) the nature of the copyright work; (3) the content and amount of the quotation; (4) the method and form of displaying the quoted work; (5) the general conceptions of the audience; and (6) whether the quoting work substitutes the demand for the quoted work.[244]

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[243] Supreme Court Decision 90Daka8845 delivered on 23 October 1990.
[244] Supreme Court Decision 97Do2227 delivered on 25 November 1997.

The upshot of the introduction of the holistic approach test was that it allowed the quotation exception to be applied to not only a traditional scenario where the quoted work should be *inserted* into the quoting work under the primary-ancillary relationship test, but also a new scenario where the quoted work is fully *appropriated* without the presence of the quoting work.[245] Supreme Court Decision 2005Do7793 illustrates this point. In this case, the defendant used another person's copyright-protected photographs as a whole in the form of Internet thumbnails for indexing purposes. After carefully considering the six criteria above, the Korean Supreme Court found that the defendant's use was in compliance with "the fair practices within the reasonable extent" within the meaning of the quotation exception.[246]

Since the advent of the holistic approach test, the quotation exception has practically served as a general and broad exemption, at least before the introduction of the fair use exception. However, since the introduction of the fair use exception, there is a concern that the application of the quotation exception and the fair use exception will likely overlap.[247] The Supreme Court attempted to readjust the scope of the quotation exception by re-adopting the primary-ancillary relationship test, together with the holistic approach test.[248] However, it did not explicitly clarify the scope of the quotation and fair use exception, and therefore there is still a large overlap in the scope of quotation and fair use exception, for which they are often considered simultaneously in practice.[249] At the same time, academic debate appears to be still continuing over this matter.[250]

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[245] Seong-Ho Park, '인터넷 환경 하에서 저작권의 제한에 관한 연구 – 저작권법 제 28 조 및 제 30 조를 중심으로 –' (2015) 19 Journal of Korea Information Law, 133.

[246] Supreme Court Decision 2005Do7793, supra n 241 (The court held that the photographs at issue were used for merely offering convenience for Internet users; that the quality of the photographs was severely deteriorated as a result of a significant reduction in the size; and therefore, the thumbnails were not considered a substitute for the original photographs.)

[247] Gyooho Lee, '공정이용법리 도입의 필요성과 과제에 대한 연구' (2009) 13 Journal of Korean Information Law, 99, 125-17.

[248] Supreme Court Decision 2011Do5835. *See also* lower court decisions following the Supreme Court decision: Seoul District Court Decisions 2012Gahap541175 delivered on 12 February 2015; 2014No1916 delivered on 26 March 2015; 2014Gahap594029 delivered on 21 August 2015; 2013Gahap93192 delivered on 16 December 2015; and 2015Gahap513706 delivered on 27 January 2016. For detailed discussion of these cases, *see* Jun-seok Park, '저작권법 제 28 조 인용조항 해석론의 변화 및 그에 대한 비평' (2016) 57 Seoul Law Journal 171.

[249] Seoul District Court Decision 2019Gahap38727 delivered on 19 November 2020.

[250] Seong-Ho Park, supra n 245. *See also* Jun-seok Park, supra n 248; Il Ho Lee, '우리 저작권법상 공정이용 규정의 실효성에 관한 소고' (2021) 25 Journal of Korean Information Law, 1; Seung Jong Oh, supra n 242, 881-82.

APPLICATION OF THE QUOTATION AND FAIR USE EXCEPTION: BENEFITS AND CHALLENGES

Having a new and additional defence has been perceived as a good opportunity for industries, educational institutions, and libraries. National Experts stated that fair use could potentially cover wide varieties of activities that fall outside the scope of the quotation exception, such as mass digitisation or text and data mining, in a parallel manner to the way in which fair use was applied for the Google Books project in the US. The potential benefits of fair use in libraries were also highlighted. For instance, fair use could be useful for the creation of library content that utilises multimedia resources for the purpose of use in library exhibitions, collecting and organising copyright works (i.e. charts or photos) included in a digitised book for the purpose of providing extended search service etc.

However, it was observed that fair use has not been as actively used in practice as expected. National Experts indicated that this was owing to a limited number of judicial precedents and clear guidelines for the application of fair use. A lack of predictability is a great cause for concern for relevant stakeholders, and one of the experts who attended the project's verification meeting commented that Korean courts' reluctance to examine the requirements of fair use in detail has been a stumbling block in providing practical guidelines for them to implement fair use with confidence. Furthermore, it was also noted that the courts' strict literal (or word-by-word basis) interpretation of the requirements of fair use has made the finding of a fair use extremely difficult, especially relating to any activities of a commercial nature.

The section below will introduce a number of decisions on the quotation exception and fair use. As mentioned, these two exceptions are intricately connected in their scope and application in Korean copyright jurisprudence. Thus, examining the application of the quotation exception, together with the fair use exception, will be useful.

The Quotation Exception in Private Education Before the Introduction of Fair Use

It is very common for Korean students to attend private educational facilities for further learning, generally known as cram schools.[251] A cram school is one type of private teaching institute, usually run for profit, that provides an educational course to offer knowledge, techniques, and arts necessary for entering top universities.[252] Cram schools often use the whole or a part of textbooks or any other educational materials that are potentially protected by copyright. There have been conflicts over whether

[251] Deepti Mani and Stefan Trines, 'Education in South Korea' (WENR, 16 October 2018) at https://wenr.wes.org/2018/10/education-in-south-korea

[252] Act on the Establishment and Operation of Private Teaching Institutes and Extracurricular Lessons (Act No. 18425, 17 August 2021), Article 2.

cram schools can benefit from the quotation exception (Article 28) in relation to their activities undertaken for educational purposes.[253]

Seoul District Court Decision 99Kahap3667 concerned the application of the quotation exception for the use of a copyright-protected textbook in lectures at a cram school. The claimant brought an action to request the court to stop the respondent from using their textbook. The court noted the facts that the respondent adopted the textbook as a main course material for the lecture and made brief reference to a part of it during the lecture but did not use the whole or a part of it verbatim. Considering the facts, the court held that the respondent's use of the textbook complies with "the fair practices within the reasonable extent", within the meaning of Article 28.[254]

In contrast, Korean courts showed a tendency to deny the application of Article 28 where copyright-protected textbooks were used verbatim (i.e. presented, projected, transcribed, or recited) especially in online lectures.

In a case where the defendant (an online education firm that produces and publishes online courses for secondary school students for profit) filmed and published lectures in which a substantial proportion of copyright-protected Korean language textbooks were used (i.e. transcribed, projected, and recited), Seoul District Court held that the defendant's act was not in compliance with the requirements of Article 28. In reaching that conclusion, the court holistically examined all relevant factors such as the nature of use, the content and amount of work used, and whether the quoting work substitutes the demand for the quoted work.

