

American University in Cairo

## AUC Knowledge Fountain

---

Theses and Dissertations

Student Research

---

Spring 6-15-2021

### Copyright and Creativity: Critiques of the US System and Possible Reform Strategy for Egypt

Dina Magdy El-hussieny selite  
dinaelhussieny@aucegypt.edu

Follow this and additional works at: <https://fount.aucegypt.edu/etds>



Part of the Intellectual Property Law Commons

---

#### Recommended Citation

##### APA Citation

selite, D. M. (2021). *Copyright and Creativity: Critiques of the US System and Possible Reform Strategy for Egypt* [Master's Thesis, the American University in Cairo]. AUC Knowledge Fountain.

<https://fount.aucegypt.edu/etds/1660>

##### MLA Citation

selite, Dina Magdy El-hussieny. *Copyright and Creativity: Critiques of the US System and Possible Reform Strategy for Egypt*. 2021. American University in Cairo, Master's Thesis. *AUC Knowledge Fountain*.

<https://fount.aucegypt.edu/etds/1660>

This Master's Thesis is brought to you for free and open access by the Student Research at AUC Knowledge Fountain. It has been accepted for inclusion in Theses and Dissertations by an authorized administrator of AUC Knowledge Fountain. For more information, please contact [mark.muehlhaeusler@aucegypt.edu](mailto:mark.muehlhaeusler@aucegypt.edu).

American University in Cairo

## AUC Knowledge Fountain

---

Theses and Dissertations

Student Research

---

Spring 6-15-2021

### Dina\_Magdy El-Husseyeny\_Selite\_thesis

Dina Magdy El-husseyeny selite

Follow this and additional works at: <https://fount.aucegypt.edu/etds>



Part of the Intellectual Property Law Commons

---

**The American University in Cairo**  
**School of Global Affairs and Public Policy**  
**Law Department**

**COPYRIGHT AND CREATIVITY: CRITIQUES OF THE US  
SYSTEM AND POSSIBLE REFORM STRATEGY FOR EGYPT**

**A Thesis Submitted to the**  
**Department of Law**  
**in partial fulfillment of the requirements for the LL.M. Degree in**  
**International and Comparative Law**

**By**

**Dina Magdy El-Husseyen Selite**

**May 2021**

The American University in Cairo  
School of Global Affairs and Public Policy

COPYRIGHT AND CREATIVITY: CRITIQUES OF THE US SYSTEM AND  
POSSIBLE REFORM STRATEGY FOR EGYPT

A Thesis Submitted by  
*Dina Magdy El-Hussieny Selite*  
to the Department of Law  
May 2021

in partial fulfillment of the requirements for the  
LL.M. Degree in International and Comparative Law  
has been approved by the committee composed of

Professor Hani Sayed

Thesis Supervisor \_\_\_\_\_  
American University in Cairo  
Date \_\_\_\_\_

Professor Naglaa Rizk  
Thesis First Reader \_\_\_\_\_  
American University in Cairo  
Date \_\_\_\_\_

Professor Dalia Hussein  
Thesis Second Reader \_\_\_\_\_  
American University in Cairo  
Date \_\_\_\_\_

Professor Thomas Skouteris  
Law Department Chair \_\_\_\_\_  
Date \_\_\_\_\_

Ambassador Nabil Fahmy  
Dean of GAPP \_\_\_\_\_  
Date \_\_\_\_\_

## DEDICATION

I dedicate this thesis to my mother and the soul of my father, may he rest in peace, who have supported and encouraged me throughout my journey of study. Although my father is not part of this world now I have very special feeling of love and gratitude towards everything he did with me. His memory will continue to guide my life and I owe everything I achieved in my life to him and my mother.

## ACKNOWLEDGMENTS

To be able to finalize my thesis during such a critical and challenging time the whole world is facing due to the COVID-19 pandemic, in addition to the personal challenges I faced through this time requires great support and coordination. I want to thank both my family and family in law for their constant support throughout the whole journey of my academic study and specially through the process of writing my thesis. A special thanks to my mother and husband for their patience, support and most of all for believing I can make it no matter how hard the circumstances were, without you I would have not made it.

I also want to thank my colleagues and friends for their constant encouragement, your words lifted me up during my worse times and guided me back to the right track.

A Special thanks to my friend and colleague Ahmed Tony for his great support and help in the process of writing my thesis.

Moreover, I would like to acknowledge the learnings I have gained through studying in the LL.M program and wish to thank my committee for their time, guidance and recommendations.

Finally, I'm very grateful to have been chosen by Yousef Jameel GAPP Public Leadership Program, without this fellowship program I would have never been able to join the AUC and benefit from this great academic experience. Mr. Jameel I owe you a lot and will always remember that you are the main reason I reached this phase in my life.

The American University in Cairo  
School of Global Affairs and Public Policy  
Department of Law

COPYRIGHT AND CREATIVITY: CRITIQUES OF THE US SYSTEM AND  
POSSIBLE REFORM STRATEGY FOR EGYPT

Dina Magdy El-Hussieny Selite

Supervised by Professor Hany Sayed

ABSTRACT

The optimum goal of copyright is to maximize the production of creative works and innovations by balancing the benefits of the copyright owners and public users. This balance requires securing the rights of copyright owners to induce authors to produce their creations, while at the same time providing public users with regulated freedom to use copyrighted work to produce new creations and innovations. In this context, it is necessary to explore the problems of the copyright system and address them in the optimum way to achieve the goals of copyright. This paper analyzes the problems of the United States copyright system that obstruct the process of creation and innovation. These problems directly threaten the users who attempt to use copyrighted work to produce new innovations and impact their choice to proceed with their creations. It also analyzes the proposed reforms addressing such problems. These reforms focus on either eliminating the existing ambiguity of some of the copyright terms, or developing the copyright infringement structure and its available remedies. This paper argues that eliminating the ambiguity of copyright terms will not lead to effective results in achieving the goals of copyright. This is because it will be impossible to provide measures and interpretation that copes with the rapid progress of the technological and digital innovations. In addition, it is argued that this ambiguity is intended by the legislator to overcome the gap between the system and the rapid technological development, by granting the judges discretionary power to decide on copyright disputes on ad hoc basis. This paper concludes that it is most effective to introduce reform to the infringement and remedial structure that is capable of limiting the threats that users may be expose to. Moreover, it argues that developing countries, including Egypt, can benefit from the proposed analysis, of the United States system, in developing their copyright legislations. It proposes a reform tailored to conform with the Egyptian system, which considers the said problems and motivates production of more creative works.

