

THE MOEBIUS STRIP:  
PRIVATE RIGHT AND PUBLIC USE IN COPYRIGHT LAW

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INTRODUCTION

The balance between the private rights of copyright owners and public use of copyright material is often said to lie at the heart of copyright law.<sup>1</sup> Recently, the nature of this balance was raised in Australia by an issues paper—*Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*—produced by the Attorney-General.<sup>2</sup> The *Fair Use Paper* was directed to the question of whether fair use provisions should be introduced into Australian copyright law to replace the current fair dealing provisions. Fair dealing provisions tend to be more specific, less open-ended, and less flexible than fair use provisions. Fair use provisions, thus, provide potentially greater scope for non-infringing public uses of copyright material.

This idea was not new: such reform to the Australian Copyright

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\* My thanks to Professor Graeme Austin, who commented extensively and generously on a previous draft of this paper. My thanks also to the panel at the Conference. The original paper presented was revised in light of the helpful and insightful comments made by panel members and the subsequent discussions at the conference.

<sup>1</sup> See COPYRIGHT LAW REVIEW COMMITTEE, COPYRIGHT AND CONTRACT, ISSUES PAPER 6 (2001), available at [http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/DOE73A70ECA655E0CA256C4100094A45/\\$file/IssuesPaperJune2001.pdf](http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/DOE73A70ECA655E0CA256C4100094A45/$file/IssuesPaperJune2001.pdf) (stating that a “[c]opyright is all about striking an appropriate balance between the need to provide incentives for innovation and creativity and the need to encourage the dissemination of information and ideas”); see also Elouise Dellit & Christopher N. Kendall, *Technological Protection Measures and Fair Dealing: Maintaining the Balance Between Copyright Protection and the Right to Access Information*, 2003 DIGITAL TECH. L.J. 1, <http://beta.austlii.edu.au/au/journals/DTLJ/2003/1.html> (referring to the copyright balance throughout the paper); Melissa de Zwart, *Seriously Entertaining: The Panel and the Future of Fair Dealing*, 8 MEDIA & ARTS L. REV. 1, 16 (2003) (referring to the “vital balance of interests of owners and users within copyright”).

<sup>2</sup> See generally ATTORNEY GEN.’S DEP’T, FAIR USE AND OTHER COPYRIGHT EXCEPTIONS: AN EXAMINATION OF FAIR USE, FAIR DEALING AND OTHER EXCEPTIONS IN THE DIGITAL AGE, ISSUES PAPER (2005), available at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf) [hereinafter FAIR USE PAPER].

Act had been recommended by various bodies since 1998.<sup>3</sup> The impetus for the current inquiry was, in part, “concerns over whether the current [fair dealing] exceptions are too complex or are sufficiently flexible to provide for new uses that are possible with digital technology”<sup>4</sup> and, in part, because of concerns about the impact of amendments to the Copyright Act necessitated by the Australia-United States Free Trade Agreement (AUSFTA), which would strengthen the rights of copyright owners.<sup>5</sup> The introduction of fair use provisions was seen as necessary by some to re-establish the balance between the rights of copyright owners and those of users, disrupted by these developments.<sup>6</sup>

The Australian Government decided, however, to reject the proposal for fair use provisions in favor of the introduction of further specific, enumerated exceptions to copyright infringement and (somewhat ironically given the impetus for the *Fair Use Paper*) a range of new measures to counteract copyright “piracy.”<sup>7</sup>

Utilizing the metaphor of the Moebius Strip, this Article argues that the relationship between the competing rights of owners and users is complex and highly dynamic, affected by changing conceptions of copyright as well as the wider context within which copyright law operates. The Australian Government’s response to the proposal to introduce fair use provisions into the Australian Copyright Act is thus open to criticism on at least two bases. First,

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<sup>3</sup> Such a provision was previously recommended in September of 1998 by the Copyright Law Review Committee in its report *Simplification of the Copyright Act: Part 1*. See generally COPYRIGHT L. REV. COMM., SIMPLIFICATION OF THE COPYRIGHT ACT 1968: PART I (1998), available at <http://bar.austlii.edu.au/au/clrc/4.html>. The most recent inquiry was generated by concerns raised in submissions to the Parliamentary Joint Standing Committee on Treaties in 2004 in its report on AUSFTA and by the Senate Select Committee on the Free Trade Agreement between Australia and the United States, which was also in 2004. “The [Australian] Government made a commitment to examine [these] issue[s] in its 2004 election policy *Strengthening Australian Arts*.” FAIR USE PAPER, *supra* note 2, at 4.

<sup>4</sup> FAIR USE PAPER, *supra* note 2, at 14.

<sup>5</sup> *Id.* at 14–15.

<sup>6</sup> Professor Julie Cohen notes that there seems to be some consensus that “users” is a preferable term to “consumers” in the contemporary copyright landscape, observing that, “[although the term is] not without some awkwardness, . . . [it] simultaneously . . . connote[s] both more active involvement in the processes of culture and a residual aura of addiction that may be entirely appropriate to the age of the iPod, the Xbox, and the blogosphere.” Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 347 (2005). As she observes, users serve two functions in the copyright system: “[u]sers receive copyrighted works, and (some) users become authors.” *Id.* at 348.

<sup>7</sup> The phenomenon of the return of the term “piracy” in copyright is explored by Martha Woodmansee in her paper delivered at this conference. See generally Martha Woodmansee, *Publishers, Privateers, Pirates: Eighteenth-Century German Book Piracy Revisited*, [http://www.case.edu/affil/sce/Texts\\_2006/Invention%20papers/Caxton\\_Pap.pdf](http://www.case.edu/affil/sce/Texts_2006/Invention%20papers/Caxton_Pap.pdf) (last visited Apr. 20, 2007).

it does not provide the degree of flexibility needed to respond to the dynamic relationship between private ownership and public use<sup>8</sup> of copyright material. Second, it does relatively little to address issues raised by the general historical movement towards the expansion of owner rights at the expense of user rights. At the same time, the introduction of a U.S.-style fair use provision, *of itself*, would not be a satisfactory response to the issues raised by the enquiry into fair use; rather it is necessary to acknowledge the variety of factors that can impinge upon the ongoing relationship between owners and users of copyright material.

Part I of this Article outlines the issues raised by the *Fair Use Paper*. Part II of this Article criticizes the Australian Government's response to the *Fair Use Paper*, utilizing the metaphor of the Moebius strip. Part III of this Article addresses the point that by merely introducing a U.S.-style fair use provision into Australian copyright law, *of itself*, would not be a satisfactory response to the *Fair Use Paper*.

## I. THE FAIR USE PAPER

The Attorney-General's *Fair Use Paper* of 2005 was prompted by the recommendations of the Joint Standing Committee on Treaties (JSCOT) and the Senate Select Committee (SSC) on the AUSFTA. AUSFTA would "extend[] the term [of protection] for most copyright material by 20 years," provide copyright owners with "more extensive owner control over temporary copies and provide[] stronger protection for technological measures used by owners to control [user] access to . . . copyright material."<sup>9</sup> Submissions made to JSCOT and SSC expressed concern that the AUSFTA would shift the "balance" between copyright owners and users too far in favor of copyright owners and that U.S.-style fair use provisions should be imported into the Australian Copyright Act to redress this imbalance.<sup>10</sup> In order to understand this suggestion, it is necessary to outline the difference between fair use and fair dealing provisions.

Although all copyright regimes allow for some public use of

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<sup>8</sup> In this Article, the term "public use" refers to all uses by non-owners. Thus, it includes not only transformative uses and public good uses, such as uses for educational purposes, but also some private consumptive uses.

<sup>9</sup> FAIR USE PAPER, *supra* note 2, at 16.

<sup>10</sup> *Id.*

copyright material,<sup>11</sup> there is a significant difference between the U.S.-style fair use provisions and fair dealing regimes.<sup>12</sup> The fair use doctrine in the United States requires courts to consider four factors in determining whether a use is “fair:” “(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality . . . [taken from] the copyrighted work . . . ; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”<sup>13</sup> Other jurisdictions, such as Australia,<sup>14</sup> New Zealand,<sup>15</sup> Canada,<sup>16</sup> and the United Kingdom,<sup>17</sup> have fair dealing provisions. “The fair dealing [provisions] are also based on a concept of fairness but are confined to . . . specific purposes.”<sup>18</sup>

In Australia, the fair dealing provisions are in two parts of the Copyright Act of 1968, providing defenses both for “works” and “subject-matter other than works” (Parts III and IV of the Act, respectively).<sup>19</sup> The Act provides that it may be a defense to copyright infringement if the copyright material was used for research or study,<sup>20</sup> criticism or review,<sup>21</sup> reporting the news,<sup>22</sup> or

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<sup>11</sup> Legislative provisions allowing for non-infringing uses represent “an assessment by Parliament of the need and desirability for the public or specified persons to be able to use copyright material, notwithstanding the impact of the measure on the economic interests of the copyright owners.” FAIR USE PAPER, *supra* note 2, at 8.

<sup>12</sup> It should be noted that the legislation of all jurisdictions also contains specific permitted uses in addition to the fair use/fair dealing provisions. *See, e.g.*, 17 U.S.C.A. § 108 (West Supp. 2005) (providing for the reproduction by libraries and archives); Copyright Act, 1968, §§ 48–53 (Austl.) (providing for copying of works in libraries and archives).

<sup>13</sup> 17 U.S.C.A. § 107. For an analysis of each factor and how the four factors are to be assessed, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–93 (1994). This case is discussed in the final part of this Article. *See infra* Part III.

<sup>14</sup> *See* Copyright Act, 1968, §§ 40–43, 103 (Austl.).