The court emphasised that it is not necessary that educational use of a copyright work must always be not for profit, but when educational use is carried out for commercial purposes, such as that in this case, there would be a considerable limit on the extent to which Article 28 can be applied. The court went on to say that in general practice, cram schools often make a one-off use of educational materials, and therefore it is hard to say that that use substitutes the demand of the market. However, the way in which the defendant used the copyright works in question was more than one-off or temporary, as it stored the works on its server for an extended period of time and repeatedly used them for students. Furthermore, the court also highlighted that the fact that the education service was provided online to a large number of students could have a considerable impact on the market.[255]

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[253] In these cases, courts rejected the application of Article 25 (a specific exception that is applicable to public schools) holding that cram schools are not classified as 'schools' within the meaning of Article 25 (In Korean language, cram schools and normal schools are two different terms spelt differently) Therefore, the key question in these cases was whether the quotation exception can be relied on by cram schools as a broad exemption. *See*, for example, Seoul District Court Decision 2011Kahap683 delivered on 14 September 2011.

[254] Seoul District Court Decision 99Kahap3667 delivered on 29 March 2003.

[255] Seoul District Court Decision 2011Kahap683, supra n 253. *See also* Seoul District Court Decision 2007Kahap3701 delivered on 14 January 2008 and Seoul Court of Appeal Decision 2011Na104668 delivered on 24 October 2012.

Fair Use Exception in Private Education

There were a few cases of similar factual backgrounds to the above quotation cases which involve use of copyright works in online private education. In these cases, courts considered whether such use could be exempted from infringement by virtue of Article 35-5 (fair use).

In Seoul District Court Decision 2012Gahap541175, the claimant was an online education firm providing online lectures. The defendant was a publisher of textbooks. They signed a licence that allowed the claimant to use the defendant's textbooks during online lectures, but later the contract was terminated without renewal due to disagreement on terms of the contract. Nevertheless, the claimant continued to use the defendant's textbooks and later sought to confirm the non-existence of debt towards the defendant, derived from its argument that the claimant's actions now constituted copyright infringement. The claimant contended that its use of the defendant's copyright work did not constitute copyright infringement and that, even if it did, it amounted to a fair use of the work.[256]

The court applied the four criteria of fair use. It noted that the nature of the claimant's use of the defendant's work was commercial; the claimant used (i.e. presented and recited) a substantial amount of the defendant's work verbatim; a large proportion of the claimant's lectures comprised the defendant's work; and the claimant's lectures were repeatedly provided online to a large number of students, which would have a significant adverse effect on the defendant's existing or potential online education market. As such, the court denied the application of fair use in this decision.[257]

Fair Use Exception in Book Publication for Educational Purposes

In another case, the claimants were copyright owners of a sculpture. The defendant – a book publisher – published picture books in print and as e-books, incorporating the claimants' sculpture in a two-dimensional image form, along with stories about the sculpture and sold them for profit. The claimants brought an action for copyright infringement. The defendant argued that the use of the claimants' work in its publication should be permitted under fair use, on the ground that the claimants' sculpture signifies human dignity and fundamental rights, and therefore it is in the public interest to educate people about it.[258]

Whilst the court applied the four criteria of fair use, it noted that it is not imperative that the use of a copyright work should be always non-commercial for it to qualify as fair use, but it will be less likely that the use amounts to fair use if it is for commercial purposes. The court acknowledged that the claimants' copyright work in question is,

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[256] Seoul District Court Decision 2012Gahap541175 delivered on 12 February 2015.
[257] The court also rejected the fair use claim in another decision that has virtually identical factual backgrounds. *See* Seoul District Court Decision 2012Gahap543348 delivered on 21 July 2016.
[258] Seoul District Court Decision 2021Gahap512773 delivered on 14 January 2022.

in fact, of great historical and universal value, in that it reminds people of the significance of human dignity and fundamental rights. Thus, it highlighted that it is incongruent to let a copyright owner absolutely monopolise such work and value therein, given the fundamental purpose and goal of copyright law. However, it also noted that it does not mean that the law should be construed as allowing and encouraging such works to be exploited freely for commercial purposes.[259]

The court found that the defendant used the claimants' work to make profits and that the amount of the claimants' work taken and its proportion in the defendant's work was substantial. Therefore, it held that the defendant's use of the claimants' copyright work did not amount to fair use.[260]

Korea Copyright Commission Guideline on Fair Use

One of the most challenging aspects of adopting fair use in the Korean copyright framework is the absence of clear standards and the resulting lack of certainty of the legal system.[261] Since the introduction of fair use in South Korea in 2012, there have been roughly 60 decisions; however, it is observed that this number is rather insufficient to provide clear guidance, particularly with no decisions directly reviewing the requirements of fair use by the Korean Supreme Court.[262]

The Korea Copyright Commission published fair use guidelines, with a view to compensating for the paucity of judicial decisions and enhancing legal certainty of fair use. The guidelines introduce various scenarios that are based on the facts of actual cases decided both domestically and overseas and considers the potential application of fair use to these scenarios. It identifies areas where use of copyright works is highly likely to be permitted under fair use. The areas primarily include where the nature of the use is non-commercial and contributory to society (i.e. the use is for criticism, research, and education).[263]

On this note, to achieve increased predictability and certainty in the application of fair use, National Experts emphasised the importance of producing more useful case law. It was suggested that the introduction of a specialist court for copyright cases could be helpful, whilst relevant stakeholders, especially for those who intend to provide educational and non-profit services, could avoid overly cautious approaches and consider more active implementation of fair use to produce useful precedents. It was

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[259] Ibid.
[260] Ibid.
[261] Key Won Suh, '공정이용 법리(fair use)의 국내법 편입에 대한 실증적 연구' (2010) 51 Law Review, 159, 176-77.
[262] Il Ho Lee, '10 Years of Fair Use Implementation in Korea and Tasks Going Forward' (Seoul Copyright Forum 2022, Seoul, 27 October 2022) at https://www.copyright.or.kr/eng/laws-and-treaties/koreaCopyright.do
[263] Seung-Jae Choi and others, 국내외 판례 조사 및 분석을 통한 공정이용*(Fair Use)* 가이드 제시를 위한 연구 (Korea Copyright Commission; 2019).

also considered to be important to produce quasi-binding guidelines through concerted efforts by various parties including judges, scholars and stakeholders in the industry and education sectors. Finally, the experts suggested building international fair use database and workshops would be beneficial for effective operation of fair use.