## TABLE OF CONTENTS

### Contents

I.	<b>I.Introduction</b> .....	<b>1</b>
II.	<b>II.Arguments Around Copyright Protection</b> .....	<b>10</b>
A.	<i>Copyright Subject Matters and Public Goods Problem</i> .....	11
B.	<i>Copyright through the Lens of Welfare</i> .....	14
C.	<i>Copyright in the Lens of Culture</i> .....	17
D.	<i>Strong Copyright Protection against More Flexible Copyright Protection Arguments</i> .....	19
III.	<b>III.Limitations on Wide Access to Works</b> .....	<b>23</b>
A.	<i>The Problem of Orphan Works</i> .....	24
1.	Definition and Impact .....	24
2.	Suggested Solutions .....	26
B.	<i>The Ambiguity of the System</i> .....	29
1.	Copyright Subject Matters .....	29
2.	Limits of Protection.....	30
3.	Unpredictability of the Outcome .....	30
4.	Interpretations of Authorizations .....	32
IV.	<b>IV.More Flexible Copyright Protection and more Application of Fair Use</b> .....	<b>33</b>
A.	<i>Fair Use:</i> .....	33
1.	Fair User Under the US Copyright Act.....	34
2.	Fair Use in Other Countries.....	34
B.	<i>Underlying Case Law and Existing Inconsistency:</i> .....	35
1.	More Inconsistent Fair Use Court Decisions .....	37
2.	Appropriation Art and Fair Use .....	40
C.	<i>Demands of a Clearer Fair Use Doctrine:</i> .....	42
1.	Impact of Fair Use on Different Fields .....	42
2.	Expansion of Fair Use Application.....	44
V.	<b>V.Copyright Infringement System and Proposed Reforms</b> .....	<b>46</b>
A.	<i>Infringement System</i> .....	46
1.	Establishing Infringement and available Remedies .....	47
2.	Features of Infringement System .....	48
B.	<i>Awarded Remedies and Innovation Anxiety</i> .....	51
C.	<i>Proposed Reforms</i> .....	58



1. Calls for Reform .....	58
2. Reforms Addressing Sole Problems .....	59
3. Reforms Addressing Boarder Problems .....	62
a. Statutory Damages Reform .....	63
4. Infringement Classification Reform .....	66
<b>VI. VI.Conclusion: .....</b>	<b>70</b>
<i>The Egyptian System</i> .....	72

## I. Introduction

Technology and digital innovations have become key cornerstones in all fields. Technology has its impact on innovation through facilitating means of communication, exchange and sharing, which accordingly accelerated the process of producing new inventions. This resulted in a global change and transformation of cultures and perspectives. In this context, since copyright is closely connected with technology and its development, it is crucial to understand the role it plays and raise awareness on its importance, scope, controversies and the debates going around it.

Copyright grants authors of original creative works, that is expressed through a tangible medium, monopoly powers by granting them the exclusive right to control the use of their created works. This sort of legal protection and monopoly is to achieve one ultimate goal that is to provide an incentive for authors to encourage them to produce more creative works. The bond connecting copyright with technological progress is now inseparable. Copyright is unquestionably included in our daily uses and activities. Computers, cell phones, tabs and all sort of technological devices we use are operating through software that is protected by copyright. The maps that help navigating our directions are copyrightable. The music we listen to, the books we read, the pictures we take, the movies, theaters and all types of motion pictures we watch, social media plat forms, applications, and many other countless ideas that are expressed and produced, are copyright's subject matters and regulated under the rules of the copyright system. This situates copyright in a position where it needs constant development along with the technological progress to be able to embrace and deal with the new inventions and innovations.

That said, the users' level of unawareness of the scope of copyright, and the right and obligations arising accordingly, is surprising. A normal internet user may not be aware that downloading or sharing of a music file or even a purchased program, such as Adobe, or Microsoft Office for example, without obtaining the proper license is considered a copyright infringement. A simple student joining a band would not be aware that his or her music composition could be considered as a copy of another existing composition, which could constitute a copyright infringement, and may lead to exposing this student to

excessive damages, and imprisonment penalty in some jurisdictions. In a recent interesting case, a copyright dispute arose around a selfie photo taken by a monkey. Both the photographer and “People for the Ethical Treatment of Animals” (non-profit organization presenting the monkey) alleged the copyright ownership of the photo. This photo went viral over the internet and generated significant profits to the photographer. The debate ended by reaching a settlement where the photographer agreed to pay the sanctuary, where the monkey lived, royalty fee for the future revenues of the photo.<sup>1</sup> Today, users are disputing around who is the original author of a created meme that goes viral over the internet and generates profit,<sup>2</sup> and there are many other examples that show how copyright is attached to our daily normal activities. It is therefore important to raise awareness about copyright, the scope of its protection and the problems it faces to ensure that its system is well structured and developed to cope with the technological progress.

The notion of copyright emerged with the development of printing press in the United Kingdom, a technology that for the first time in that era reduced the lead time to reproduce books which made copying easily occur without authorization. Lobbyists sought to cease the tremendous impact of unauthorized copying by encouraging authors to issues licenses to print their books.<sup>3</sup> Accordingly, the world’s first copyright statute “The Statue of Anne” was enacted in England in 1710.<sup>4</sup> Inspired by The Statue of Anne, the United States enacted its first copyright legislation in 1790. The said legislation secured the authors’ rights against unauthorized copying of maps, charts, and books. This Act was followed by many revisions extending the set of protected creations until the final and recent copyrights act “The Copyright Act of 1976” (“the Copyright Act”), including eight different sets of subject matters of copyright.<sup>5</sup> The interpretation of each of the subject matters became

---

<sup>1</sup> Can the monkey selfie case teach us anything about copyright law?, [https://www.wipo.int/wipo\\_magazine/en/2018/01/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html) (last visited Apr 10, 2021).

<sup>2</sup> Lee J. Matalon, Modern Problems Require Modern Solutions: Internet Memes and Copyright, 98 TEX. L. REV. 405 (2019).

<sup>3</sup> The history of copyright | Australian Libraries Copyright Committee, <https://libcopyright.org.au/the-history-of-copyright>.

<sup>4</sup> Doteasy, *History of Copyright*. 2005, <http://historyofcopyright.org>.

<sup>5</sup> See Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012), Section 101, <https://www.copyright.gov/title17/92chap1.html>. Works of authorship includes literary works; musical works

different along with the technological progress. For instance, in the past, the protection of literary work included novels, stories, short stories and poems. Today, literary work protection includes computers software. This example illustrates the need of constant development of copyright law.

For years scholars have been focusing on demonstrating the importance of copyright protection to encourage authors to express their ideas and produce creative works to the world. There are arguments calling for including information technology inventions in the realm of copyright.<sup>6</sup> Economists focused their scholarship on displaying the importance of copyright's role in investments and international trade.<sup>7</sup> Arguments around the importance of regulating intellectual property internationally spread all over the world until international treaties were concluded and came into force, including the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention")<sup>8</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").<sup>9</sup>

Nevertheless, the authors' monopoly powers had various outcomes with the significant and rapid development of technology and communication. Researchers started to realize that the tools copyright relies on to incentivize creativity have their negative impact on the process of creation.<sup>10</sup> Arguments started to formulate around the effect of such monopoly powers granted to authors over the freedom of creation and production.<sup>11</sup> Debates around copyright and its problems continued, and calls for reforms of the copyright

---

including any accompanying words; dramatic works including any accompanying music; pantomimes and choreographic works; pictorial, graphic and sculpture works; motion pictures and other audiovisual works; sound recording; and architectural works.

<sup>6</sup> See John M. Newman, *Copyright Free Economic*, Vanderbilt Law Review, Vol.66:5:1409.

<sup>7</sup> Indiana Journal of Global Legal Studies, Fall, 1999, Vol. 7, No. 1, Symposium: Globalization at the Margins: Perspectives on Globalization from Developing States (Fall, 1999), at 117-189.

<sup>8</sup> World Intellectual Property Organization. 1982. Berne Convention for the Protection of Literary and Artistic Works: texts. [Geneva]: World Intellectual Property Organization.