<sup>15</sup> *See* Copyright Act, 1994, §§ 40–43 (N.Z.).

<sup>16</sup> *See* Copyright Act, R.S.C., ch. C-42, § 29(1)–(2) (1985) (Can.).

<sup>17</sup> *See* Copyright, Designs and Patents Act, 1988, c. 48, §§ 29–30 (Eng.).

<sup>18</sup> *See, e.g.*, FAIR USE PAPER, *supra* note 2, at 4.

<sup>19</sup> Copyright Act, 1968 (Austl.). In relation to “subject-matter other than works,” sections 103A to 103C of the Copyright Act apply fair dealing to an “audio-visual item,” which is defined in section 100A as “a sound recording, a cinematograph film, a sound broadcast or a television broadcast.” *Id.* §§ 100A, 103A–C. The Copyright Amendment (Digital Agenda) Act of 2000 extended the fair dealing provisions to the right of “communication to the public” to extend the defense to the internet environment. *See* Copyright Amendment (Digital Agenda) Act, 2000, §§ 1, 20, 40, 42 (Austl.). Fair dealing, however, is not a permitted purpose for the supply of a circumvention device within the meaning of the Act. *Id.* § 98.

<sup>20</sup> Copyright Act, 1968, §§ 40(1), 103C (Austl.); *see also* *De Garis v. Neville Jeffress Pidler Pty Ltd.* (1990) 37 F.C.R. 99, 104–06 (Austl.) (discussing section 40 of the Copyright Act).

<sup>21</sup> Copyright Act, 1968, §§ 41, 103A (Austl.); *see also* *TCN Channel Nine Pty Ltd. v. Network Ten Pty Ltd.* (2001) 108 F.C.R. 235, 275–84 (Austl.) (discussing section 41 of the Copyright Act 1968); *De Garis*, 37 F.C.R. at 106–07 (same); *Commonwealth v. John Fairfax & Sons, Ltd.* (1980) 147 C.L.R. 39, 55–56 (Austl.) (same); *Hubbard v. Vosper* (1972) 2 Q.B. 84, 94 (C.A.) (noting that fair dealing may “use[] as a basis for comment, criticism or review”). Only

professional advice given by a legal practitioner, patent attorney, or trade marks attorney.<sup>23</sup>

The Act does not provide a definition of the term “fair dealing” and the fairness of a use is to be determined on a case-by-case basis.<sup>24</sup> A court must exercise discretion in determining whether or not a dealing is fair.<sup>25</sup> Only the provision relating to fair dealing for the purposes of research or study provides some guidance to the court by way of a set of non-exclusive factors to be taken into account in determining whether a dealing is fair. These are:

- (a) the purpose and character of the dealing; (b) the nature of the work or adaptation; (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price; (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and (e) in the case where part only of the work or adaptation is copied—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.<sup>26</sup>

Despite the fact that these factors are expressed to apply only in relation to an assessment of fairness in relation to use for research or study, in practice they have been considered relevant to a dealing for one of the other purposes.<sup>27</sup> The fair dealing provision relating to the purpose of research or study also provides quantitative parameters, within which a dealing will be deemed to be fair.<sup>28</sup>

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the purpose of the person who actually deals with a work for research, study, criticism, or review is relevant.

<sup>22</sup> Copyright Act, 1968, §§ 42, 103B (Austl.); see also *TCN Channel Nine*, 108 F.C.R. at 284–89 (discussing the fair use defence of reporting the news); *Nine Network Australia Pty Ltd. v. Australian Broadcasting Corp.* (1999) 48 I.P.R. 333 (Austl.) (same); *Fairfax & Sons*, 147 C.L.R. at 56–57 (same).

<sup>23</sup> Copyright Act, 1968, §§ 43, 104 (Austl.).

<sup>24</sup> Peter Brudenall, *The Future of Fair Dealing in Australian Copyright Law*, 1997 J. OF INFO., L. & TECH. 1, 4, available at [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997\\_1/brudenall/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997_1/brudenall/).

<sup>25</sup> See *Hubbard* (1972) 2 Q.B. at 96–97.

<sup>26</sup> FAIR USE PAPER, *supra* note 2, at 12. These factors were inserted in 1980 following recommendations of the Franki Committee, which was influenced by United States’ section 107 that was then before the United States Congress. *Id.*

<sup>27</sup> See SIMPLIFICATION OF THE COPYRIGHT ACT 1968: PART I, *supra* note 3, at § 4.09; Tami Dower, *Casting the Fair Net Further: Should Australia Adopt an Open-ended Model of Fair Dealing in Copyright?*, 20 J. COPYRIGHT SOC’Y AUSTRALIA. 4, 5 (2002).

<sup>28</sup> See Copyright Act, 1968, §§ 10(2), 40(3)–(4) (Austl.). Thus, section 40(3) provides that if a work or adaptation comprises an article in a periodical, copying the whole or part of that article for the purposes of private research or study will be a fair dealing and, in any other case, a “reasonable portion” is allowed. *Id.* § 40(3), (5). Subsection 4 provides that subsection 3 will not apply if another article in the same publication but dealing with different subject matter is also reproduced. *Id.* § 40(4).

Fair dealing provisions are generally perceived to be more restrictive than fair use provisions (the United States provisions, for instance, would allow a fair use that falls outside one of the Australian fair dealing categories)<sup>29</sup> and to provide courts with less flexibility in dealing with new technologies.<sup>30</sup> Of particular concern to the *Fair Use Paper* was the fact that the specificity of the fair dealing provisions meant that certain private consumptive uses—particularly “time-shifting,”<sup>31</sup> format shifting,<sup>32</sup> and back-up copying<sup>33</sup>—constituted copyright infringement in Australia. There was also concern expressed that the fair dealing provisions were not appropriate for dealing with digital technologies.

The *Fair Use Paper* acknowledged, however, that there was opposition to the introduction of fair use into the Australian Copyright Act based upon the potential uncertainty of such a provision, whether such a provision could successfully be incorporated into the Australian Act and “whether such a provision would be consistent with [Australia’s] treaty obligations.”<sup>34</sup> Nevertheless, consolidating the fair dealing exceptions in a single open-ended “fair use” style provision was one of the potential policy options identified by the *Fair Use Paper*.<sup>35</sup> The other options

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<sup>29</sup> See FAIR USE PAPERS, *supra* note 2, at 17. “The Senate Select Committee noted that the United States ‘fair use’ doctrine has been judicially interpreted as permitting activities which are an infringement of copyright in Australia.” *Id.*

<sup>30</sup> See *id.* at 20 (stating that “[t]he flexibility of the fair use exception has allowed the courts to play an active role in adapting United States copyright law to major changes in technology”). For a discussion of the role of a flexible fair use provision in adapting copyright to new technologies, see FRED VON LOHMANN, ELEC. FRONTIER FOUND., FAIR USE AND DIGITAL RIGHTS MANAGEMENT: PRELIMINARY THOUGHTS ON THE (IRRECONCILABLE?) TENSION BETWEEN THEM 5–6 (2002), available at [http://www.eff.org/IP/DRM/cfp\\_fair\\_use\\_and\\_drm.pdf](http://www.eff.org/IP/DRM/cfp_fair_use_and_drm.pdf).

<sup>31</sup> For example, recording a television program for viewing at a later time. In the United States, the issue was considered in the context of an earlier technology—the video tape. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 421 (1984). As von Lohmann points out, the prevailing opinion of many scholars at the time was that video taping was not fair use because (1) the user copied the whole work and “(2) did so for a purely consumptive, nontransformative purpose.” VON LOHMANN, *supra* note 30, at 3. The decision was a response to the possibilities of the new technology. For a contemporary example of the “time-shifting” argument involving the internet, see *National Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d 1831, 1834 (2000).

<sup>32</sup> That is, copying material from one format to another (e.g., transferring music from CDs to a portable MP3 player). For the United States’ position, see *Recording Industry Ass’n v. Diamond Multimedia System, Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999), holding that consumer copying of digital music to a portable MP3 player was a non-infringing personal use.

<sup>33</sup> For example, copying legitimately-purchased copyright works when the original is lost or damaged.

<sup>34</sup> FAIR USE PAPER, *supra* note 2, at 16.

<sup>35</sup> *Id.*

included: “retain[ing] current fair dealing provisions and add[ing] further specific exceptions” into the Act or “retain[ing] current fair dealing provisions and add[ing] a statutory license that [would] permit[] private copying of copyright material.”<sup>36</sup>

In response, the Government passed the Copyright Amendment Act of 2006. Ultimately, the Government decided not to introduce fair use provisions but rather to introduce further specific and enumerated fair dealing exceptions<sup>37</sup> for uses such as format shifting, time-shifting, back-up copying, parody and satire,<sup>38</sup> and non-commercial educational uses. It also undertook to pursue a range of new measures to tackle copyright “piracy.” These measures include on-the-spot fines, proceeds of crime remedies, and a change in presumptions in litigation to make it easier to establish copyright piracy.<sup>39</sup> Research is also to be undertaken by the Australian Institute of Criminology “on the nature and extent of piracy and counterfeiting in Australia” and how best to respond to the problem.<sup>40</sup>

## II. TWO CRITICISMS OF THE GOVERNMENT’S RESPONSE TO THE *FAIR USE PAPER*

This part of the Article suggests that the Australian Government’s response to the *Fair Use Paper* is open to criticism on at least two bases: first, it does not provide the degree of flexibility needed to respond to the dynamic relationship between ownership and use of copyright material, and second, the Government’s response does little to redress the wider issues relating to access to copyright material (such as the use of technological protection measures or the use of contract to override fair dealing provisions) touched on by the *Fair Use Paper*. Thus, it does not counter the general historical movement towards the expansion of owner rights

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<sup>36</sup> *Id.* at 34–35.