FAIR USE DURING THE COVID-19 PANDEMIC

As with many other countries, the COVID-19 pandemic was challenging for the education sector in South Korea. An empirical study suggested that the pandemic had a significant impact on music education in primary schools, especially with copyright issues arising in online-based distance learning.[264] In 2020, the Korean Government published guidelines that permit wider use of copyright works for educational purposes on a temporary basis during the pandemic.[265] However, it was observed that the guidelines neither provided sufficient practical support,[266] nor were entirely in compliance with requirements of copyright exceptions.[267] Against this background, there is a growing discussion of the feasibility of the application of fair use, albeit one that is rather embryonic.[268]

FAIR USE LITIGATION AND THE IMPACT OF FAIR USE ON THE EDUCATION SECTOR

There is no available empirical evidence that suggests that there has been an increase or a decrease in the number of litigations on fair use as opposed to those concerning the previous copyright exceptions framework. Similarly, as for the impact of fair use on the education sector, no empirical evidence is available to gauge the impact of fair use on the education sector. As was discussed above, there have not been enough judicial decisions that develop the law of fair use in a meaningful way. Nor has there been enough academic research on fair use.[269]

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[264] Joo Man Park, '코로나 19 에 따른 비대면 원격 음악수업에서 초등교사들이 겪은 어려움과 지원방안' (2021) 6 The Journal of Future Music Education, 91.
[265] The guidelines are available at: https://www.copyright.or.kr/notify/notice/view.do?brdctsno=45738
[266] Joo Man Park, supra n 264.
[267] Ah-Hyung Bae, '포스트 코로나 시대의 온라인 콘텐츠와 저작권' (2019) 10 Yonsei Journal of Medical and Science Technology Law 1, 8-9.
[268] Ibid.
[269] Il Ho Lee, supra n 250.

FINDINGS AND CONCLUSIONS

This report has reviewed open norms in seven selected jurisdictions, namely, the US, Canada, Israel, Singapore, Sri Lanka, Japan and South Korea, and highlighted the benefits and challenges faced by these countries in transplanting an open norm from a foreign jurisdiction into their own legal systems.

In carrying out this review, the authors commenced the research by assessing the fair use exception in the US – before moving on to considering the emergence, adoption, use and impact of open norms in Canada, Israel, Singapore, Sri Lanka, Japan and South Korea. Whilst countries such as Israel, Singapore, Sri Lanka and South Korea opted to transplant the US's fair use exception, or a version of it, countries such as Japan and Canada employed alternative mechanisms for introducing an open norm. For example, Japan rejected the US's fair use provision in favour of two open norms designed to suit the country's business and technological needs, whilst Canada broadened an existing provision, namely the fair dealing provision, to provide more freedom in the creative, research and education sectors.

In each case, this report has highlighted the manner in which these mixed and civil legal systems recognised the need to expand user rights and provide flexibility and openness in their copyright systems between the years 2003 and 2018. The report also captures their experiences including the motivations, benefits, challenges and impact on the research and education sectors, guidance from the judiciary and the use of an open norm during the COVID-19 pandemic in an attempt to draw policy recommendations for EU legislators.

MOTIVATION FOR INTRODUCING AN OPEN NORM

Of the countries examined, there are a few common threads running through at least some of them regarding their motivation for introducing an open norm, whilst for other countries, their motivation has been dependent on various other factors. For example, countries such as Singapore and Sri Lanka were motivated to introduce the fair use provision due to economic interests and as a result of entering into a Free Trade Agreement with the US. However, Israel's and South Korea's motivations were quite different. Israel was driven by their desire to "avoid stagnation in copyright … by providing courts greater interpretive freedom to resolve unforeseen uses"[270] and South Korea was motivated by the need to "increase flexibility of copyright exceptions in a rapidly changing online environment".[271]

Canada's and Japan's reasoning were completely different to the other countries. Interestingly, Canada did not introduce an open norm *per se,* nor did they transplant the

[270] Lior Zemer, supra n 98, 1104.
[271] Explanatory note for the amendment of Korean Copyright Act (Act No. 11110, 02 December 2011).

US's fair use provision into their legal system. Instead, building on jurisprudence, Canada revised and broadened an existing provision, i.e. their fair dealing exception. This has been a success as detailed above. Japan on the other hand was motivated by practical business considerations and an aspiration to overturn an inflexible copyright regime which was driving business away from Japan towards the US's more flexible copyright and technology friendly system.[272]

BENEFITS AND CHALLENGES

In terms of benefits and challenges, it is accurate to state that the countries which have adopted an open norm – and have had time to see the results – have experienced more benefits than challenges. Some commentators have viewed the transplant of fair use into a foreign jurisdiction with scepticism, arguing that the introduction of fair use is a "fatal flaw" that could cause "confusion" and "uncertainty",[273] whilst others have argued that the introduction of fair use (more broadly speaking, an open norm) will lead to a situation of unregulated use of copyrighted materials.[274]

However, Israel's experience reflects quite the opposite, and demonstrates that the introduction of open norms can be successful while also serving to "enlarge the public domain in encouraging a production of new works and not as a proprietary regime".[275] Equally, Canada has viewed the broadening of the fair dealing exception through a positive lens, whilst Japan has welcomed the two open norms particularly for advancing the business and technology sectors. Singapore has also embraced the recent amendment to their fair use provision as a very positive step in the right direction. Therefore, for countries such as Israel, Canada, Singapore and Japan, the research points to many benefits in introducing fair use. However, other countries such as Sri Lanka and South Korea have experienced several challenges as detailed above.

IMPACT ON RESEARCH AND EDUCATION

In terms of the impact on various sectors, Canada, Singapore and Israel have seen the greatest success. The broadening of the fair dealing exception in Canada and its liberal interpretation by the judiciary, has led to fair dealing being upheld in a number of cases relating to research and education.[276] Similarly, Singapore has experienced success through the adoption of the fair use provision, which the National Experts

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[272] *See* Nobuhiro Nakayama, supra n 211.
[273] *See* Politico news, supra n 108. *See also,* additionally a letter from the Ambassador to the European Union to the South African Government, supra n 109.
[274] Niva Elkin-Koren and Neil Weinstock Netanel, supra n 94.
[275] Israeli National Expert, at the project verification meeting on 23rd March 2023.
[276] *CCH Canadian Ltd. v Law Society of Upper Canada,* supra n 68; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, supra n 74; *York University v Canadian Copyright Licensing Agency (Access Copyright),* supra n 90.

clarified has been well received particularly in enabling classroom sharing which in turn has had a positive impact on education.[277]

Israel's adoption of the fair use provision has also led to positive results in the research and education sector. For example, it has been used as the basis for large scale digitisation,[278] copying for educational and learning purposes[279] and making available online sections of a newspaper article[280] and a photograph,[281,282] all of which have been welcomed in Israel.