<sup>9</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, 33 I.L.M. 1197 (1994).

<sup>10</sup> See Joseph P. Fishman, *Creating Around Copyright*, Harvard Law Review, March 2015, Vol. 128, No.5, at 1383.

<sup>11</sup> *Id.*

system expanded.<sup>12</sup> These calls did not only request to expand copyright subject matters and include new inventions in the realm of copyright protection, but also demanded to ensure that ultimate goal of copyright is achieved and that authors as well as public both are benefiting fairly from the created works.

Copyright notion plays an important role in the legal system and has direct impact on states 'economic growth and cultural activities. This is because the industries concerned with copyright's subject matters are considered a substantial part of the investment and trade business of countries, which constructs their economy and have direct impact on their revenues. For instance in the United States, Hollywood creative industries accounted for 3.2% of the United States goods and services in 2011.<sup>13</sup> Motion picture and video production and distribution industry in the United States in 2019 generated total revenue of \$74.95 billion.<sup>14</sup> The American film and television industry in 2020 supported 2.5 million jobs and presented \$181 billion of the total wages.<sup>15</sup> The United States recorded music business generated in 2019 total revenue of \$11.1 billion.<sup>16</sup> All of these figures forecasts the importance of copyright and reflect its impact on the economy of countries.

The reach of Industries affected by copyright protection is not only related to movies. Music, and other forms of artistic industries relate to copyright. Science, education, books, research, journalism are all fields associated to copyrights as well. Computers, mobile phones and other related technological industries involves copyright to great extent of their business. For instance, in using "iTunes", Apple relies on two business models: first, the copyright law which governs what actions consumers are allowed to take in the music

---

<sup>12</sup> See Abraham bell and Gideon Parchomovsky, Restructuring Copy Rights Infringement, Texas Law Review, Volume 98, Issue 4 (03/2020).

<sup>13</sup> Associated Press in Washington, *Hollywood has blockbuster impact on US economy that tourism fails to match*, THE GUARDIAN (2013), <http://www.theguardian.com/business/2013/dec/05/arts-culture-us-economy-gdp> (last visited Feb 18, 2021).

<sup>14</sup> Revenue of U.S. motion picture and video industry 2005-2019, STATISTA, <https://www.statista.com/statistics/184140/estimated-revenue-of-us-motion-picture-and-video-industry-since-2005/>.

<sup>15</sup> Film Ratings | Motion Picture Association, <https://www.motionpictures.org/film-ratings/>.

<sup>16</sup> US Recorded Music Revenue Reaches \$11.1 Billion in 2019, 79% From Streaming: RIAA, BILLBOARD, <https://www.billboard.com/articles/business/8551881/riaa-music-industry-2019-revenue-streaming-vinyl-digital-physical>.

purchased from iTunes. The second model is the contract, which is licenses agreements entered with the iTunes consumers that govern the general terms and conditions of their use of purchased music: this in some cases may contain more restricts than what is permitted under copyright's law, but it never contains less restrictions.<sup>17</sup> Moreover, the software used in iPhone, iPad, Mac, and other Apple products are copyright's subject matter that extensively relies on copyright law in its protection. The recent ruling issued by the Southern District of Florida US Federal District Court in *Apple v. Corellium*, in 2020 is a great manifestation on the role copyright law plays in such industries and its significance in shaping the economy of countries.<sup>18</sup> In this case Corellium developed a product that allows users to create tailored virtual models of iPhones using iOS files loaded by the user. The court decided that Corellium's act of copying is fair use. This ruling demonstrated the role copyright law plays in such industries and its significance in shaping the economy of countries. The United States software industry in 2018 generated revenues amounting to \$183.3 billion.<sup>19</sup> According to CNBC, in 2020, Apple's revenues passed Saudi Arabia's Aramco (the world's most famous oil and gas company) revenues<sup>20</sup>(the latter was the world's most profitable company in 2019).<sup>21</sup>

As illustrated above, in the US, many of the industries that are directly touched and concerned with copyright laws have increasing and significant revenues that form a fundamental component of the country's economy. As such, there is an increasing understanding of the significance of safeguarding and enforcing copyright laws in the context of the role it plays in such, and other, significant industries. Scholars has been debating around the impact of adopting strong copyright policies on the flourishing of the

---

<sup>17</sup> See Fisher, William W. 2004. iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media. Berkman Klein Center for Internet & Society Research Publication.

<sup>18</sup> Apple Inc. v. Corellium, LLC, CASE NO. 19-81160-CIV-SMITH (S.D. Fla. Dec. 15, 2020).

<sup>19</sup> Software market revenue in United States 2016-2021, STATISTA, <https://www.statista.com/forecasts/963605/software-revenue-in-united-states>.

<sup>20</sup> Jay Peters, *Apple is now the world's most valuable publicly traded company*, THE VERGE (2020), <https://www.theverge.com/2020/7/31/21350154/apple-worlds-most-valuable-company-saudi-aramco>.

<sup>21</sup> *Supra* note 18. The market valuation Apple had in 2020, reached \$1.84 trillion, while Aramco had \$ 1.76 trillion. Apple Inc. v. Corellium, LLC, No. 9:2019cv81160 - Document 381 (S.D. Fla. 2020), JUSTIA LAW, <https://law.justia.com/cases/federal/district-courts/florida/flsdce/9:2019cv81160/555634/381/>.

creative ideas founding these industries, and its leading effects on the economic growth of countries.

A strong copyright system reflects a system that expands copyright protection at the expense of the public domain.<sup>22</sup> This approach limits the exceptions of the use of copyrighted works, which provide very limited available choices for users within the public domain after precluding the copyright's protected works.<sup>23</sup> It is also common in such system to impose heavy deterring sanctions on infringers who use copyrighted works.

There are many doctrines that reflect the constraints and limitations of copyrights, which are strictly adopted by strong copyright protection systems, while in more flexible copyright protection systems they are adopted in more flexible ways that allow a certain extent of freedom for users. An illustration of a strong copyright protection notion is the monopoly given exclusively to the copyright owner to prepare derivative works, which limits the rights of other innovators to build on the already existing work and create an innovative work out of it.<sup>24</sup> On the other hand, the "fair use" doctrine is considered an example of weak or more flexible copyright protection system. However, even such a doctrine can be strictly applied, which reflects the adoption of strong copyright protection, or expansively applied, which reflects flexible copyright protection.<sup>25</sup> The US Sixth Circuit Court of Appeal's decision in *Bridgeport Music, Inc v. Dimensions Films* is a clear example that illustrates the adoption of strong copyright protection. In its decision, the Court laid down the principle of "get a license or do not sample"<sup>26</sup> in a dispute around a two seconds three-note guitar riff which was extended to sixteen seconds and repeated in a sound recording by a rap group.

---

<sup>22</sup> Neil Weinstock Netanel, First Amendment Constraints on Copyright after *Golan v. Holder*, 60 UCLA L. REV. 1082 (2013).

<sup>23</sup> Joseph P. Fishman, *supra* note 10, at 1383.

<sup>24</sup> *Id.*, at 1393.

<sup>25</sup> *See Id.*, at 1397.

<sup>26</sup> *BRIDGEPORT MUSIC, INC. v. DIMENSION FILMS* 410 F.3d 792 (6th Cir. 2005).