<sup>37</sup> See Copyright Amendment Act, 2006 (Austl.). However, “the government [is] ‘still considering’ what to do about the need to circumvent copy protection for the purposes of making fair dealing or format shifting copies.” Electronic Frontiers Australia, Intellectual Property On-line, Current Issues: *Copyright Amendment Bill 2006* Deeply Flawed, <http://www.efa.org.au/Issues/IP/> (last visited Apr. 20, 2007).

<sup>38</sup> As Australia recognizes moral rights, a creator may still have a legal action if he or she can establish that the work has been treated in a derogatory way.

<sup>39</sup> Copyright Amendment, 2006, c. 1 (Austl.).

<sup>40</sup> Media Release, Attorney Gen.’s Dep’t, Major Copyright Reforms Strike Balance (May 14, 2006), available at [http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media\\_Releases\\_2006\\_Second\\_Quarter\\_14\\_May\\_2006\\_-\\_Major\\_Copyright\\_Reforms\\_Strike\\_Balace\\_-\\_0882006](http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006).

at the expense of public access. Indeed, it seems a fine irony that an inquiry generated by concern about public use should result (at least in part) in a drive to ensure stronger protection for copyright owners. In order to explain these points, I turn now to the metaphor of the Moebius Strip.

### A. *The Moebius Strip*

Metaphors can be a valuable means of gaining insight into a particular subject matter. Commentators have observed that metaphors “unconsciously shape[] our perception of the subject” and “contribut[e] to the creation of our social realities.”<sup>41</sup> In law, metaphors are said to be essential,<sup>42</sup> facilitating the development of “procedures and tools to guide interpretation and the creation of meaning.”<sup>43</sup>

Within the law, metaphors mold the framework of discourse, determining the scope of appropriate questions about and answers to various social and legal problems. Courts and commentators employ metaphors as heuristics to generate hypotheses about the application of law to novel, unexplored domains. Metaphors structure the way lawyers conceptualize legal events, as they infiltrate, consciously and unconsciously, legal discourse.<sup>44</sup>

The purpose of the first part of this Article is to explore the relationship between private ownership and the public use of copyright material through the metaphor of the Moebius Strip.

The Moebius Strip is a mathematical figure symbolizing infinite

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<sup>41</sup> Ronnie Cohen & Janine S. Hiller, *Towards a Theory of Cyberplace: A Proposal for a New Legal Framework*, 10 RICH. J.L. & TECH. 2, 2 (2003); see also Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207, 1209 (2002) (stating that metaphors “stimulate the imagination, drawing attention to patterns and possibilities that would otherwise have escaped attention”). At the same time, Professor Yen cautions against over-reliance upon any one metaphor because of the potential for constriction of the imagination. *Id.* “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926); see also Jonathan H. Blavin & I. Glenn Cohen, Note, *Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265, 267 (2002) (warning that metaphors may not always do justice to all aspects of an issue).

<sup>42</sup> Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1076–77 (1989) (stating that “[p]ut simply: metaphors are essentially paradoxical pieces of language; law is essentially paradoxical; thus, legal metaphors are a perfectly sensible way of talking about law”).

<sup>43</sup> Michael J. Madison, *The Narratives of Cyberspace Law (or, Learning from Casablanca)*, 27 COLUM. J.L. & ARTS 249, 253 (2004).

<sup>44</sup> Blavin, *supra* note 41, at 266 (footnotes omitted).

motion. A simple model of a Moebius Strip can be formed by twisting a strip of paper by a half-circle and attaching the opposite ends together. This creates a figure with no right or wrong side but with only one surface: “when one passes a finger round the surface of the moebius strip, it is impossible to say at which precise point one has crossed over from ‘inside’ to ‘outside.’”<sup>45</sup> “The two sides are only distinguished by the dimension of time, the time it takes to traverse the whole strip.”<sup>46</sup> With a complete “rotation about th[e] surface, [one] appear[s] to return to [the] point of origin[, b]ut this return is in fact also a departure . . . [,] instead of remaining on the same side of the strip as in the case of cylindrical rotation, [one] carried to the opposite side.”<sup>47</sup>

Since its properties were discovered in 1858,<sup>48</sup> the Moebius Strip has been featured in the work of a number of diverse thinkers.<sup>49</sup> It was particularly important in the work of psychoanalytic theorist, Jacques Lacan,<sup>50</sup> who used the Moebius strip to describe the structures of the psyche.<sup>51</sup> The value of the metaphor of the Moebius strip is that it can be used to call into question our common understanding of apparently binary oppositions. Thus, following Lacan, the “wild man of philosophy,” Žizek, utilizes the Moebius strip to describe the relationship between such apparently opposed concepts as fantasy and trauma; the imaginary and the symbolic;<sup>52</sup> and, importantly, for the purposes of this Article, the universal and the particular.<sup>53</sup> The relationship between such concepts, rather

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<sup>45</sup> NoSubject.com, Moebius Strip, [http://www.nosubject.com/Moebius\\_strip](http://www.nosubject.com/Moebius_strip) (last visited Apr. 20, 2007).

<sup>46</sup> *Id.*

<sup>47</sup> Steven M. Rosen, *What is Radical Recursion?*, SEMIOTICS, EVOLUTION, ENERGY, & DEV. J., Mar. 2004, at 38, 43, available at <http://www.library.utoronto.ca/see/SEED/Vol4-1/Rosen.pdf>.

<sup>48</sup> “The properties of the [Moebius] strip were discovered independently and almost simultaneously by two German mathematicians, August Ferdinand Möbius and Johann Benedict Listing.” 8 NEW ENCYCLOPAEDIA BRITANNICA 210 (15th ed. 1994).

<sup>49</sup> Such as the artist M.C. Escher (1898–1972) and science fiction writer Arthur C. Clarke (1917).

<sup>50</sup> See DAVID S. CAUDILL, LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY, at ix (1997).

<sup>51</sup> See JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS 156 (Jacques-Alain Miller ed., Alan Sheridan trans., 1981).

<sup>52</sup> These terms are used in a particular Lacanian sense. Lacan’s theory postulated three registers of human experience: the Real, the Imaginary, and the Symbolic. A discussion of these terms is not possible within the confines of this paper. For a general overview of Lacanian theory and its relevance to law, see Paula D. Baron, *The Influence of Psychoanalysis on Jurisprudence*, in WESTERN JURISPRUDENCE 438 (Tim Murphy ed., 2004).

<sup>53</sup> See SLAVOJ ŽIZEK, FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 32 (1994). For instance, Žizek notes the movement from the universal to the

than being rigidly oppositional, can be seen to be fluid, dynamic, and continuous:<sup>54</sup> the one, as it is, is the “truth” of the other, and vice versa. Utilizing these ideas, the Moebius strip can shed light on the dynamic relationship between the private ownership and the public use of copyright material in copyright law.

### *B. Applying the Moebius Strip to Copyright Law*

If we imagine private ownership in copyright and public use as being on the opposing sides of a strip of paper which is twisted and joined to create a Moebius strip, a copyright regime may be situated at any particular point of time along the continuum between the two. This is not a fixed point of balance as such (as much of the literature on copyright would suggest), rather copyright tends to move backward or forward along this continuum as a result of design and/or circumstance.

Two factors in particular have had a significant impact upon determining the location of contemporary copyright regimes upon this continuum. They are our changing conceptualization of copyright protection and fair use and the impact of technologies, particularly digital technologies. Both of these developments have been explored in the literature, but it is necessary to outline them briefly here.

#### 1. Our changing conceptualization of copyright protection and fair use

Contemporary copyright laws protect “original works of authorship fixed in any tangible medium of expression.”<sup>55</sup> The economic rights enjoyed by the copyright owner under contemporary copyright regimes include the rights to reproduce the work, to import or export the work, to create derivative or transformative works, and to perform or display the works in public.<sup>56</sup> These rights are, in general, freely alienable,<sup>57</sup> and the copyright owner may sell

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particular so that law is ultimately a “universalized crime.” *Id.* (emphasis omitted). He writes: “The external opposition of particular crimes and universal law has to be dissolved in the ‘inner’ antagonism of crime: what we call ‘law’ is nothing but universalized crime—that is, law results from the negative self-relationship of crime.” *Id.*

<sup>54</sup> See Rosen, *supra* note 47, at 45.

<sup>55</sup> 17 U.S.C.A. § 102 (West 2000).

<sup>56</sup> See, e.g., *id.* § 106; Copyright Act, 1968, § 31 (Austl.).

<sup>57</sup> See *Gardner v. Nike, Inc.*, 279 F.3d 774, 781 (9th Cir. 2002) (holding that, under the United States Copyright Act, owners of exclusive licenses cannot assign or sublicense copyrighted works to third parties without permission from the owners of their copyrights).

or assign his or her economic rights to others.<sup>58</sup> Permitted public uses of copyright material function as exceptions to the rights of copyright owners rather than limitations upon them.<sup>59</sup> This, however, was not always the case. A number of commentators have acknowledged that since the original copyright legislation—the Statute of Anne<sup>60</sup>—the rights of owners have steadily expanded<sup>61</sup> and the rights of public use have contracted.<sup>62</sup> The metaphor of the Moebius strip suggests that this trend reflects a general movement over time in our conceptualization from particularization to universalization of ownership rights and a corresponding movement from universalization to particularization of permitted use—particularly fair use.