On the other hand, South Korea and Sri Lanka have struggled in this context, as outlined above. Sri Lanka has found it challenging due to the fair use provision being subject to a closed list, and South Korea has grappled with the co-existence of the quotation and fair use exceptions, which appears to have led to limited use of the latter in the research and education sectors.

In addition to the research and education sectors, there have also been benefits for the technology and creative sectors. For example, as mentioned above, Japan is a clear beneficiary with regard to the technology sector. Similarly, Israel's conservative yet open approach has also seen success, as witnessed with the opinion delivered by the Ministry of Justice affirming that fair use applies to machine learning where a model is trained on multiple different datasets from more than one author.[283]

In relation to the creative sector, countries such as Canada, Singapore, Israel have experienced the most success, with parody, satire and entertainment sectors benefiting the most from the introduction of their open norms. Japan has also seen benefits in this area. However, Japan's focus on "purpose" of the open norms – which *inter alia* apply to uses which do not undermine the interests of the rightsholders – has restricted its use in the creative sector to some extent.

GUIDANCE FROM THE JUDICIARY

Case law always serves to provide guidance and clarity and some countries have certainly benefited from open norm being interpreted by the judiciary which in turn has provided these countries with judicial guidance and direction. In particular, countries such as Canada and Israel have been the beneficiaries of such judicial direction surrounding an open norm, whilst Singapore and Sri Lanka are yet to have their open norm tested in court. Japan introduced its open norms in 2018 and according to the National Experts, Japan's open norms have not yet been assessed in a court of law. Time will tell whether it has been a success if/when the open norms are interpreted

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[277] *See*, Division 3, sections 195 – 205.
[278] *See* Israel section and comments from one of the National Experts.
[279] *Mejula v Hanan Cohen*, supra n 133.
[280] *Danon PR Telecommunications v Shelly Yachimovich*, supra n 134.
[281] *Ronen v Let the Animals Live*, supra n 135.
[282] *Forgas v Beit Hinuch High School, Western Galilee*, supra n 136.
[283] Ministry of Justice Opinion on Machine Learning, supra n 105.

by the judiciary. On the other hand, South Korea has had approximately 60 cases since the fair use provision was introduced in 2011, but since none of these cases have been reviewed by the Seoul Supreme Court, there is a vacuum as concerns sufficient guidance, precedent and clarity.

OPEN NORMS DURING THE PANDEMIC

In terms of the pandemic, all countries reviewed in this report moved rapidly to online learning during that time. However, in most cases, it is not evident whether access to copyrighted material was given due to the open norms or whether it was driven by the need at the time. In some countries, such as the US, where extensive access to copyright materials was given during the pandemic, it has led to a lawsuit from copyright holders.[284] The case is awaiting appeal, and it remains to be seen how it will unfold.

OPEN NORMS ARE A BENEFIT AND LEAD TO MORE SUCCESS THAN CHALLENGES

As one of the American National Experts commented, the US's fair use provision has been credited for the development of the technology, creative and education sectors and some of the recent case law which has followed in recent times reflect these benefits very well.[285] Cases such as *Authors Guild v HathiTrust*[286] and *Authors Guild v Google*[287] are two seminal decisions which considered the transformative nature of digitised books. The fact that the cases were decided in favour of HathiTrust and Google are due to the broad and flexible fair use exception. Equally, online repositories have also gained from fair use as seen in *Cambridge University Press v Patton*.[288]

As such, there is much to gain from adopting a fair use provision or an open norm. The US has benefited greatly from its fair use provision which goes back to Justice Story's decision in *Folsom v Marsh*[289] before it was codified into law under the Copyright Act 1976 (as amended).[290]

For countries that have adopted it recently, such as the countries that have been reviewed in this report, it is of course not possible to see such extensive benefits in the short term. However, our research points to countries such as Israel, Japan and Canada which have particularly benefited from the adoption of open norms through a fair use provision (Israel), a tailor-made open copyright exception (Japan), or broadening the existing exception (Canada) in advancing the creative, education and technology

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[284] *Hachette Book Group, Inc v Internet Archive*, supra n 57.
[285] American National Experts, at the project verification meeting on 10th February 2023.
[286] *Authors Guild v HathiTrust*, supra n 44.
[287] *Authors Guild v Google*, supra n 49.
[288] *Cambridge University Press v Patton,* supra n 53.
[289] 9. F.Cas (C.C.D. Mass. 1841).
[290] Copyright Act 1976. Published no. 94-553 (codified as amended at 17 U.S.C. 107).

sectors respectively. Countries such as Singapore have also benefited, particularly in in the education and creative sectors.

In bringing this report to a conclusion, the next part will be structured as follows:

- Summary of the findings and conclusions from each country; and
- Policy recommendations.

FINDINGS AND CONCLUSIONS BY COUNTRY

FINDINGS AND CONCLUSIONS: CANADA

SUMMARY

- Broadened fair dealing provision in 2012.
- Canada has therefore not adopted fair use nor any other foreign models of open norm.
- Demonstrates that an existing provision can be expanded successfully to achieve the aims of an open norm including inclusivity, flexibility and openness.
- Activities such as AI and data mining, parody, satire, documentary filmmaking have been included.
- Broad and liberal interpretation of fair dealing provision under section 29 by the Supreme Court has broadened the exception in the education and research library sector.
- Growing body of case law has led to clarity.
- **Has proved to be a success** and has brought many benefits to various sectors, particularly the creative, research and education sectors.
- **Key take-away:** Transplanting an open norm or fair use provision from a foreign jurisdiction into one's own is not always necessary, if existing provisions can be broadened and successfully applied in achieving the end-result of an inclusive and flexible open norm.

Canada is a mixed legal system, based on a combination of common law and civil law traditions influenced by the English and French legal systems. The Copyright Act 1985 (as amended) is the primary copyright legislation in Canada. Section 29 of this Act has fair dealing enshrined within it. In 2012, the scope of fair dealing was updated and broadened by the Copyright Modernization Act 2012.

Unlike all other jurisdictions reviewed in this Report, which have adopted a fair use provision or an open norm to suit the country's needs (i.e. Japan), Canada in fact has done neither. Canada has continued with its fair dealing provision. Yet, Canada is a noteworthy case study, in illustrating how a country that has fair dealing strongly embedded within it, has broadened its scope significantly to enable an inclusive, flexible and open-ended copyright landscape.