For the above-mentioned reasons, and the role copyright plays in shaping the economy of the countries, it is significant to acknowledge the problems of the copyright system and work on their reform to help the industries connected to copyright flourish. Moreover, analyzing the copyright system in the US is specifically important as one of the world's leading countries in relation to industries that are connected to copyright. Being the world's largest economy, analyzing the US copyright system would be a reflection of a model system that the developing countries could consider while developing their copyright systems.

In this thesis, I provide an explanation of the United States copyright system and its structure. I identify the main problems of the system and their impact on the process of creativity. I argue against the application of a strong copyright system and claim that more flexible copyright protection serves better the goals of copyright, that is to incentivize creativity. Flexible copyright protection can be achieved through expansion of the application of copyright exceptions, like fair use, compulsory licensing, and developing a system that permits the use of orphan works. It can be also achieved through restructuring copyright infringements and its available remedies.

In this thesis, I do not argue for eliminating the ambiguity of copyright's terms and doctrines. I rather argue that reforms seeking to develop and remove the ambiguity of the doctrines and terms of copyright will not be as effective as reforms that aim to restructure the copyright infringement structure and its available remedies. This is attributed to two reasons: the first is due to the fact that such ambiguity could be intended by the legislator to allow the courts to rule on copyright disputes on ad hoc basis;<sup>27</sup> the second, is because no matter how such doctrines and terms are developed, they will not be able to cope with the rapid progress in technology and embrace all its changes. Thus, I conclude that copyright system reform could be made through classifying the copyright infringement structure and available remedies, by introducing into the system categories for different types of

---

<sup>27</sup> See Craig Allen Nard, Patent Law's Purposeful Ambiguity, 87 TENN. L. REV. 187 (2019).



infringements and tailoring the remedies available for each category according to the infringing users' intentions and degree of culpability. Moreover, I conclude that the provided analysis could benefit the Egyptian copyright system. I propose reforming the Egyptian copyright system by introducing new copyright infringement categories. Such reforms will remove the threat users are facing when using already existing works as a material to produce new creations.

I start chapter II by looking into the arguments around the copyright protection itself. I explain how copyright subject matters are perceived as public goods and how this problem is addressed by economists. I then underline the theories behind copyright protection, Afterwards, I end the chapter with explaining two opposing arguments in the literature: arguments in favor of a strong copyright protection system against arguments in favor of a flexible copyright system that allows more access to knowledge and freedom in creation.

In chapter III, I analyze the problems that limit the wide access to copyrighted works, namely the problem of orphan works, and other problems related to the ambiguity of the copyright system and misinterpretation of some of its terms.

In Chapter IV, I argue that a more flexible copyright system is better to achieve the goals of copyright. I start by analyzing the application of the fair use doctrine in the US and other similar doctrines in other countries. I then analyze the US case law including fair use justification and point out the inconsistency of court decisions in establishing fair use justification and applying remedies to cases involving fair use defense. Finally, I finish the chapter by discussing the various calls for expanding the application of fair use. Afterwards, I point out that developing the doctrine of fair use through creating certain measuring criteria that determines if the use is fair or not is not the most preferable reform of the copyright system as it will fail to cope with technological progress and include its unforeseen innovations.

In the last chapter, I discuss the structure of both copyright infringement system as well as the available remedies, while emphasizing on the main features of both structures. Then I move to the impact of this structure on courts decisions, which lead to rendering

excessive and inconsistent decisions in disputes involving copyright that accordingly create anxiety for users to decide to refer to or use existing copyrightable work in their new creations. As such, I propose certain reforms as a solution to the copyright problems, which should contribute to incentivizing creativity. I divide the proposed reforms into two groups. The first group addresses reforms to a specific single copyright problem (i.e., fair use, personalizing copyright protection, and orphan works). The second group addresses mitigation of boarder copyright problems without focusing on one specific problem. This is, as I suggest, needs to be carried out by reforming either the infringement or the remedies structure. In this part, I discuss a proposal to reform statutory damages structure and another proposal to reclassify the infringement structure itself and, accordingly, the available damages.

Based on the above, I conclude that the last proposed reform, which suggests reclassifying the infringement structure and available remedies, is most suitable method of reform. I however add to this reform proposal certain recommendations, which covers the problem of orphan works and suggest removing the statutory damages from willful infringers in plausible fair use cases to encourage innovators to build on existing works and produce new creations. Moreover, I finally suggest applying the same proposed method of reform to the Egyptian copyright legislation with some alternations that would comply with Egyptian legal system's nature and structure.

## II. Arguments Around Copyright Protection

The arguments around copyright protection are plentiful. This is a result of the close connection between, and the impact of, intellectual property rights in general and copyright in precise, on economics as well as their direct affiliation with innovation, technology and development. Today information or data became a tradable commodity in itself. Peer to Peer networks (“P2P”) became an essential part of our daily business and personal lives. P2P networks can be easily explained as networks that are established through direct connections between end user computers for the purpose of file exchange between peers.<sup>28</sup> Thus, as much as technology is essential in our daily lives and everything around us revolves around it, it has numerous functions, on which some of such functions circumvents copyright protection, which explains the affiliation between technology and copyright.

Accordingly, the importance of copyright must be understood in the context of copyright theory, which displays the arguments around why copyright should exist and to what extent should its scope and limits be. Underlining the theories is of great importance because it allows for a constructive evaluation of the law and system. This is because lawmakers frequently rely on policy arguments during drafting the law. In addition, due to the ambiguity of copyright system, as will further be explained, lawyers tend to deploy policy arguments embedded in these theories in disputes involving copyright infringement.<sup>29</sup> There are four theories that justifies copyright protection. First, the fairness theory which is based on the idea that hard work should be compensated. Thus, authors who made effort and used labor to produce and express their ideas should control and benefit their creations.<sup>30</sup> Second, is the personality theory, which focuses on protecting the bond between authors and their creations. According to this theory artistic creations are considered as the author’s children, and thus, it is necessary to protect their moral integrity through inserting copyright in their creations.<sup>31</sup> Third is the welfare theory that aims to

---

<sup>28</sup> Roger Gachago, *The Effect of Technology on Copyright*, University of Cape Town, June 2011.

<sup>29</sup> Marc Pelteret, *CopyrightX: Lecture Transcripts* 343, at 26.

<sup>30</sup> Theories of copyright | Copyright Corner, <https://library.osu.edu/site/copyright/2014/05/09/theories-of-copyright/>.

<sup>31</sup> *Id.*

achieve greater good for the larger group.<sup>32</sup> The fourth theory is the culture one which aims to foster the culture of the society.<sup>33</sup>

In this context, there are two core arguments in the literature with opposing effects. The first argues that a strong copyright system can stimulate development and trade by providing incentives for individuals and firms to create the goods and services protected by copyright. The second argument, on the other hand, is of the view that strong copyrights can negatively affect development and trade by conferring disproportionate monopoly power to the owner of the right or by reducing access to copyrighted materials; this is since copyright laws does not only reach counterfeits, but also reaches innovators of creative works built upon already existing ones.<sup>34</sup> Both opposing arguments strive to reach the same outcome which is a better proposal for a copyright system that properly considers the problems of copyrights and offers a productive solution that supports stimulating creativity and innovation to enrich the culture and economy of countries.