It is widely recognized that contemporary copyright regimes originated in the grant of privilege by the state to the Stationers Company. The privilege granted in the Stationers' Charter of 1557 provided that the Stationers Company, a guild of booksellers and printers, would receive a general monopoly over printing by letters patent in return for censoring material, preventing the distribution of material that was "seditious, heretical, obscene and blasphemous."<sup>63</sup> By the late 17th century, the Stationers' power to regulate the book trade was governed by the Licensing Act of 1662, but in 1695 this lapsed.<sup>64</sup> In order to reinstate their general

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<sup>58</sup> Economic rights are transferable as opposed to any moral rights that may exist in copyright material and generally are not transferable. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (discussing how an artist's moral rights are personal and independent from other rights in copyright).

<sup>59</sup> As Professor Ruth Okediji observes:

[T]he choice between labeling fair use as an "exception" or "limitation" is a pedagogical one reaching the very heart of copyright policy. Is fair use merely an adjunct to copyright law serving perfunctory purposes of a narrow nature and, thus, merely an "exception" or is it a "limitation," an integral part of what domestic copyright law purports to be, namely an instrument of public policy designed first to allocate resources and then to redistribute those resources to facilitate the purposeful end of progress in the arts?

Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 113–14 (2000) (footnote omitted).

<sup>60</sup> Copyright Act, 1709, 8 Ann., c. 21 (Eng.).

<sup>61</sup> See, e.g., STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 23–24 (1983) (providing examples where the rights of owners expanded).

<sup>62</sup> See, e.g., Robert E. Thomas, *Vanquishing Copyright Pirates and Patent Trolls: The Divergent Evolution of Copyright and Patent Laws*, 43 AM. BUS. L.J. 689, 691 (2006) (writing that it should not be surprising "that changes in copyright law have not only strengthened intellectual property rights but also have allowed content holders to limit the exercise of fair use in order to suppress Internet piracy").

<sup>63</sup> BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911*, at 11–12 & n.3 (1999).

<sup>64</sup> *Id.* at 11–12.

monopoly over the book trade, the Stationers initially sought the reinstatement of the Licensing Act.<sup>65</sup> When this failed, they lobbied for the introduction of the Statute of Anne, the first copyright legislation.<sup>66</sup>

Early copyright cases showed a consciousness of the fact that copyright was a grant of a monopoly, in the original sense of that word, that is, “exclusive possession or control of something,’ usually granted by the state.”<sup>67</sup> That grant was originally justified upon utilitarian principles,<sup>68</sup> that is, because the purpose of the original copyright legislation was expressed to be “the encouragement of learning,” the private rights of copyright were subject to certain important and built-in limitations which ensured public access to copyright works: the duration of copyright protection was very limited<sup>69</sup> and at its conclusion the work fell back into the public domain; the so-called idea/expression dichotomy sought to ensure that only expression of works could be protected, while the underlying facts and ideas remained in the public domain;<sup>70</sup> and,

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<sup>65</sup> *Id.* at 12.

<sup>66</sup> *Id.* But see Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 85 (2003) (stating that “[t]he sketchy and ambiguous Statute of Anne . . . was not an effective source of rationale for the defense of the general public interest”).

<sup>67</sup> JOHN F. DUFFY, INTELLECTUAL PROPERTY AS NATURAL MONOPOLY: TOWARD A GENERAL THEORY OF PARTIAL PROPERTY RIGHTS 7 (unpublished research paper), available at <http://www.utexas.edu/law/academics/centers/clbe/assets/DuffyPaper.pdf> (last visited Apr. 20, 2007); see also Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 34 (2005) (pointing out that every form of property ultimately “represents only state-granted legal monopolies issued to individuals for particular policy reasons”). In the contemporary environment, a body of competition law has developed that understands “monopoly” in terms of market power, where substantial market power was a precondition to the legal definition of “monopoly” for competition law purposes. DUFFY, *supra*, at 6. Under this latter understanding, copyrights will rarely constitute monopolies “because the ‘market’ often contains many substitutes for the subject matter.” *Id.* at 7. The ambiguity in the term has led to considerable resistance to calling copyrights “monopolies.” See *id.*

<sup>68</sup> A number of commentators have noted more cynical reasons for the introduction of the Statute of Anne. See, e.g., MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 4 (1993); Shelly Warwick, *Is Copyright Ethical?: An Examination of the Theories, Laws and Practices Regarding the Private Ownership of Intellectual Work in the United States*, 1999 B.C. INTEL. PROP. & TECH. F. 060505, [http://www.bc.edu/bc\\_org/avp/law/st\\_org/iptf/commentary/content/1999060505.html](http://www.bc.edu/bc_org/avp/law/st_org/iptf/commentary/content/1999060505.html). Both observe that the primary purpose of the statute was “to regulate [the book trade] rather than recognize author’s rights or promote learning.” Warwick, *supra*.

<sup>69</sup> The term of Copyright in the Statute of Anne was fourteen years, renewable once. Copyright Act, 1709, 8 Ann., c. 21, § 1 (Eng.).

<sup>70</sup> The distinction between fact or idea and expression has always been difficult and decided on a case-by-case basis. There has, however, been some suggestion that the distinction was eroded significantly in recent years. See, e.g., *West Publ’g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986) (holding that the page numbers and page breaks of West’s legal case reports were expression and hence protected by copyright).

most importantly, the grant of copyright was made subject to the concept of fair use.

As I have written elsewhere, fair use was originally “a general standard against which to assess infringement.”<sup>71</sup> The core issue in copyright disputes in pre-modern cases was whether a defendant’s use of a work was “legitimate . . . in the fair exercise of a mental operation, deserving the character of an original work.”<sup>72</sup> It was open to any person to produce a work similar to an original, but the issue was whether the second work was, in substance, new and original<sup>73</sup> and, thus, of benefit to the public.<sup>74</sup> A transformative use was non-infringing.<sup>75</sup> Transformative uses “of the protected works, such as translations, abridgements and derivations, were not prohibited as these were not considered copies, but uses of the work.”<sup>76</sup> A distinction was made “between the use of the copyright and the use of the work.”<sup>77</sup> Thus, “[s]ome similarities, and some use of prior works, even to copying of small parts, are in such cases tolerated, if the main design and execution are in reality novel or improved, and not a mere cover for important piracies from others.”<sup>78</sup> This universalization of fair use was seen as important because of the underlying utilitarian rationale for copyright protection—encouraging the production of new and useful works.

Over time, however, copyright law has moved around the Moebius strip, shifting the relationship between private rights and public use. This began with the notion that copyright ownership was rightly characterized as a “natural right” rather than as a privilege,

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<sup>71</sup> Paula Baron, *Back to the Future: Learning from the Past in the Database Debate*, 62 OHIO ST. L.J. 879, 921 (2001).

<sup>72</sup> *Bramwell v. Halcomb*, 40 Eng. Rep. 1110, 1110–11 (1836) (quoting *Wilkins v. Aikin*, 34 Eng. Rep. 163, 165 (1810)) (explaining that a “writer might take all the vital part of another’s book, though it might be but a small proportion of the book in quantity[, rather i]t is not only quantity but value that is always looked to”).

<sup>73</sup> *Stowe v. Thomas*, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514).

<sup>74</sup> John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 480 (2005).

<sup>75</sup> See Warwick, *supra* note 68.

<sup>76</sup> *Id.*

<sup>77</sup> NEW S. WALES ATTORNEY GEN.’S DEP’T, ISSUES PAPER: FAIR USE AND OTHER COPYRIGHT EXCEPTIONS 3 (2005), available at [http://www.tisn.gov.au/agd/WWW/rwpattach.nsf/VAP/\(0C3FC6E500CE9F81CFAAA22DF670141F\)~85+Attorney+Generals+Department+of+NSW.doc/\\$file/85+Attorney+Generals+Department+of+NSW.doc](http://www.tisn.gov.au/agd/WWW/rwpattach.nsf/VAP/(0C3FC6E500CE9F81CFAAA22DF670141F)~85+Attorney+Generals+Department+of+NSW.doc/$file/85+Attorney+Generals+Department+of+NSW.doc) [hereinafter FAIR USE AND OTHER COPYRIGHT EXCEPTIONS] (emphasis omitted); see also L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 46 n.150 (1987) (explaining that “[t]he purpose of copyright relates to the use of the work; the function of copyright relates to the use of the copyright”).

<sup>78</sup> See *Webb v. Powers*, 29 F. Cas. 511, 517 (C.C.D. Mass. 1847) (No. 17,323).

a notion that arose fairly early on in the history of copyright.<sup>79</sup> It began as a rhetorical turn initiated by the Stationers in order to regain the benefits of their original privilege in the two founding court cases in copyright law, *Millar v. Tayler* and *Donaldson v. Beckett*.<sup>80</sup> Although it was still relatively uncontroversial to refer to copyright as a species of monopoly throughout the late eighteenth century,<sup>81</sup> the issues raised by these cases led to the “seminal” debate in intellectual property.<sup>82</sup> This debate was centered on the question of whether, at common law, authors and their assigns enjoyed perpetual rights over their own creations. This debate over the “true” nature of copyright—a privilege or a right—raged in the first half of the nineteenth century.

As time wore on, the understanding of copyright as a natural right,<sup>83</sup> rather than as a privilege, gained hold. Today, it is commonplace to characterize copyright as a property right, although commentators note that the characterization of copyright as “intellectual property,” and hence as a “property right,” is only a relatively recent development<sup>84</sup> (at least in the courts)<sup>85</sup> and one that has gained very significant currency with the advent of TRIPs.<sup>86</sup>

Intellectual property rights are analogized to real property and,

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<sup>79</sup> See Tehranian, *supra* note 74, at 468–69.

<sup>80</sup> In these cases, the Stationers argued that the Statute of Anne merely supplemented an existing perpetual right to one’s creation. Tehranian, *supra* note 74, at 469–70; see *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837, 843 (H.L.); *Millar v. Tayler*, (1769) 98 Eng. Rep. 201, 202 (K.B.).