In this sense, Canada demonstrates that transplanting an open norm is not always necessary, but a country can utilise its existing provisions, such as fair dealing, to

broaden the copyright horizon. This was achieved when Canada updated the Copyright Act in 2012 and broadened the scope of fair dealing to include parody and satire as well as a more research and education friendly environment.[291]

Also noteworthy is the manner in which Canada has interpreted fair dealing since 2004 and most recently in 2021. In these cases, the Supreme Court adopted a liberal approach in interpreting the meaning of the statutory purposes to ensure that users' rights are not unduly restricted. As such, Canada exhibited how an exception such as fair dealing can be sufficiently flexible to include activities such as documentary filmmaking, AI and data mining and activities within the education and research library sector[292] for example, which otherwise would have been impossible. This was particularly evident in a 2004 case where the Canadian Supreme Court held that research is not limited to non-commercial or research in a private context, but, conducting research in the business of law for profit, such as research for the purpose of advising clients, giving opinions, arguing cases etc., could qualify as research.[293] This finding was applied and consolidated in later cases in 2012[294] and 2021.[295]

[291] Copyright Modernization Act (S.C. 2012, c. 20).
[292] Canadian National Expert at the project verification meeting held on 10th February 2023.
[293] *CCH Canadian Ltd. v Law Society of Upper Canada*, supra n 68.
[294] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, supra n 68; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, supra n 74.
[295] *York University v Canadian Copyright Licensing Agency (Access Copyright)*, supra n 90.

FINDINGS AND CONCLUSIONS: ISRAEL

SUMMARY

- Introduced fair use open norm in 2007 which is enumerated in section 19.
- Prior to that, Israel relied on the British fair dealing model.
- Motivated by a maturing copyright environment aiming to avoid stagnation and provide greater interpretive freedom.
- Of notable significance is the ability for a Minister to make regulations prescribing conditions as to when a use shall be deemed a fair use.
- Despite scepticism that an open norm will lead to uncertainty, confusion and a free-for-all, Israel courts' conservative and localised approach to fair use has countered this assertion.
- A rich body of case law (55 cases in 10 years) has led to greater clarity.
- **Has proved to be a success** and based on interviews with National Experts has brought many benefits to various sectors, particularly the research and education and technology sectors.
- **Key take-away:** Transplant of the fair use provision into Israeli copyright law reflects a success story, supplemented by a rich body of case law. Complementing the open norm with *ex-ante* intervention by the Government further illustrates alternative ways in which an open norm can be interpreted and managed.

Israel introduced its codified open norm in 2007, reflecting a variation of the US's fair use provision. Prior to that, Israel was governed by the UK Copyright Act 1911 and the Copyright Ordinance 1924. The transition to the Copyright Act 2007 moved Israel from a fair dealing system to a fair use model. The motivation for introducing a fair use style open norm in Israel, as mentioned above, was "to avoid stagnation in copyright … by providing courts greater interpretive freedom to resolve unforeseen uses".[296]

The open norm modelled on the US's fair use provision in the 2007 Act commences in section 19 which sets out the types of uses which may be viewed by the courts as fair. Elkin-Koren and Netanel's study however shows that there is tendency for Israeli courts to treat the uses permitted as a closed list,[297] and much like countries such as Sri Lanka and Singapore, suggesting that this is linked to judicial customs emanating from the UK Copyright Act 1911. This is then followed by a non-exhaustive four-factor model, much like the US's fair use provision.

Whilst Israel's fair use provision differs from section 107 of the US Copyright Act 1976 (as amended) in several ways, one of the notable differences is that it makes way for a Minister to make regulations prescribing conditions under which a use shall be

[296] Lior Zemer, supra n 98.
[297] Niva Elkin-Koren and Neil Weinstock Netanel, supra n 94.

deemed a fair use. Therefore, rather than being reliant solely on the judiciary for interpretation of the fair use provision, §19(c) can be used by the Government to provide legal clarification and guidance quickly and easily. Although this provision has not been used yet (perhaps in part due to the plethora of cases since the inception of the 2007 Act), its existence acts as a useful back-up should it be needed, without resorting to the court process.[298]

Another notable finding from Israel's adoption of the open norm provision is the number of reported rulings relating to fair use. Between 19 May 2008 and 18 May 2018, Israel reported 55 judgments (compared to 185 judgments in the US, during the same period).[299] Being a comparatively small country, the number of cases certainly stands out. The reason for this sudden jump in the number of cases, may be attributed to the openness of the fair use provision, as opposed to the previous precise and defined nature of the UK fair dealing system. Furthermore, the higher costs of litigation in a country such as the US, can lead parties to settle out of court; such debilitating costs was not an issue in Israel during the 2008–2018 period that was assessed.[300] It also seems likely that advances in technology, particularly the widespread adoption of the Internet leading to more litigation can in part explain the discrepancy in the number of cases between fair use and fair dealing.

There has been scepticism from US-based trade bodies, and more recently the European Union, that transplanting fair use into a foreign jurisdiction will lead to a situation of unregulated use of copyrighted materials whilst leading to uncertainty. However, the conservative and localised approach to fair use adopted by the Israeli courts firmly dispels such fears. Although section 19 provides wide-ranging freedoms, it has been managed tightly by the Israeli courts. For example, prior to May 2008, Israeli courts rejected fair dealing defences in 84% of cases, compared to fair use being rejected in 71% of cases between 2008 and 2018.[301] In fact, the Israeli courts found in favour of fair use only in 29% of the cases (compared to 49% in the US, during the same period).[302] Finally, whilst commercial use led to an unfavourable fair use finding, the Israeli courts placed strong weight on moral rights and right of attribution – both of which are distinct to the US's operation of the fair use provision.

[298] In 2022, the Ministry of Justice issued an opinion on AI and machine learning and its status as a fair use activity. This is an example of ex-ante intervention by the Government to provide interpretational guidance to businesses, organisations, public etc. even if codified §19(c) is not used.
[299] Niva Elkin-Koren and Neil Weinstock Netanel, supra n 94.
[300] Ibid., 1162.
[301] Ibid., 1160. *See* Figure 2 in the Israel section above.
[302] Ibid.