Accordingly, this chapter will first look at the two most famous theories underlying copyright protection. I will first explain how copyrighted products are perceived as public goods and the public goods problem in the lens of economy, followed by reciting the welfare and cultural theories of copyrights. I close with discussing the two opposing views of having a strong copyright system versus a weaker or more flexible copyright system, and the impact of each on the copyright goals to incentivize creativity.

### **A. Copyright Subject Matters and Public Goods Problem**

Copyright's subject matters are perceived as public goods and are under threat of being underproduced if the government did not intervene to incentivize their production. This is reflected in the definition of public goods, as explained by Harvard University Professor of

---

<sup>32</sup> See Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, *Indiana Journal of Global Legal Studies*, Fall, 1999, Vol.7, No.1, at 117-189.

<sup>33</sup> *Id.*

<sup>34</sup> Pamela J. Smith, Omar B. Da'ar, Kevin H. Monroe, Fabricio X. Nunez, and Charlotte J. Tuttle, *How Do Copyrights Affect Economic Development and International Trade?*, *The Journal of World Intellectual Property* (2009) Vol. 12, no. 3, at 198–218.

Economics Stefanie Stantcheva, can be defined as: “Goods that are perfectly non-rival in consumption and are non-excludable.”<sup>35</sup> Non-rival in consumption means that one individual’s consumption of a good does not affect another individual’s consumption to the same good. While, non-excludable means individuals cannot deny each other the opportunity to consume this good.<sup>36</sup> The classic example of a public good, as stated by Professor William Fisher of Harvard Law School, is lighthouse which gives a warning to ships from the existence of rocks to avoid crashing. The benefit that one ship receives from the light house does not affect or preclude the benefit of other ships. In addition, it would be difficult to control or exclude the use of a certain number of ships to the lighthouse, or to exclusively grant this use to a certain ship.<sup>37</sup>

This example is of a great relevance in the system of copyrights protection. The use of a copyrighted work does not restrict its use by others. The nature of copyright’s subject matters drives individuals to spread them, in addition to the vast technological development that makes it easy to reproduce, transfer, and share copies of the work. Public goods in general, and copyright in particular, are characterized by two distinct features: firstly, they have huge social benefits, and secondly, they are likely to be underproduced if not incentivized through additional stimulations.<sup>38</sup>

Accordingly, to adopt the public good aspect in copyright, a copyright grants original authors exclusive property rights to their creations, which entitles them with a sort of monopoly controlling the use of their created work, to be able to exclude others from copying their work without obtaining their consent. This sort of monopoly is granted by copyright law to overcome the public good aspect of copyright’s subject matters.<sup>39</sup> The public good aspect in economies generally entails the existence of a non-rivalrous and non-

---

<sup>35</sup> Stefanie Stantcheva, *Lecture 8: Public Goods* 31 (2012).

<sup>36</sup> *Id.*

<sup>37</sup> William Fisher, *CopyrightX: Lecture 4.1, Welfare Theory: The Utilitarian Framework* (2015), 7:31-8:50 <https://www.youtube.com/watch?v=3ISstJYsCWs>.

<sup>38</sup> *Id.*

<sup>39</sup> Aleksandar Stojkov, Goce Naumovski, & Vasko Naumovski, *ECONOMICS OF COPYRIGHT: CHALLENGES AND PERSPECTIVES*, *Mizan Law Review*, Vol. 7 No. 1 (2013), at 132.

excludable product, that is likely to be underproduced due to its public good nature, unless the government interferes to stimulate its creation. This governmental intervention can be made through, among other things, enacting law that regulates competition.<sup>40</sup>

The authors of copyrightable works use their efforts and labor to get their creative works expressed and published, which after publishing will be subjected to non-rivalrous consumption at very low cost. If the creative works of such authors were not protected by the copyright law, the authors will not be able to cover the spent cost. This is because copyrighted materials have high cost to produce and low marginal cost to reproduce and distribute.<sup>41</sup> The same applies on firms that invest in copyright's concerned industries. The copyright law entitles these firms to exclusive monopoly rights that allows them to price the copyrightable goods over their actual costs which makes the deadweight loss tolerable. This induces such firms to invest in copyright creative projects.<sup>42</sup> Without granting such monopoly to authors and firms there will be no incentive to produce more creative works; nevertheless, this monopoly has its cost on future innovation, as the output of one author is deemed to be the input of another.<sup>43</sup> The exclusive rights granted to an author through copyright laws that allows the copyright owner to price his work above the marginal cost, leads to restricting the use of this issued work in new productions, which leads to the less production of created works. The end result is a reduced access to the created works, and thus producing deadweight loss for the society.<sup>44</sup>

Consequently, there is a pressing need for a balance to be able retain the benefits of the two sides: the interests and incentives of authors to create and control their creations, and the interest of public to have access to the created work and less constraints limiting the use of this work. As Fishmen states: "any exclusive right should be large enough to induce investment in creativity upstream but not so large that it unnecessarily inhibits creativity

---

<sup>40</sup> William Fisher, *supra* note 37.

<sup>41</sup> Aleksandar Stojkov, Goce Naumovski, & Vasko Naumovski, *supra* note 39, at 132.

<sup>42</sup> Doteasy, *supra* note 4, at 1345.

<sup>43</sup> *Id.*

<sup>44</sup> Aleksandar Stojkov, Goce Naumovski, & Vasko Naumovski, *supra* note 39, at 132.

downstream.”<sup>45</sup> Thus, a better copyright system should consider balancing between the social and private interests that means balancing between the copyright’s owner interest and the user of copyrighted work. This has been reflected in the copyright system which has started developing and introducing exceptions copyright, such as the fair-use and compulsory licensing doctrines that will be discussed further.

## B. Copyright through the Lens of Welfare

In looking at copyright through the lens of welfare it becomes apparent that welfare theory is inspired by utilitarianism. The utilitarian approach was first introduced in the late 18<sup>th</sup> century in the writings of English philosophers and economists, mostly advocating and inspired by the views of Jeremy Bentham and John Stuart Mill.<sup>46</sup> Utilitarianism can be described as a general doctrine of ethics that advocates actions fostering happiness and pleasure to the greater group and opposes actions causing unhappiness or harm.<sup>47</sup> As such, the core aim of this approach, in the context of social, economic and political decisions, is to achieve what is better for the whole society.

Utilitarianism is fairly manifested in the economic welfare theory and its views on copyright protection, which generally perceives that the government and law should be organized in a way that promotes the greatest amount of happiness to the greater number of people.<sup>48</sup> This, accordingly, means that copyright laws shall be established in a way that constantly considers the benefits and happiness of the greater group, reflected in the society, rather than advocating the rights of a certain group of people.

---

<sup>45</sup> Doteasy, *supra* note 4, at 1346.

<sup>46</sup> Driver, Julia, "The History of Utilitarianism", The Stanford Encyclopedia of Philosophy (Winter 2014 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>>.

<sup>47</sup> Carla Tardi, *Utilitarianism Defined*, INVESTOPEDIA, <https://www.investopedia.com/terms/u/utilitarianism.asp>.

<sup>48</sup> William Fisher, *supra* note 37.