<sup>81</sup> DUFFY, *supra* note 67, at 4 (referring to the views of Adam Smith and Thomas Jefferson).

<sup>82</sup> SHERMAN & BENTLY, *supra* note 63, at 9. See generally Rose, *supra* note 66 (providing additional instances of rhetoric).

<sup>83</sup> Such a right is seen to be based either on labor, following John Locke, or based in personality, following Hegel. Warwick, *supra* note 68. The concept of intellectual property as a natural right was entrenched by subsection 2 of Article 27 of the Universal Declaration of Human Rights Article (1948–98): “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc A/810 (Dec. 12, 1948).

<sup>84</sup> See Warwick, *supra* note 68 (“Intellectual property is a term that has recently come into extensive use, and is often used without definition.”).

<sup>85</sup> See Mark A. Lemley, *Property, Intellectual Property, and Free Riding* 4 (Stanford L. Sch., John M. Olin Program in L. & Econ., Working Paper No. 291, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=582602](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=582602). Lemley traces the modern use of the term “intellectual property” to the foundation of the World Intellectual Property Organization (WIPO) by the United Nations. *Id.* at 4 n.6. He concedes, however, that there were uses of the term in the literature well before this time, especially on the Continent. *Id.*

<sup>86</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPs Agreement].

thus, carry with them notions of exclusion,<sup>87</sup> theft,<sup>88</sup> and trespass. Although property is often characterized as exclusionary in character, it is not an absolute right, even in strong property regimes.<sup>89</sup> “[L]imits can [and do] exist on the manner in which an owner may use resources . . . .”<sup>90</sup> Nevertheless, these have tended not to find their parallels in “intellectual” property,<sup>91</sup> and many commentators see the essence of property as the right to exclude.<sup>92</sup> Furthermore, commentators have pointed to problems of market failure that attach to the exploitation of intellectual property rights.<sup>93</sup> For instance, Professor Thomas points out that because

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<sup>87</sup> Mossoff, *supra* note 67, at 38 (observing that the “narrow” view of property, characterized by the right to exclude, “works well for tangible property entitlements, but it fails miserably to capture our intangible property entitlements”). He also states that he prefers the “classic definition of property as the right to use, possess and dispose of one’s possessions.” *Id.* at 40.

<sup>88</sup> See *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (cautioning that “Thou shalt not steal” in an action for infringement of copyright for music sampling); see also Jessica Litman, *Lawful Personal Use 3* (Univ. of Mich. John M. Olin Ctr. for L. & Econ., Paper No. 06-004, 2006), available at <http://www.law.umich.edu/centersandprograms/olin/papers.htm> (noting that “[t]oday, trading music with your friends is called ‘piracy’ and collecting photocopied articles relevant to your job is stealing”).

<sup>89</sup> “All legal property rights, whether tangible or intangible, are born of important policy considerations.” Mossoff, *supra* note 67, at 29. He later writes: “[E]very tangible property entitlement has arisen from a crucible of moral, political, and economic analyses, and thus implicates the same questions about utility, personal dignity, and freedom that now dominate the debates over digital copyright,” *id.* at 33 (emphasis omitted), and that the differences between real property and intangible property are differences in “degree” rather than “kind.” *Id.* at 39 (emphasis omitted).

<sup>90</sup> O. Lee Reed, *What is “Property”?*, 41 AM. BUS. L.J. 459, 491–92 (2004). A similar point is made by Professor Duffy who observes that “[t]he property-monopoly debate is to some extent a pointless disagreement about semantics” because all property rights, ultimately, are exclusive rights granted by the state and involve trade offs between private and public interests. DUFFY, *supra* note 67, at 8; see also JOSHUA S. GANS, PHILIP L. WILLIAMS, & DAVID BRIGGS, *INTELLECTUAL PROPERTY RIGHTS: A GRANT OF MONOPOLY OR AN AID TO COMPETITION?* 3 (2002), available at [www.mbs.edu/home/jgans/papers/Intellectual%20Property%20Rights%20and%20Monopoly.pdf](http://www.mbs.edu/home/jgans/papers/Intellectual%20Property%20Rights%20and%20Monopoly.pdf) (“On one level, having a system of intellectual property rights is no more exclusionary or monopolistic than having a system of property rights *per se.*”).

<sup>91</sup> See, e.g., Litman, *supra* note 88, at 34, (urging for the consideration of basic property law principles, such as easements, in order to resolve the issues of personal use).

<sup>92</sup> See, e.g., Reed, *supra* note 90, at 500. Thus, for instance, Frank Easterbrook argues that “a right to exclude in intellectual property is no different in principle from the right to exclude in physical property.” Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL’Y 108, 112 (1990). Blackstone described the right of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” WILLIAM BLACKSTONE, 2 COMMENTARIES \*1, \*2.

<sup>93</sup> Indeed, the problem of market failure in relation to intangibles has led to the suggestion that fair use depends upon the resolution of market concerns. See generally Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601–02 (1982).

tangible property can only be enjoyed by a finite number of people simultaneously, losses due to unauthorized use are limited.<sup>94</sup> However, a single sale of an object embodying intangible property can make the property accessible to a potentially unlimited number of people: “Therefore, profit-maximizing owners of intangible property must take greater precautions against unauthorized transfers in order to maintain profit flows.”<sup>95</sup> It should not be surprising, then, that there is something of a psychological shift inherent in casting creative effort as property: a tendency on the part of intellectual property owners to assume that their property rights are absolute, “a property right delineated as absolute sovereignty over the disposition and use.”<sup>96</sup>

Just as the characterization of private ownership in copyright moved towards universalization as a property “right” and away from concepts of privilege, public use moved in the opposite direction, away from fair use as a limitation upon copyright to fair use as an exception to copyright ownership.<sup>97</sup> As Professor Tehranian notes, the case of *Folsom v. Marsh*<sup>98</sup> marks a significant change in the justification for copyright protection and thus in the nature of fair use.<sup>99</sup> As the natural rights rhetoric of copyright protection grew, the nature of a fair use began to change. A transformative use alone was insufficient to justify a finding of non-infringement because under a natural rights justification, copyright protection was primarily against a commercial and competitive use. Use of an original work was considered to be illegitimate if it would serve as a substitute for the original work or prejudice that work in the market place.<sup>100</sup> In some jurisdictions, even this narrowed conception of a fair use was discarded, so that private, non-competing uses were disallowed.<sup>101</sup> Indeed, the nature of the use

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<sup>94</sup> Thomas, *supra* note 62, at 696–97.

<sup>95</sup> *Id.* at 697–98.

<sup>96</sup> Julie E. Cohen, *Overcoming Property: Does Copyright Trump Privacy?*, 2002 U. ILL. J.L. & TECH. POL’Y 375, 379.

<sup>97</sup> The change in language from “limitation” to “exception” is reflected in much of the literature and case law. See, e.g., *TCN Channel Nine Pty Ltd. v. Network Ten Pty Ltd.*, (2002) 118 F.C.R. 417, 420 (Austl.) (Finkelsteing, J.) (“There are exceptions to the monopoly rights given to copyright owners. Fair dealing is one of those exceptions.”); see also de Zwart, *supra* note 1, at 2 (“In Australia exceptions are granted to the exclusive rights of the copyright owner pursuant to the concept of fair dealing . . .”).

<sup>98</sup> 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

<sup>99</sup> Tehranian, *supra* note 74, at 483–85.

<sup>100</sup> See *Greene v. Bishop*, 10 F. Cas. 1128, 1134 (C.C.D. Mass. 1858) (No. 5,763); *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497); *Dodsley v. Kinnersley*, (1761) 27 Eng. Rep. 270 (U.K.).

<sup>101</sup> See Litman, *supra* note 88, at 3 (observing that “the recording industry has sued more

became relatively unimportant: the courts “making no inquiry into whether the owner’s decision to exclude a defendant was proper or improper, or whether the defendant’s use of the owner’s resource was harmful or productive.”<sup>102</sup>

This is a development of particular concern to Litman who has observed that, for much of copyright history, “[t]he exclusive rights granted by copyright were narrow, and the law aimed its proscriptions at commercial and institutional entities.”<sup>103</sup> Private, consumptive uses, in particular, “functioned as historic copyright liberties, implicit in the copyright statutory scheme and essential to its purpose.”<sup>104</sup> However, as the conception of permissible public use declined, such uses were no longer seen as liberties but as privileges.<sup>105</sup>

The concept of fair use as an exception to copyright, rather than a limitation upon it, has been reinforced by international treaties. Article 9(2) of the Berne Convention,<sup>106</sup> Article 13 of the TRIPS Agreement,<sup>107</sup> Article 10 of the WIPO Copyright Treaty,<sup>108</sup> and Article 16 of the WIPO Performances and Phonograms Treaty<sup>109</sup>

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than 20,000 individuals for making personal uses that can be characterized as ‘commercial’ only by redefining commercial to mean ‘unlicensed’); *see also* Cohen, *supra* note 6, at 350 (noting that digitization is a strong contributing factor to renewed interest by copyright owners in the private consumptive uses made of copyright works).

<sup>102</sup> WENDY J. GORDON, TOURING THE CERTAINTIES OF PROPERTY AND RESTITUTION: A JOURNEY TO COPYRIGHT AND PARODY 19 (1999), *available at* <http://www.oiprc.ox.ac.uk/EJWP1399.pdf>. A similar view is expressed by Professor Cohen, who observes that the rules relating to infringement “operate without reference to users or to categories of use; they are triggered, instead, by the mere technical processes of copying or rendering digitally stored information.” Cohen, *supra* note 6, at 350.