FINDINGS AND CONCLUSIONS: SINGAPORE

SUMMARY

- Introduced fair use initially in 2004, before updating it in 2021.
- Prior to that, Singapore relied on Australia's/UK's fair dealing model.
- Originally motivated by entering into a Free Trade Agreement with the US.
- More recently motivated by creating an environment conducive to the development of creative works.
- 2021 amendments have ironed out previous challenges.
- Singapore has struck a successful balance in providing a detailed open norm reflected in §190-194, complemented by clear guidance and provisions in multiple sections.
- However, very limited case law on the interpretation of the open norm.
- **Has proved to be a success** and has brought many benefits, particularly to the creative, education and research sectors.
- **Key take-away:** Demonstrates how a successful open norm can be drafted in multiple sections complemented by clear examples and guidance being provided for greater clarity and certainty.

Singapore first introduced an open norm – as a version of the US's fair use exception – in 2004, which was amended in 2021. Prior to that, Singapore was reliant on the fair dealing exception under the Copyright Act 1987 (as amended), drawn from Australian and English legal systems. The move towards an open norm in 2004 was initially motivated by Singapore adopting the TRIPS Agreement in 1994[303] and thereafter, entering into a Free Trade Agreement with the US in the early 2000s.[304]

The motivation for updating the fair use provision in 2021 was to pave the way for future creators and to create an environment conducive to the development of creative works, through facilitating greater investment, research and development in the copyright industries in Singapore.[305] It is a clear step forward for a country that has reached maturity in the copyright landscape.

Although Singapore moved towards a US-style fair use provision in 2004, it continued to label its open norm as "fair dealing". Furthermore, the open norm in 2004 included a fifth factor, thereby differing from the US's four-factor provision. However, during the amendment of the law in 2021, this fifth factor reflected in Clause 183 of the draft bill was removed following a public consultation,[306] as it was seen as difficult to apply.

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[303] *See* https://e-trips.wto.org/
[304] George Wei, supra n 149.
[305] Intellectual Property Office of Singapore, supra n 150.
[306] *See*, Proposal 6, section 27 (p. 12 of 29) of Public Consultation on the Proposed Copyright Bill (5 February 2021) at https://www.mlaw.gov.sg/files/news/public-consultations/2021/copyright bill/Copyright_Consultation2021.pdf

As such, the updated open norm in the 2021 Act mirrors the US's four-factor model and adopts the terminology "fair use" (as opposed to fair dealing), thereby providing more clarity in the law.

In terms of the fair use provision itself, this is enumerated in Division 2 (sections 190-194) of the 2021 Act. Therefore, in contrast to other countries whose fair use provision is fairly general, broadly worded and contained in a single section, Singapore's fair use provision is more structured and provides detailed rules on fair use across a number of sections. Singapore has also struck a successful balance in providing an open norm on the one hand and providing clear and prescriptive guidance on acts of fair use on the other. For example, section 197 – copying or communicating very small portions of literary or dramatic work for course of education by educational institutions – provides very clear guidance on how much can be copied, as discussed above.[307]

In this sense, it appears that Singapore's "second iteration" of the fair use provision in 2021 has removed some of the challenges that were prevalent in the 2004 Act. The new Act has been considered "easier to understand and apply",[308] has had a positive impact on education[309] and has ensured that Singaporean society is "future-ready" in embracing innovation, transformative uses, parody, text and data mining, and liberal education exceptions, amongst others.[310]

Whilst there is a lack of case law and as such limited judicial guidance based on the 2004 Act (and none from the 2021 Act), a couple of cases from 2009 and 2016 has offered some guidance in relation to the current law.

According to the National Expert, the fifth factor ("the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price") was also dropped as it confused people, rather than clarifying the law.

[307] *See,* supra, Singapore country report: 'Application of fair use in the research and education sector'.

[308] Copyright Factsheet on Copyright Act 2021, supra n 148.

[309] *See,* Division 3, sections 195 – 205.

[310] Singapore National Expert at the project verification meeting on 9th February 2023.

FINDINGS AND CONCLUSIONS: SRI LANKA

SUMMARY

- Introduced fair use open norm in 2003.
- Motivated by entering into a Free Trade Agreement with the US.
- Prior to that, Sri Lanka relied on UK's fair dealing exception.
- Enumerated in section 11 but restricted by an exhaustive list in section 12, "acts of fair use".
- Lack of case law and therefore lack of guidance by the judiciary.
- During COVID-19 pandemic moved rapidly to online learning, however, lack of evidence that it was supported by the open norm.
- **Has proved to be a challenge** due to the introduction of an open norm, with restrictive shades of fair dealing still present. The manner in which the provision has been drafted has proved to be the biggest challenge.
- **Key take-away:** Demonstrates the importance of drafting an open norm that should not be undermined by being subject to an exhaustive list of provisions/guidance on acts of fair use.

Sri Lanka introduced the fair use exception – identical to the US's fair use – in 2003. Prior to that, for many years Sri Lanka had been reliant on English law's fair dealing provision – firstly under UK Copyright Act 1911 and then under Sri Lanka's Intellectual Property Code 1979. However, with the introduction of the TRIPS Agreement 1994, and Sri Lanka's economic interests leading to a Free Trade Agreement with the US, Sri Lanka implemented the US's fair use provision – and did so in 2003 under the IP Act.

However, Sri Lanka's experience of adopting this open norm has been riddled with challenges. Section 11 of the 2003 Act which contains the fair use provision is subject to an exhaustive closed list in Section 12, which sets out "acts of fair use". According to section 11(3), the fair use open norm will apply if a work falls within the "acts of fair use" detailed in section 12. In other words, if a work does not fall within the 10 subsections as set out in section 12, then the open norm in section 11 will fail to apply.

As such, Sri Lanka appears to be "stuck" between having introduced an open norm, in the form of fair use on the one hand, and limited by a fair dealing type exhaustive, closed list, on the other. In this sense, Sri Lanka provides a valuable insight and learning experience for countries which are considering moving from a fair dealing-type landscape to a fair use type open norm.

It is fair to say that Sri Lanka's challenges have arisen, partly due to the manner in which sections 11 and 12 have been drafted and secondly, due to the lack of interpretation of the provision by a court of law. The lack of case law has led to a vacuum in guidance and direction as to how these provisions should be interpreted.

One of Sri Lanka's National Experts who attended this project's verification meetings stated that Sri Lanka intended to follow in the footsteps of Singapore by introducing a general rule that is not fact-specific and in fact abstract, whilst complementing it with a set of concrete provisions which deem certain acts to be fair use.[311] If interpreted in this manner, then the general rule will not be undermined. However, drafting an open-ended general norm which can only be used in certain circumstances – as set out in section 12 – has meant that Sri Lanka has reverted to a restrictive fair dealing type scenario, with the section 11 open norm being applicable, only by name.

[311] Sri Lankan National Expert, at the project verification meeting on 9th February 2023.