To explain the relation between copyright protection and societal welfare, professor William Fisher used the example of a film making company that created a documentary and produced it on DVD. This film-making company, to be able to make profits, it has to set the price of the DVD above its marginal cost. If copyright law did not exist, then other companies will be allowed to make copies of the DVD and sell it with a lower price than the companies with the original copy. At this point the film-making company will realize that it will have to lower the cost of the DVD's original copy to be able to sell; yet, competitors who sell the same DVD movie would also lower their price, and so forth until the movie falls down the marginal cost, meaning that it would rarely cover the cost of its production.<sup>49</sup>

Although this would lead to having more copies produced and distributed to consumers in a very low price; nevertheless, the film making company will find itself in a deadlock situation where the production of the documentary does not return any profit to the company, which will lead accordingly to the stop of production, resulting in depriving the society from the benefits of such movies. Clearly this situation is harmful for both the benefits of the producers and consumers as well. This requires a government intervention to alleviate such situation, which is the purpose of copyright law: to suppress competition in the production and distribution of copyrightable creative works.<sup>50</sup>

In the United States, when the legislator amended the Copyright Act and expanded its scope, the aim was to encompass informational content that was not, at that time, normally recognized as copyrightable, and which had an effective impact on the US economy system.<sup>51</sup> The introduction of intellectual property protection in the Uruguay round of negotiating the TRIPS Agreement sought to mitigate the welfare loss that the country suffered resulting from intellectual property rights violations that distorted the flow of free trade and resulted in significant reductions of welfare benefits that countries enjoy on the basis of free trade.<sup>52</sup> The law sought, on one hand, to protect the rights of authors from

---

<sup>49</sup> William Fisher, *CopyrightX: Lecture 4.2, Welfare Theory: The Incentive Theory of Copyright* (2015), 2:15-10:00, <https://www.youtube.com/watch?v=t9wqQNCC-Vs>.

<sup>50</sup> *Id.*

<sup>51</sup> See Ruth Gana Okediji, *supra* note 32.

<sup>52</sup> *Id.*, at 118.



piracy and counterfeit activities that constituted a great threat on the trade of intellectual property, including copyrights, to provide incentives to their authors and creators, and reduce their welfare loss. On the other hand, the law aimed to protect the rights granted to authors, which are provided to incentivize creativity.

Thus failure to protect such rights, would reduce the rate of producing these activities, which would also lead to welfare loss in the form of minimizing creativity and innovation.<sup>53</sup> Professor Ruth Okediji argued that the process of globalization created powerful links between markets, peoples and cultures, which enlarged the existing problems, and requires more, not less, government intervention to be able to solve this problems.<sup>54</sup> She also argued that intellectual property rights provide incentives for individuals to create and failure to protect such right retards creativity. Moreover, lack of enforcement, she argues, would lead to inefficiently and costly strategies to protect innovations, while eliminating the availability of new information to public.<sup>55</sup>

The intervention of copyright law, with its objective to stimulate creativity, eliminates the public good's problem in copyright and stands as the core economic justification of the copyright system to enhance the public welfare. In this context, to ensure the fulfilment of the copyright system's welfare goal (by enhancing the public welfare and removing greater extent of harm to the public), exceptions to copyrights, which are the exclusive rights granted to authors, are introduced to balance the system and positions it in the direction of imposing greater welfare to public. Such exceptions evolved clearly in the doctrines of "first-sale", "fair use" and "compulsory licenses." The latter two doctrines will be further demonstrated in the upcoming chapters. These famous doctrines, that deviates from the free market model, in the view of welfare advocates, attempt to rectify the weakness existing in the free trade of copyrights and intellectual property in general.<sup>56</sup> This regains the sought balance and achieved better public welfare results.

---

<sup>53</sup> *Id.*, at 121.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, at 122.

<sup>56</sup> *Id.*, at 123.

### C. Copyright in the Lens of Culture

Unlike the welfare theory, which is concerned with achieving the better for the whole society through the interference of the government and law in a way that guarantees to regulate the law to achieve the better results for the larger group. Looking at copyright through the lens of culture presents a different view.

The roots of culture theory approach can be tracked back to the writings of Karl Marx in the late 18<sup>th</sup> century, followed by the writings of social theorists like Max Weber and Emile Durkheim. Nevertheless, the theory did not start to shine until the mid of the 19<sup>th</sup> century. The theory planted its roots in philosophy, political and legal literature. The theory is based on the idea that humans, because of their nature, either flourish or suffer according to the conditions existing around them.<sup>57</sup> Accordingly, social, political and legal institutions should facilitate the conditions surrounding individuals to be able to flourish. The theory lists eight conditions that are essential for individuals, or are perceived as the components needed for individuals, to fully realize their personhood and accordingly start flourishing. These conditions are, as listed by Professor William Fisher: life, health autonomy, engagement, self-expression, competence, connection and privacy.<sup>58</sup> Worth noting that these conditions are the fundamental human rights guaranteed by human right conventions. In this section I will focus on elaborating how copyrights are conceived from cultural perspective, and the impact of such perception on copyright.

Scholars defending the cultural approach have various disagreements among themselves and adopt this approach variously. Despite such disagreement, advocates of cultural approach, generally, perceives that copyright shall, as any other field of law, be organized in a way that facilitates and sustains a just and attractive culture.<sup>59</sup> This can be reflected in a legal framework that encourages individuals to act in certain ways which help in realizing a more attractive society and future. The advocates of this theory prioritize

---

<sup>57</sup> William Fisher, *CopyrightX: Lecture 10.1, Cultural Theory: Premises* (2015), 10:00-17:25 <https://www.youtube.com/watch?v=sFiKtoE9huA>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

human freedoms in general, and freedom of expressions in particular, as one of the essential elements that drives the society to flourish. However, those same advocates believe that “people are not always the best judges for their own interests”<sup>60</sup>; accordingly, the law needs to intervene to regulate the direction for individuals to follow. Those advocates arguments aim to ensure that all individuals are granted fair shares of resources, as well as fair access to opportunities necessary for humans to flourish.

According to advocates of the culture approach, self-autonomy is considered an essential element to flourish. Ultimate degree of autonomy is impossible to achieve; however, it is essential to reach a substantial degree, as higher levels of autonomy enriches the culture. As such, from a copyright perspective, the concept of creative autonomy is essential for the production of more quantity and better varieties of creative works.<sup>61</sup> According to Mary Gani-Ikilama, when justifying the creative autonomy theory, John Locke, the English philosopher, reflected on the importance of ensuring that the remaining resources for the public, after appropriation, are sufficient in quality and quantity, to be easily utilized by others in the society. Moreover, individuals shall not be allowed to exhaust resources more than they could use to avoid wastage.<sup>62</sup>

In the context of copyright and the effect of the cultural thoughts on it, it is important to explicate the basis of which some of the cultural approach advocates relies on in justifying copyright. Freedom of expression is a fundamental right affiliated to humans, advocated and guaranteed by every human rights convention or state’s constitution, including the freedom to choose the method of such expression.<sup>63</sup> The European Court of Human Rights underlines, in many of its decision, the importance of the concept of artistic expression in the context of freedom of expression,<sup>64</sup> as well as the principle of proportionality that entails “striking a balance between freedom of expression and property right.”<sup>65</sup> Article 15 of the

---

<sup>60</sup> *Id.*

<sup>61</sup> Mary Gani-Ikilama, Copyright Theory and a Justificatory Framework for Creative Autonomy in Cultural Industries, 6 QUEEN MARY J. INTELL. PROP. 154 (2016).