<sup>103</sup> Litman, *supra* note 88, at 9.

<sup>104</sup> *Id.* (footnote omitted). Litman traces a line of cases where courts have treated private uses as essential copyright liberties. *Id.* at 18–19.

<sup>105</sup> *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001) (stating that courts, in assessing the first factor in the fair use analysis, purpose, and character of the use, should determine “whether and to what extent the new work is ‘transformative’” on the basis that “[c]ourts have been reluctant to find fair use when an original work is merely retransmitted in a different medium” (internal quotations omitted)).

<sup>106</sup> Berne Convention for the Protection of Literary and Artistic Work of September 9, 1886, July 24, 1971, 1161 U.N.T.S. 3, 31 [hereinafter Berne Convention].

<sup>107</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299, 305.

<sup>108</sup> World Intellectual Property Organization Copyright Treaty, art. 10, Dec. 20, 1996, 36 I.L.M. 65, 71 [hereinafter WIPO Copyright Treaty] (arising from diplomatic conference on certain copyright and neighbouring rights questions). The treaty is independent of both the Berne Convention and TRIPS.

<sup>109</sup> World Intellectual Property Organization: Performance and Phonograms Treaty, art. 16, Dec. 20, 1996, 36 I.L.M. 76, 85–86 [hereinafter WIPO Performance and Phonograms Treaty].

establish a three-step test for assessing the validity of exceptions to the exclusive rights of copyright owners. Under this test, exceptions to the rights of copyright owners are restricted: “[(1)] to certain special cases[, (2)] [that] do not conflict with a normal exploitation of the [work,] and [(3)] do not unreasonably prejudice the legitimate interests of the [right holder].”<sup>110</sup> Any proposals for new exceptions or alterations to existing exceptions in the relevant copyright legislation of member states must be consistent with this three-step test. Indeed, the United States has been subject to criticism for the open-ended nature of its fair use provisions.<sup>111</sup>

Thus, as copyright ownership moved from the particular to the universal, that is, from privilege to right, permitted uses of copyright material moved generally from the universal to the particular, that is, from right to privilege. Therefore, the movement has been characterized as “the expansion of owners’ rights and contraction of public [use] entitlements [in the twentieth century]—in contrast to the nineteenth century position when copyright owners were, to some extent, viewed as intruders on the public domain.”<sup>112</sup>

## 2. The Impact of New Technologies

Our conceptualization of copyright has not, of course, been the only factor influencing the relationship between private ownership in copyright and public uses. New technologies are a powerful factor in this relationship. In particular, technologies that allow consumers, not just competitors, to reproduce and distribute copyright material—such as tape recorders,<sup>113</sup> video recorders,<sup>114</sup>

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<sup>110</sup> WIPO Copyright Treaty, art. 10(2), Dec. 20, 1996, 36 I.L.M. 65, 71; accord WIPO Performance and Phonograms Treaty, art. 16(2), Dec. 20, 1996, 36 I.L.M. 76, 86.

<sup>111</sup> Okediji, *supra* note 59, at 116; see also MYRA J. TAWFIK, IS THE WTO/TRIPS AGREEMENT USER-FRIENDLY?: FINAL REPORT TO THE INTERNATIONAL TRADE TREATIES COMMITTEE OF THE CANADIAN LIBRARY ASSOCIATION 37, 40 (2005), available at [http://www.cla.ca/resources/tawfik\\_final\\_report.pdf](http://www.cla.ca/resources/tawfik_final_report.pdf) (noting the continuing controversy on this point, she writes that “[u]ntil such time as there is some international consensus as to the legitimacy of ‘fair dealing’ or like-provisions under the WTO/TRIPS paradigm, Commonwealth countries need to be wary of extending the scope of this exception beyond the way in which it has traditionally been considered”).

<sup>112</sup> FAIR USE AND OTHER COPYRIGHT EXCEPTIONS, *supra* note 77, at 3.

<sup>113</sup> See, e.g., C.B.S. Songs Ltd. v. Amstrad Consumer Elect. Plc. (1988) R.P.C. 567, 568 (H.L.). CBS sought an injunction against Amstrad to prevent the sale of double-cassette decks on the basis that the decks would facilitate widespread infringement copyright works by consumers. *Id.* at 568. The Court denied the injunction, observing:

No manufacturer and no machine confers on the purchaser authority to copy unlawfully. The purchaser or other operator of the recorder determines whether he shall copy and

photocopiers,<sup>115</sup> and, more recently, computerization, digitization, and the internet<sup>116</sup>—have had a significant impact on the relationship between private rights and public use in copyright.

This impact is not, however, straightforward. At least initially, new technologies tend to move the relationship between owners and public use back in favor of users. Cumulatively, the opportunities for copyright infringement, which is often difficult to detect<sup>117</sup> and hard to control through conventional legal processes,<sup>118</sup> have been greatly increased, leading to a culture of consumer copying that has been described as “ubiquitous.”<sup>119</sup>

In the longer term, however, such developments have been considered to contribute to the trend towards stronger ownership rights. This is seen as occurring in two ways. First, copyright owners have been very successful in lobbying for stronger copyright protection in face of the fear of widespread infringement.<sup>120</sup> Indeed, commentators have acknowledged that, historically, “the practice of making copyright law is particularly prone to regulatory capture.”<sup>121</sup>

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what he shall copy. By selling the recorder [the defendants] may facilitate copying in breach of copyright but do not authorise it.

. . . The operator of an Amstrad tape recording facility, like all other operators, can alone decide whether to record or play and what material is to be recorded.

*Id.* at 603–04.

<sup>114</sup> See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984) (discussing whether the use of a video tape record infringed copyrights).

<sup>115</sup> See, e.g., *Univ. of New S. Wales v. Moorhouse* (1975) 133 C.L.R. 1 (Austl.) (discussing whether the use of photocopiers infringed a copyright).

<sup>116</sup> The phenomenon of file sharing has posed particular challenges for the application of copyright law. See *Universal Music Austl. Pty Ltd. v. Sharman License Holding Ltd.* (2005) F.C.A. 1242 (Austl.); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 918–19 (2005); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

<sup>117</sup> See *Dellit and Kendall*, *supra* note 1, at para. 62; *Thomas*, *supra* note 62, at 710 (“With a very low probability of detection, the only deterrent to copying is an ethical imperative against engaging in the proscribed behaviour.”).

<sup>118</sup> *Thomas*, *supra* note 62, at 711–12.

<sup>119</sup> WORLD INTELLECTUAL PROP. ORG., INTELLECTUAL PROPERTY ON THE INTERNET: A SURVEY OF ISSUES 131 (2002), available at <http://wipo.int/copyright/e-commerce/en/pdf/survey.pdf>.

<sup>120</sup> *de Zwart*, *supra* note 1, at 2; see also *Thomas*, *supra* note 62, at 691–92 (writing that the size and substantial resources of large media companies, such as Disney, A&M Records, and MGM Studios “allow them to exert tremendous influence on legislative bodies”).

<sup>121</sup> JOHN CAHIR, THE MORAL PREFERENCE FOR DRM ORDERED MARKETS IN THE DIGITALLY NETWORKED ENVIRONMENT 7, <http://www.copyright.bbk.ac.uk/contents/publications/workshops/theme1/jcahir.pdf> (last visited Apr. 20, 2007); see also Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 568 (2006) (“As a result of special-interest capture, the Copyright Act confers overly broad rights to copyright owners at the expense of the public interest in having access to creative works.”). Bohannon notes that this is because copyright “confers concentrated benefits on small groups while imposing diffuse costs on large groups.” *Id.* at 614. For illustrations of how this has happened (particularly in

Second, the more recent technologies offer copyright owners greater means of protecting their works, both through their capacity to track<sup>122</sup> and potentially charge for each usage,<sup>123</sup> through greater technological means of protection,<sup>124</sup> and through the alliance of technological protection and contract law,<sup>125</sup> which means copyright owners may override copyright's statutory permitted public uses.<sup>126</sup> These trends have been considered by some to have been exacerbated by legislation that prohibits the use of anti-circumvention devices,<sup>127</sup> legislation deemed necessary in response

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relation to the United States Digital Millennium Copyright Act), see generally Thomas, *supra* note 62, at 712–21.

<sup>122</sup> See Dellit & Kendall, *supra* note 1, at para. 16 (noting that “increased surveillance of Internet use and access to copyright materials, while understandable as a means of addressing piracy in some circumstances, does risk leading to a situation where legitimate use is curtailed and fair dealing undermined”).

<sup>123</sup> An issue of concern to Samuelson as relatively early as 1998, he wrote:

[T]here is no piece of a copyrighted work small enough that they are uninterested in charging for its use, and no use private enough that they aren't willing to track it down and charge for it. In this vision of the future, a user who has copied even a paragraph from an electronic journal to share with a friend will be as much a criminal as the person who tampers with an electrical meter at a friend's house in order to siphon off free electricity.

Pamela Samuelson, *The Copyright Grab*, 29 UWLAL REV. 165, 168 (1998).

<sup>124</sup> Technological protection measures (TPMs), according to the Australian Copyright Act, “are devices or products that prevent or inhibit the infringement of copyright in a work by either ensuring that access to the work is only available by use of an access code or process, or by controlling copying of the work.” Dellit & Kendall, *supra* note 1, at para. 5. Dellit and Kendall point out, TPMs can take a variety of forms, including password protection, encryption, or the copy control technology commonly used on CDs or DVDs. *Id.* TPMs are not without their own issues. In a recent class action, consumers alleged that certain Sony CDs, which had TPMs, exposed their computers to security risks. *Michaelson v. Sony BMG Music, Inc.*, No. 05-CV-9575 (S.D.N.Y. filed Nov 14, 2005). The case was settled. See Hearing Order, *In re Sony BMG CD Technologies Litigation*, No. 1:05-cv-09575 (NRB) (Jan. 6, 2006), available at [http://www.eff.org/IP/DRM/Sony-BMG/sony\\_settlement.pdf](http://www.eff.org/IP/DRM/Sony-BMG/sony_settlement.pdf) (approving the settlement agreement).