FINDINGS AND CONCLUSIONS: JAPAN

SUMMARY

- Introduced two separate open-ended exceptions in 2018.
- Did not adopt the US-style fair use exception when amending statute to introduce flexibilities into domestic copyright law.
- Motivated by a desire to support Japanese businesses in new technology markets and overturn its inflexible copyright regime which was harming Japanese business considerations.
- "Purpose" in the form of enjoyment and incidental use are at the heart of both open norms.
- Seen as a qualified general exception as open norms can only be applied to a prescribed type and a class of activity.
- Lack of case law at this point in time.
- **Has proved to be a success** and based on the positive feedback from National Experts the exceptions appear to have brought many benefits, particularly to the technology and business sectors.
- **Key take-away:** In rejecting fair use, Japan demonstrates a new type of open norm which focuses on "purpose" more so than any other country. Whilst well received in Japan, particularly amongst businesses, the openness of the two flexible exceptions, is restrained by the over-arching purpose-limitation of the provisions. As a result of the purpose-limitation the education, research and technology sectors may well not be as well supported by Japanese copyright law as they are by in fair use countries. On the other hand, as determined by the Japanese government a wide and non-prescriptive implementation may have had a chilling effect on organisations unwilling to take risk.

Of the countries evaluated in this Report, Japan is one of only two countries (the other being Canada) not to have adopted fair use, and has rather opted for two open norms, styled according to Japan's needs. Deliberated for a period of over ten years during which time careful preparation was undertaken, Japan introduced its two norms, which are enumerated in Arts. 30-4 and 47-4 of the Japan Copyright Act (Act No. 48 of 1970) (as amended).

Whilst Japan is highly advanced in technology, it is interesting to note that Japan was perceived to be lagging behind in relation to e-commerce markets and losing business to the US.[312] Amongst academic commentators, a widely cited reason for this was Japan's inflexible copyright regime which was driving business away from Japan and towards the US's flexible copyright regime and technology-friendly landscape, as

[312] *See* Nobuhiro Nakayama, supra n 211 and 216.

mentioned above.[313] As such, the motivation for introducing these two open norms was based on practical business considerations.

In relation to the structure and formulation of the open norms, a detailed survey commissioned by the Agency of Cultural Affairs in 2016 clarified that most respondents (68.6%) favoured a broad exception which enumerates some of the types of acts that may fall within its scope.[314] It was this response that led legislators to introduce the two open norms, which are open and flexible, but also codified in relation to the prescribed type and a class of activity. As such, it is fair to identify the Japanese open norms as "open general exceptions" or more accurately as this study suggests, "qualified general exceptions". Japan strikes the balance successfully by providing an open norm which can be applied to a flexible list of purposes, uses or works on the one hand whilst promoting uniform application by applying a single test to a group of uses or purposes.[315] Although very different to the US fair use, it resembles its formation and structure in the sense that the two Japanese exceptions also create an open list of permitted activities whilst applying a uniform flexible test to their application. However, the fact that it can only be applied to a prescribed type and class of activity is the reason why it is considered as "qualified general exceptions" as opposed to an "open general exception". Based on the workshops the decision to opt for this type of open norm has been received well by the business community in Japan.

In terms of the purpose underlying the two open norms the intellectual and emotional enjoyment of the copyright work and the incidental use of the work are at the heart of Arts. 30-4 and 47-4.

Art. 30-4 is restricted to uses which do not invoke intellectual or emotional enjoyment of the original copyright when it is shared with others, whilst Art. 47-4 stipulates that mechanical copies produced by a computer is not infringing as they do not undermine the interests of rightsholders in being able to control how people enjoy the work. As such, whilst the open norms have been well received in Japan, the openness of the two flexible exceptions, is restrained by the over-arching purpose of the provisions.

[313] Ibid.
[314] Aoyama Shachū, supra n 221.
[315] Sean Flynn and Michael Palmedo, supra n 231.

FINDINGS AND CONCLUSIONS: SOUTH KOREA

SUMMARY

- Introduced fair use provision in 2011.
- Prior to that, South Korea relied heavily on the quotation exception.
- Motivated by an aim to increase flexibility of copyright exceptions.
- However, the co-existence of the quotation (Art. 28) and fair use provisions (Art. 35-5) has led to overlap and uncertainty in Korean copyright law.
- Conservative approach by the courts has led to very few cases being decided in favour of fair use.
- Although there have been approx. 60 cases, none have been reviewed by the Seoul Supreme Court and therefore there is a lack of clear guidance/precedent.
- Strict interpretation of the requirements of fair use, particularly activities of a commercial nature, has also contributed to lack of positive fair use cases.
- **Has proved to be a challenge.** The co-existence of the quotation and fair use exceptions gives South Korea much choice, but in fact it has led to a lack of clarity, driven by the very conservative approach by the courts, exacerbated by the strict and literal interpretation of "commercial use" within fair use.
- **Key take-away:** Demonstrates the challenges of introducing an open norm, when a similar successful provision has been used for many years.

South Korea is one of the civil law countries (along with Japan) to have introduced an open norm in recent times. The Korean Copyright Act 1957 (as amended) was updated in 2011 to introduce a US-style fair use provision with the aim beingto increase flexibility of copyright exceptions in a rapidly changing online environment. Fair use, as set out in the Korean Copyright Act is laid out in Art. 35-5 and consists of two paragraphs. Whilst Art. 35-5(1) sets out a general exception, Art. 35-5(2) sets out an open norm, in the style of the US's fair use provision.

Prior to the introduction of the fair use open norm, South Korea relied heavily on its quotation exception under Art. 28 – and still continues to do so. Although the quotation exception was construed narrowly in the past, from around 1997[316] the quotation exception has been broadly interpreted using the *holistic approach test*. Whilst this was seen as a positive step at the time, since the introduction of the fair use exception, there is concern in relation to the likely overlap between the quotation and fair use exceptions. This has been evident in recent case law as discussed in the Korean country report above.[317] However, what is clearly evident from these cases is that

[316] Supreme Court Decision 97Do2227, supra n 244.
[317] *See* cases in supra n 253.

despite both the quotation and fair use provisions being available, the courts have adopted a conservative approach with few cases being decided in favour of either the quotation or the fair use provisions. This has led to some uncertainty in Korean copyright law.

Another factor is that the courts have adopted a strict interpretation of the requirements of fair use which has meant that finding in favour of the new open norm has been rare, especially if the activity is of a commercial nature.[318] This is apparent in the recent cases which have been brought before the Seoul District Court.

All these factors have led to various questions around the feasibility of the application of the fair use provision in South Korea.