<sup>62</sup> *Id.*, at 162.

<sup>63</sup> *Id.*, at 158.

<sup>64</sup> 4e3265de2.pdf, <https://www.refworld.org/pdfid/4e3265de2.pdf> (last visited Feb 28, 2021).

<sup>65</sup> Mary Gani-Ikilama, *supra* note 61, at 158.

International Covenant on Economic, Social and Cultural Rights also recognized the individual's right to participate in cultural life activities, enjoy benefits of scientific progress, as well as, benefiting from protection of moral and material interests of their created scientific, literary, or artistic productions.<sup>66</sup> According to the above and based on the underlying argument of the cultural theory, the supporters of this theory interpret creative work as a mean of freedom of expression and perceives copyright as an exception to the right of freedom of expression and they accordingly call for limiting such exception, as much as possible, to allow humans to flourish. Thus, it can be concluded, as explained above, that the cultural theory advocates do not call for eliminating copyright protection, they rather advocate for restricting copyrights to allow more freedom of expression and ensure wide access to fair quality and quantity of cultural work.

#### **D. Strong Copyright Protection against More Flexible Copyright Protection Arguments**

It is clear that literature comprises two opposing arguments in copyright's system, as previously articulated, those who support having a strong copyright system against who support having a flexible copyright system. In this section I will discuss the base of both arguments and reflect on some of the grounding ideas found in each of the arguments.

To call for having a strong copyright system scholars had to base their opinion on strong arguments. One of the ideas adopted by scholars who argue for a stronger copyright system is that limitations and constraints on copyright are essential to push individuals to the edge of their innovation, by limiting their choices, which leads to producing better creative expressions. This leads to logically adopting the concept of the "idea/expression" defense, which entails that copyright protects only creative expressions and not ideas. This leaves authors, with plenty of ideas available in public, through which they can utilize any to produce one's creative expression, only then, this expression shall be copyrightable.

---

<sup>66</sup>*Id.*

In this context, multiple justifications were offered by supporters of this view. One of such justifications included relying on an experimental study made on two groups of peoples for the innovation of software coding design. The group who were restricted from access to the work of the other group, came up with better innovative idea, than the other group, who were permitted to access what the competing group reached and built up on their work.<sup>67</sup>

In addition, couple of situations were cited by Fishman, in which constraints turned out to work in favor of innovation and creativity,<sup>68</sup> from which, is the track “All Falls Down” which was recorded by Kanye West when they failed to obtain a music sample license. Another example is the track resulting used by David Newhoff in a film scene “All Falls Down”, which he decided to use after failure to obtain a license of the Shirelles’ “Tonight’s the Night” which he aimed for at the first place.<sup>69</sup> According to Fishman, Newhoff thought that he movie ended up with a better track because he was forced to search more for another alternative.<sup>70</sup> Nevertheless, such pleasant outcome is not of a frequent occurrence, because; on one hand, in both mentioned situations the film-makers, who are in the position of users of copyrighted works, refrained at all from using the desired track and shifted for the use of another, which fortunately in their situation turned out to be good. Yet, this result is not guaranteed, and the end result of each of those situations is that film-makers were deprived from the use of an existing work. On the other hand, in incidents were users fail to obtain a license to use and build up on existing protected work, they mostly refrain from the use of such work, which ends up loss of creative productions, or could unlikely choose to use the work without obtaining the license, which exposes them to the risk of being disputed before courts and likely if found infringers, they will be subjected to a huge amount of damages, as will be further illustrated in chapter four.

---

<sup>67</sup> Doteasy, *supra* note 4, AT 1396.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, at 1371

<sup>70</sup> *Id.*

The opposing side of this Argument calls for having a flexible copyright system, based on the fact that creators will be deprived from their freedom of expression if they wished to express an idea related to a protected work. Thus, complying with copyright law restrictions, will not intrinsically incentivize innovators. Such restrictions would rather hold them back from expressing their ideas. In this context, the end result will be depriving the society from significant cultural activities and ideas.

Doctrines introducing exceptions to copyrights are adopted to limit the monopoly granted by copyright, that is essential to foster the culture of the society. Supporters of this view calls for a wide interpretation for such doctrines to achieve the required freedom that motivates creator of innovate, without limitations, and express their innovations. It is important to differentiate between imitating and transforming an existing work to a new creative one. The supporters of this view do not call for the exclusion of copyright or the encouragement of mere copying and imitating, on the contrary, they are aware of the importance of copyright and the certain monopoly conveyed to authors to provoke the production of creative works. They are calling for the introduction and wide interpretation of copyright exceptions, to allow other to build on the existing work.

In this context, it is important to emphasize the importance of exceptions to copyright such as the famous fair use, compulsory licenses, first sale, idea/expression, and other doctrines. Those doctrines are indeed essential to fostering the society, and without them the society would have lost countless opportunities in the production of creative work. A clear example illustrating this outcome; the loss that would have been suffered by the society, is the assumption of exclusion of fair use doctrine, in the well know Betamax case *Sony Corp. of America v. Universal City Studios, Inc.* (“Betamax Case”).<sup>71</sup> In this case, Sony provided for the first time the VCR machines, which allowed consumers to videotape television broadcast and replay them later with the option of fast-forwarding to skip commercials.<sup>72</sup> This situation disturbed the advertisement business and in turn the business

---

<sup>71</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.* - 464 U.S. 417, 104 S. Ct. 774 (1984).

<sup>72</sup> *Ramos, Carey R. "The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law." Stanford Law Review 31, no. 2 (1979): 243-63.*

of the network and the studios, which depended on earning money from licenses issued in the process of enabling television networks to eventually broadcast movies, that are copyrighted, to consumers, without any breach in copyright law.<sup>73</sup> Universal Studios brought a contributory infringement claim against Sony for manufacturing the machine used by consumers to make verbatim copies of their protected and owned work without authorization. The court eventually ruled in favor of Sony and justified their use under the fair use doctrine based on the fact that time shifting is a common use of the VCR machine and that the machine was capable of substantial non-infringing use.<sup>74</sup>

Without this justification provided under the scope of fair use, the court would have ruled that a copyright infringement occurred, since actual verbatim copying occurred without obtaining a license. This would have locked the court in a closed circle, where the court would have no room to allow for exceptions, and accordingly would have awarded the Universal Studios a compensation in addition to injunctive relief, which could have resulted in the cease of producing the VCR machines. This outcome would have resulted in a clear loss to the society by depriving it from such a creative product that is today a normally used home entertainment and is heavily relied on by consumers to enable them to conveniently watch later anything they have missed.

Hence, the mentioned example clearly shows the importance of copyright exceptions and the gains of easing, in certain occasions, some of its constraints. On the other hand, it has been clearly demonstrated that some of the constraints introduced by copyright are vital and needed to ensure the continuing production of copyrightable works. Scholars today are aware of the importance of both copyright constraints and exceptions. The challenge exists in finding the balancing point of imposing a strong copyright system, that help in incentivizing creation and innovation, as well as removing the obstacles that hurt the process. This will be attainable by protecting the right of such creators, while at the same

---

<sup>73</sup> THE BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY, *William Fisher, CopyrightX: Lecture 9.2, Fair Use: Fair Use Today* (2015), 37:44-38:02, <https://www.youtube.com/watch?v=Z9q6JA6f5Co>.