<sup>125</sup> This issue was examined by the Australia Copyright Law Review Committee (CLRC) in 2001. See FAIR USE PAPER, *supra* note 2, at 25. Specifically, the CLRC considered “the extent to which electronic trade in copyright works is subject to contracts which exclude or modify exceptions to copyright provided for under the Copyright Act.” *Id.* The CLRC concluded that this was a problem and that existing remedies were not adequate. *Id.* “[It] recommended that the Copyright Act should [be amended to] provide that an agreement that excludes or modifies a specified exception has no effect.” *Id.* To date, its recommendation is still under consideration by the Government. *Id.*

<sup>126</sup> Dellit & Kendall, *supra* note 1, at para. 41 (cautioning that in the Australian context, “fair dealing is in danger of being overridden by the push for TPMs, calls for stronger anti-circumvention provisions that provide legal protection for TPMs and more legislative and judicial restrictions on who can access what, how they can access it and when”).

<sup>127</sup> See, e.g., *id.* at para. 14–15 (arguing that the changes brought about to the Copyright Act in Australia by the Digital Agenda Act have “tipped the balance” of copyright in favor of copyright owners: “Previously, the *Copyright Act* (Cth) was only concerned with copyright infringement. Now, the Act covers activities that do not themselves constitute infringement but *may* assist people in infringing copyright”).

to “[c]reative consumers . . . [who] found ways to circumvent [technological protection] measures as they continue to download and exchange copyrighted works.”<sup>128</sup>

In sum, there has been a general historical tendency for copyright regimes to move around the Moebius strip in favor of private rights at the expense of public uses. This is not, however, a straightforward progression nor has it moved copyright away from any original fixed point of balance between owners and users. The tension between private rights and public use and the variety of factors that impact upon the relationship between them ensures that this relationship is dynamic.

### *C. The Implications of the Moebius Strip*

The dynamic nature of the relationship between the private rights of users and public uses of copyright material suggests that what is needed in drafting copyright law is the retention of flexibility that will allow adjustment of that relationship as it is needed. The first difficulty in the Australian Government’s response to the *Fair Use Paper* is that it tends towards a static conception of copyright. This is reflected in the decision to add further specific and enumerated exceptions to the Copyright Act. The primary advantage of a U.S.-style fair use provision is flexibility. Although much was made by critics of the introduction of a fair use provision into the Act of the uncertainty of fair use,<sup>129</sup> the metaphor of the Moebius strip suggests that this is the strength of a fair use provision, allowing the courts the ability to respond by adjusting the competing rights between owners and users as that relationship evolves. In particular, an open-ended fair use provision has more capacity to allow the law to adapt to the impact of new technologies than do provisions that are highly specific, such as those aimed at time or

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<sup>128</sup> Carol Y. Guess, *Downloading in a Post-Napster World: May Fair Use Be with You*, HOUS. LAW., Nov.–Dec. 1006, at 18, 18. In Guess’ conclusion, she observes that “[u]ntil the courts rule differently, most Fair Use challenges against [technological protection measures] will not prevail.” *Id.* at 21. For a general analysis of the ways in which technological protection measures feature as one aspect of a portfolio of enforcement measures by copyright owners, see generally Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1 (2006).

<sup>129</sup> It is also not the case that fair dealing is immune to uncertainty. See generally Michael Handler & David Rolph, “A Real Pea Souper”: *The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia*, 27 MELBOURNE UNIV. L. REV. 381, 387–88, 390–401 (2003) (discussing the unclear principles of the authorities on fair dealing defenses).

format shifting.<sup>130</sup>

The second difficulty with the Government's response is that it fails to address the historical tendency towards the expansion of owners' rights at the expense of public use. Indeed, the Government's response includes a number of measures that seek to *strengthen* the rights of copyright owners. The specific measures introduced into the Act do not address the wider concerns about public access to copyright material touched upon by the *Fair Use Paper* relating to the use of contracts to override existing fair dealing uses<sup>131</sup> or the general issues relating to the extension of the term of copyright or the use of technological measures to restrict public use.<sup>132</sup>

At the same time, the metaphor of the Moebius strip suggests that introducing a U.S.-style fair use provision, of itself, would not be sufficient to address the concerns raised in the *Fair Use Paper*. This is because of the variety of other factors that influence the situation of individual copyright regimes along the continuum between private rights and public use.

### III. WHY THE INTRODUCTION OF A FAIR USE PROVISION ALONE WOULD NOT BE ADEQUATE

The context within which specific copyright regimes function is a very important factor in the relationship between owners' rights and public use. There are significant differences between the United States and Australia in this regard. These differences serve to locate the regimes of the two countries in rather different positions on the Moebius strip, despite the general historical trends

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<sup>130</sup> Indeed, this need for such flexibility was previously recognized by the introduction of the "technologically neutral" right of communication to the public, introduced into the *Copyright Act* by the *Copyright Amendment (Digital Agenda) Act* of 2000 to replace the technologically-specific rights of broadcast and cable diffusion. See generally *Copyright Amendment (Digital Agenda) Act, 2000 (Austl.)*.

<sup>131</sup> FAIR USE PAPER, *supra* note 2, at 25.

<sup>132</sup> See *id.* at 23. This has led some commentators, such as Dellit and Kendall, to suggest that the issue of whether or not to introduce a fair use provision is beside the point. Dellit & Kendall, *supra* note 1, at para. 71.

The problem that copyright users face is not that their activities do not fall within the fair dealing provisions because they are too narrow. Rather, it is that more and more works are being locked away behind technological protection measures. Suggested amendments to the fair dealing provisions would not assist users attempting to access and copy works in the digital environment. Technological protection measures prevent users from accessing or copying works regardless of whether they wish to infringe copyright in the work or use the work for fair dealing purposes.

*Id.*

identified in the previous part of this Article.

First, the United States' constitutional grant of power in relation to copyright explicitly retains the utilitarian philosophy underpinning copyright. Section 8, Clause 8 of Article I of the United States Constitution, also known as the Copyright Clause, gives Congress the power to enact statutes "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>133</sup> Thus, although a strong natural rights ethos also pervades much of the copyright literature in the United States,<sup>134</sup> the wording of the Constitution provides a powerful constraint on the development of intellectual property law.<sup>135</sup> The Australian Constitution, in contrast, merely provides in section 51(xviii) that "[t]he Parliament . . . ha[s] power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . . Copyrights, patents of inventions and designs, and trade marks."<sup>136</sup> There is no constitutional constraint equivalent to that of the United States. The distinction between the two countries can be seen clearly in the two directory cases, *Feist Publications, Inc. v. Rural Telephone Service, Co.*<sup>137</sup> and *Telstra Corp. Ltd. v. Desktop Marketing Systems Pty Ltd.*<sup>138</sup> In *Feist*, the contents of a telephone directory were found not to be capable of protection by copyright, not at least because such contents do not have the requisite degree of originality to warrant copyright protection:

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." It is,

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<sup>133</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>134</sup> For examples of contemporary "natural right" copyright theory, see generally Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990); Paul Goldstein, *Copyright*, 55 LAW & CONTEMP. PROBS. 79 (1992); and Jack B. Hicks, Note, *Copyright and Computer Databases: Is Traditional Compilation Law Adequate?*, 65 TEX. L. REV. 993 (1987). See also Christophe Geiger, *Copyright and Free Access to Information: For a Fair Balance of Interests in a Globalised World*, 28 EUR. INTELL. PROP. REV. 366, 367–68 (2006) (asserting that the principles of copyright are based on natural law).

<sup>135</sup> Even so, critics of the expansion of private rights in copyright law have expressed concern about the impact of this expansion on First Amendment rights. See, e.g., Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 4 (2001).

<sup>136</sup> CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA § 51(xviii).

<sup>137</sup> 499 U.S. 340 (1991).

<sup>138</sup> (2001) F.C.A. 612 (Austl.).

rather, “the essence of copyright,” and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler’s selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.<sup>139</sup>

However, in *Telstra*, the contents of the directory were held to be capable of copyright protection under the ‘sweat of the brow’ theory.<sup>140</sup> The Court considered that compilations, though lacking originality in the creative sense, required an investment of skill, judgment, or labor which was protected against free riding by second-comers.<sup>141</sup> Although Judge Sackville acknowledged that from a policy perspective, the decision was not necessarily a “satisfactory state of affairs,” copyright infringement was made out: “A court is ill-equipped to undertake the inquiries and make the policy assessments necessary to resolve these issues. The questions are for Parliament to consider. In the meantime, Australian law recognizes copyright in so-called industrious compilations, even in the case of whole of universe compilations prepared by monopolists.”<sup>142</sup>

Although some commentators have recognized that fair dealing in Australia reflects the utilitarian philosophy underpinning copyright law,<sup>143</sup> there is no explicit recognition in the case law. This can lead to very different results to the United States. For instance, in the case of *Campbell v. Acuff-Rose Music, Inc.*, the United States Supreme Court was clear that “[t]he four statutory [fair use] factors [must] be explored and weighed together *in light of* copyright’s

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<sup>139</sup> *Feist*, 499 U.S. at 349–50 (citations omitted) (alteration in original).

<sup>140</sup> *Telstra*, (2001) F.C.A. at 612 (taking the term “sweat of the brow” from American case law).