Coupled with these concerns, and although there have been approximately 60 cases in South Korea around fair use, there is a sentiment that this number is insufficient to provide clear guidance particularly as none of the decisions have led to a review of the requirements of fair use by the Korean Supreme Court.

In view of this, and in view of the fact that there is an absence of clear standards and therefore certainty in the legal system, the Korea Copyright Commission published fair use guidelines in 2020 to enhance the legal certainty of fair use. The introduction of a specialist court for copyright cases and quasi-binding guidelines drawn up by various parties including judges, scholars and other stakeholders has also been considered for the future.

[318] *See* Seoul District Court Decision 2012Gahap541175, supra n 248.

FINAL CONCLUSIONS

Based on the discussion above as well as the conclusions and findings set out in this section, the researchers have reached the following final conclusions:

1. It is not always necessary to transplant an open norm or fair use provision into one's jurisdiction, if an existing provision can be broadened and successfully applied, as reflected in Canada. However, for this to be effected, a liberal approach by the judiciary is needed in order to lead to more openness.
2. Complementing an open norm with ex-ante intervention and guidelines by a government illustrates how an open norm can be interpreted and managed well as reflected in Israel. Of notable significance in Israel, is the ability for a Minister to make regulations prescribing conditions as to when a use shall be deemed a fair use. In addition, opinions from legal authorities are also used for seeking clarity. Supplemented by a rich body of case law, this approach is considered a success in Israel.
3. An open norm does not have to be encompassed in one single section of a statute. Singapore demonstrates how a successful open norm can be drafted in multiple sections. Complemented by clear examples and guidance, Singapore's approach is hailed for providing greater clarity and certainty.
4. Introducing an open norm, in a country, does not mean that it has to be modelled on fair use principles. Japan's approach demonstrates the introduction of a new type of open norm which focuses on "purpose" more so than any other country. Although generally seen as flexible, the open norm is restrained by the overarching purpose-limitation of the provisions. While it has been well received in Japan, particularly amongst businesses, this model is so far specific to Japan and may not necessarily suit all national situations elsewhere.
5. Clear language is of great importance when drafting an open norm. If not done correctly, it can lead to the open norm being undermined, as seen in Sri Lanka. This is important to bear in mind for a country seeking to introduce an open norm. In Sri Lanka, the open norm is subject to an exhaustive list of provisions/guidance on acts of fair use. Therefore, although an open norm exists in Sri Lanka, practically it cannot be used effectively, as it is restricted heavily by an exhaustive list of provisions.
6. If a provision such as a quotation exception has been used successfully for several years by the judiciary of a country in a flexible manner, then introducing an open norm could be a challenge as seen in South Korea. Whilst South Korea has the option of using the quotation or the fair use exception since its introduction in 2012, the choice has led to uncertainty and confusion in the country with the judiciary taking a very conservative approach to the use of the fair use exception. However, to mitigate this challenge, the Korean Copyright Commission

published fair use guidelines in 2020 to enhance the legal certainty of fair use. Furthermore, the introduction of a specialist court for copyright cases and quasi-binding guidelines drawn up by various parties including judges, scholars and other stakeholders is currently being developed, which will no doubt be beneficial in the future.

The above conclusions illustrate that introducing an open norm has several benefits, and that steps can be taken to mitigate challenges. In a couple of countries where the open norm has not worked as well (Sri Lanka and South Korea), it is clear that it is not due to the open norm *per se*, but, rather due to flaws in drafting it or how it has been approached by the judiciary. Crucially, however, these are not attributable to any incompatibility of open norms with a civil law or hybrid system. These are lessons that can be learnt in considering the introduction of an open norm. However, apart from these two issues, the research encapsulated in the conclusions reflects the positive impact of introducing an open norm, in a given country, leading to many benefits. These include, amongst others, allowing a country's creative, educational and research sectors to progress effectively, and benefit from developments in technology in a timely manner.

RECOMMENDATIONS

Based on our research findings, we recommend the adoption of open norms in other countries around the world, including in European countries. As European countries in particular are mostly industrialised and highly developed, they are especially likely to reap immediate benefits from bringing open norms into their copyright laws.

From the review of the countries explored in this report, there are many benefits to be gained as well as lessons that can be learnt from these examples, should a country decide to follow this path. The legal tradition in countries, whether common law, civil law, hybrid or mixed, has not been found to be a barrier to successful implementation of open norms in copyright law. Rather, the drafting of laws and the jurisprudence of the courts have far greater impact on whether the outcome is a success or not.

As such, the report has captured the results in the form of motivations, benefits, challenges and guidelines in a summary table, as set out in the Introduction. In addition, it should be noted that nearly all European countries have the benefit of supra-national courts to which they can refer cases for interpretation of copyright law – the Court of Justice of the European Union adjudicates for the 27 EU member states and all 46 Council of Europe member states have recourse to the European Court of Human Rights where appropriate. Both courts have shaped national jurisprudence in several instances, thus increasingly blurring the lines between common law and civil law systems in all of Europe.[319] Accordingly, the flexibility of open norms allows copyright laws to remain balanced while moving with the times without abandoning the principles of the Berne Convention Three-Step Test.

The adaptability of open norms is significantly more beneficial than relying solely on a list of specific exceptions, because it inevitably takes countries a significant amount of time to amend or introduce new technology-driven copyright legislation. Typically, this would lead to copyright users having to wait long periods of time without the tools they need to contribute fully to the economy.[320] Whilst being mindful of legislation being introduced too quickly, which can lead to stifling new innovation,[321] continually lagging behind technological advancements is unhelpful too. The consequence of such a system leads to situations where at the time of introducing new legislation, it is playing catch-up and therefore, risks being obsolete. Countries without open norms can lag behind those countries that have successfully introduced them. This is where introduction of open norms can be very beneficial, since open norms permit jurisdic-

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[319] Teresa Hackett, supra n 3.
[320] Ben Depoorter, 'Technology and uncertainty: The shaping effect on copyright law' Vol. 157 (2009) University of Pennsylvania Law Review, 1831.
[321] Simon Davies, 'Lawtech regulation must not stifle innovation' (October 2019) Law Gazette at https://www.lawgazette.co.uk/commentary-and-opinion/lawtech-regulation-must-not-stifle-innovation/5101875.article *See also*, Dinusha Mendis, Mark Lemley and Matthew Rimmer (eds), *3D Printing and Beyond: Intellectual Property and Regulation* (Edward Elgar, 2019).

tions which already have them to easily adapt to rapid technological change and progress innovation to become more economically competitive. As such, there is much to gain, and little to lose, by adopting open norms in copyright law as highlighted in this report.

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