<sup>141</sup> *Id.*

<sup>142</sup> *Desktop Marketing Systems Pty Ltd. v. Telstra Corporation Ltd.* (2002) 119 F.C.R. 491, 598 (Austl.).

<sup>143</sup> *See, e.g., Dellit & Kendall, supra* note 1, at para. 40.

purpose of promoting science and the arts.”<sup>144</sup> Thus, parody could be protected under the fair use doctrine in spite of its commercial nature.<sup>145</sup> By contrast, in Australia, the *Panel Cases* showed the way in which parody had to be slotted, rather uncomfortably, into one of the fair dealing defenses of “criticism,” “review,” and/or “reporting of news” in order to avoid a finding of copyright infringement.<sup>146</sup> The legal principles relating to fair dealing, identified and applied by Judge Conti, have been criticized as an “untidy agglomeration of statements drawn from [the relevant] authorities that have not been analyzed or criticized.”<sup>147</sup> Further, without the explicit utilitarian justification for the grant of copyright, the commercial aspect of a use assumes an overriding importance in determining whether a dealing is fair.<sup>148</sup>

Second, U.S. copyright law is affected by the constitutional guarantee of free speech. Indeed, the fair use provisions of the United States Copyright Act are said to be based in the First Amendment, which provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>149</sup>

It has been said that copyright is the “engine of free expression” by providing “the economic incentive to create and disseminate ideas.”<sup>150</sup> At the same time, the fair use provisions of the United States Copyright Act “are [said to be] protected by and co-extensive with the fair use doctrine.”<sup>151</sup> In *Eldred v. Ashcroft*, the Supreme Court held that the First Amendment “securely protects the

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<sup>144</sup> 510 U.S. 569, 569 (1994) (emphasis added).

<sup>145</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268 (11th Cir. 2001).

<sup>146</sup> *Handler & Rolph*, *supra* note 129, at 383 (internal quotations omitted); see *TCN Channel Nine Pty Ltd. v. Network Ten Pty Ltd.* (2002) 118 F.C.R. 417, 437–38, 439, 440 (Austl.); *TCN Channel Nine Pty Ltd. v. Network Ten Pty Ltd.* (2001) 108 F.C.R. 235, 248, 250, 275, 283 (Austl.).

<sup>147</sup> *Handler & Rolph*, *supra* note 129, at 390.

<sup>148</sup> *Delitt & Kendall*, *supra* note 1, at para. 48; see also *Handler & Rolph*, *supra* note 129, at 405 (criticizing the tendency in the judgments of the *Panel Cases* towards an “unqualified focus on commercial rivalry” between the parties in assessing whether the dealings were fair).

<sup>149</sup> U.S. CONST. amend I.

<sup>150</sup> *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

<sup>151</sup> Melissa de Zwart, *The Future of Fair Dealing in Australia: Protecting Freedom of Communication*, [2006] AUST. INTELL. PROP. LAW RESOURCES n.9, available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/2.html> (internal quotations omitted) (quoting *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999); see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (“First Amendment concerns in copyright are allayed by the presence of the fair use doctrine.”).

freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches. . . . [The] built-in free speech safeguards” will allow such speech where necessary.<sup>152</sup>

Australia, however, has no express constitutional guarantee of free speech.<sup>153</sup> Although the High Court has recognized “an implied freedom of political communication;”<sup>154</sup> it is extremely narrow.<sup>155</sup> Fair dealing, thus, has no free speech underpinnings in Australia, nor is the grant of copyright constrained by free speech imperatives.<sup>156</sup> The lack of a free speech guarantee can affect the public use of information in other ways too. Whereas the U.S. courts resisted legislative attempts to introduce internet censorship on free speech grounds,<sup>157</sup> the Australian Commonwealth and state legislatures have introduced comprehensive internet censorship regimes.<sup>158</sup>

Third, the United States has no comprehensive privacy legislation equivalent to Australia’s Privacy Act of 1988.<sup>159</sup> In Australia, the

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<sup>152</sup> 537 U.S. 186, 221 (2003).

<sup>153</sup> This issue is explored at greater length by Melissa de Zwart. *See de Zwart, supra* note 151.

<sup>154</sup> *Lange v. Australian Broad. Corp.* (1997) 189 C.L.R. 520, 525 (Austl.). The right does not apply to individuals; it only limits the exercise of legislative or executive power. *Id.* at 525, 528.

<sup>155</sup> *See, e.g., APLA Ltd. & Ors v. Legal Serv. Comm’r of New S. Wales* (2005) 219 A.L.R. 403 (Austl.) (rejecting an argument that the implied freedom rendered invalid on constitutional grounds the New South Wales legislative ban on lawyer advertising of personal injury services). *See generally* Megan Richardson, *Freedom of Political Discussion and Intellectual Property Law in Australia*, 19 EUR. INTELL. PROP. REV. 631 (1997) (discussing the scope of the right and its impact on intellectual property).

<sup>156</sup> There has been some suggestion, however, that copyright is subject to the constitutional protection of property. *See Stevens v. Kabushiki Kaisha Sony Computer Entm’t & Ors* (2005) 221 A.L.R. 448 (Austl.).

<sup>157</sup> *Reno v. A.C.L.U.*, 521 U.S. 844, 849 (1997); *A.C.L.U. v. Reno*, 217 F.3d 162, 165–66 (3d Cir. 2000).

<sup>158</sup> The federal internet censorship scheme is the Broadcasting Amendment (On Line Services) Act. *See* Broadcasting Services Amendment (Online Services) Act, 1999 (Austl.) [hereinafter *Online Service Act*]. It was the Commonwealth’s intention that the initiative of the *Online Services Act* be supported by a second tier of uniform State and Territory legislation regulating content providers. *Id.* at § 4. Although this has not occurred as yet (apart from amendments to the existing South Australian Act), most states and territories in Australia had enacted censorship legislation that affects the internet. *See, e.g.,* Classification (Publications, Films and Computer Games) (Enforcement) Act, 1995, (Vic.); Censorship Act, 1996, (W. Austl.); Classification of Computer Games and Images Act, 1995, (Queensland); Classification (Publications, Films and Computer Games) Act, 1995, (S. Austl.); Classification (Publications, Films and Computer Games) Enforcement Act, 1995, (New S. Austl.); Classification (Publications, Films and Computer Games) (Enforcement) Act, 1995, (Austl. Capital Territory); Classification of Publications, Films and Computer Games Act, 1996, (Austl. N. Territory).

<sup>159</sup> The Act is based on the 1980 OECD Guidelines on the Protection of Privacy and

way in which privacy protection can work hand-in-hand with copyright to restrict public use of material can be seen in *Seven Network v. Media Entertainment and Arts Alliance*.<sup>160</sup> In this case, the Media Entertainment & Arts Alliance (MEAA) represented staff employed by the Seven Network (Seven).<sup>161</sup> Seven proposed to enter into an enterprise agreement directly with the employees and, in response, the MEAA engaged the ACTU Member Connect Pty Ltd. (Connect) to undertake a telephone poll of employees in relation to the proposed agreement.<sup>162</sup> In order to contact the employees, MEAA passed on an internal Seven telephone directory to Connect.<sup>163</sup> Connect then created a database so call staff could enter the results of the poll, using the employee's first and last names, the work phone number, and the employee's location.<sup>164</sup> Seven brought proceedings against the MEAA and Connect, alleging breaches of both the Privacy Act of 1988 and the Copyright Act of 1968, and succeeded in establishing breaches of both acts.<sup>165</sup>

Given these very different factors, it would also need to be acknowledged that the United States has built up a significant body of case law on fair use that would not necessarily be relevant to Australia. It is likely that without the constitutional guarantees of the United States and with more extensive legislative provisions potentially affecting copyright material, a fair use provision modeled on that of the United States would be given a far more restrictive interpretation by the Australian courts.

#### IV. CONCLUSION

Although it is often said that the balance between private rights and public use is at the heart of copyright law, this Article has sought to show that the relationship between private rights and public use is not, and never has been, a static "balance." Rather the relationship is highly dynamic and complex, affected by changing

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Transborder Flows of Personal Data, which regulates the collection, storage, and use of identifiable personal information. ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA (1980), available at [http://www.oecd.org/documentprint/0,2744,en\\_2649\\_34255\\_1815186\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/documentprint/0,2744,en_2649_34255_1815186_1_1_1_1,00.html). It affects not only private personal information, but such information that is publicly available. *Id.*

<sup>160</sup> (2004) 148 F.C.R. 145 (Austl.).

<sup>161</sup> *Id.* at 149.

<sup>162</sup> *Id.* at 149–50.

<sup>163</sup> *Id.* at 154.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 157, 161.

conceptions of copyright, as well as technological change and the wider context within which copyright law operates.

The Australian Government's response to the proposal to introduce fair use provisions into the Australian Copyright Act does not acknowledge the complexity or the dynamism of this relationship. The incorporation of further specific exceptions to copyright infringement and the introduction of further measures to try to counter copyright "piracy" do not provide the degree of flexibility needed in copyright law; nor do these measures redress the general movement towards the expansion of owner rights at the expense of public use. At the same time, this Article has suggested that the introduction of a U.S.-style fair use provision of itself would not be a satisfactory response to the issues of public use raised by the inquiry into fair use because of the significant differences between the contexts in which copyright functions in the United States and Australia. What is required is an acknowledgment of the dynamism of the relationship between private rights and public use, and a sensitivity to the variety of factors that can impinge upon the ongoing relationship between owners and users of copyright material. The Australian experience reveals the significant difficulties that can arise from agreements such as AUSFTA that seek to "graft" U.S. law onto the law of other jurisdictions when these matters are not fully understood.