<sup>74</sup> Marc Pelteret, *supra* note 29.

time offering the freedom to create and safeguarding their work from any future risk exposure to claims against their creations.

Based on the earlier arguments around copyright system and its significant effect on the stimulation of creativity and innovation, I have demonstrated the importance of allowing innovators to have a wide access to created works, and the ability to use and build on existing works. The supporters for both arguments (strong copyright system against a flexible one) acknowledge the necessity of allowing users to build on already existing work, to help flourishing culture in the society.

### **III. Limitations on Wide Access to Works**

Limitations on wide access to work restrict the freedom of innovators to use existent work as a material for producing new creative works. Considering the long term of copyright which lasts in the United States for 75 years after the death of the author, if users are restricted to use the existing copyrighted works in their creations this will obstruct the process of creation and innovation. Thus, the cost of such restriction on innovation outweighs its benefits for the copyright owner. Accordingly, obstacles hindering the access and authorization of the use of copyrighted work in new creations shall be managed wisely so as not to impair the creation process. For this reason, debates around adopting strong or weak copyright system arose.

In this Chapter, I will discuss two main problems that limit users from having a wide expansive access to created works, as well the freedom to use this work in producing other creations. I will focus on discussing two specific existing problems which exacerbates the process of creation, and hinders building on the existing works. I will not refer to the more generic problems of copyright law that limits, as well, the mentioned creation process. First, I will discuss the orphan works problem and its impact on creativity and innovation. Then, I will discuss the problem of the ambiguity of some terms of the copyright law and scope of license, which has direct effect on the users' choice to proceed with their creations.



## A. The Problem of Orphan Works

When considering the problems limiting users wide access to created works, the problem of orphans works limits to a great extent users' availability to seek licenses and use the created orphaned works.

### 1. Definition and Impact

In terms of its definition, there is no unified definition of orphan works; however, each definition proposed by scholars entails the existence of a copyrightable work that does not include any information which could lead to the identity or location of its owner, even when a profound due diligence search is made to identify or locate this owner.

This leaves the users in a deadlock situation, where they are uncertain whether the work is still under protection or in the public domain, and, accordingly, they cannot obtain licenses to use this work and benefit from it. Thus, the users are left with two tough alternatives: either to choose relinquishing the use of the orphan work, or to use the work and incur the risk of reappearance of the copyright holder. In such case the copyright holder will then be entitled to claim copyright infringement damages available at law. This will likely minimize the appetite to use such works as an input for new creations. Undoubtedly, the end result of this situation is depriving the society from the opportunity to benefit from the potential creative works that would have been produced if the users were able to locate the copyright owners or to obtain licenses to the use of such works. As such, orphan works can be defined as “copyrighted works whose owners are difficult or impossible to identify and/or locate after a diligent search has been conducted.”<sup>75</sup> This includes books, photographs, movies and other types of works.<sup>76</sup>

This orphan works problem hardly existed before the adoption of the “formality free” obligation by international conventions and practice, specifically the Berne

---

<sup>75</sup> Ahmed, B.A. & Al-Salihi, K.H. 2019, "Proliferation of the problem of orphan works across the world", *The Journal of world intellectual property*, vol. 22, no. 5-6, at 419-439.

<sup>76</sup> Hansen, David R., Kathryn Hashimoto, Gwen Hinze, et al. 'Solving the Orphan Works Problem for the United States', *The Columbia Journal of Law & the Arts*, vol. 37/no. 1, (2017;2013), at 3.

Convention<sup>77</sup>; which imposed obligation on all parties to remove any legal formalities to acquire copyright. This changed the copyright system from an “opt in” to “opt out” system, where innovators obtain copyrights upon expressing their ideas once articulated in a tangible medium without any need to take any formal procedures to register this copyright.<sup>78</sup> The problem became more apparent after the “Google Book Search” and the “HathiTrust” digital library cases, where both were attempting to launch digital libraries. HathiTrust was an organization formed by universities to operate a digital library.<sup>79</sup> Google Books was also a project of digital library including data base of allowing individuals to search through millions of books and read selected passages.<sup>80</sup> Both were litigated for attempting to collect digital books, by scanning the books and uploading them without obtaining license, which made them address problem of orphan works on a larger scale.<sup>81</sup>

Aside from the exemption of Google on the basis of the adoption of fair use doctrine, the problem of digital libraries relies on existing numbers of orphan works, which is proved to be very challenging for organizations in the process of librarying that includes millions of books, photos and other copyrightable work. The US copyright law entails the copyright holder, who may at any time reappear and claim ownership of the orphaned work, to claim injunctive reliefs and monetary damages that could reach up to \$150,000 per infringed work. Accordingly, organizations, to avoid such damages that could easily lead to their bankruptcy, often incline towards removing these orphaned works from their collection, which is perceived as a culture loss to the society.<sup>82</sup>

Orphan Works problem is not limited to books and libraries, it also limits the ability of users to create derivative works out of the orphaned one, which limits the production of motion pictures, films, songs, and other creative innovations that enriches the culture.

---

<sup>77</sup> Berne Convention, *supra* note 8.

<sup>78</sup> Ahmed, B.A. & Al-Salihi, *supra* note 75, at 420.

<sup>79</sup> Authors Guild, Inc. v. HathiTrust - 755 F.3d 87 (2d Cir. 2014).

<sup>80</sup> Google wins copyright battle over books, BBC NEWS, April 18, 2016, <https://www.bbc.com/news/technology-36072243> (last visited Apr 20, 2021).

<sup>81</sup> Hansen, David R., Kathryn Hashimoto, Gwen Hinze, *supra* note 76.

<sup>82</sup> *Id.*

The famous Middle East Iraqi singer *Kazem Al-Saher* stated that it took him five years of searching to find the owner of the poem “I and Leila” which he wished to sing. He also stated that, in the process of searching, various people alleged its ownership, but none of them was able to provide the whole versus of the poem. This could have easily lead *Al-Saher* to mistakenly obtain a license form a non-owner, and expose himself to the risk of being litigated.<sup>83</sup> On the other hand, if *AL-Saher* did not successfully reach the author of the poem, he would have not performed one of the most famous songs in the Middle East.

If users are not able to take the risk and afford the potential liability they may be exposed to when they use orphan work, their financial incentive to create will be undercut, and thus, removing the barriers and allowing innovators to use the orphan works will facilitate the production of variety of creative works in science, humanity, arts, literature, sound recordings, film making, and several other fields of innovations.<sup>84</sup>

## 2. Suggested Solutions

Based on the orphan works problem and its impact on utilizing copyrighted works, scholars have been suggesting several proposals to solve this problem. Some of such proposal revolve around encouraging authors to provide their information on the work they created. Established digital platforms play important role in this context. For example, “SACEM” (a platform of the society of music authors, composers, and publishers) provides services for artists and performers to administer their work as well as providing services, including obtaining licenses and the collection and distribution of royalties. This society started in France to manage the French and European authors’ rights, followed by its successor society in the Middle East “SACERAU.”<sup>85</sup>

---

<sup>83</sup>Ahmed, B.A. & Al-Salihi, *supra* note 75, at 427.

<sup>84</sup>*Id.*

<sup>85</sup> Egypt’s Society of Authors, Composers, and Publishers celebrates 70th anniversary - Music - Arts & Culture, AHRAM ONLINE, <http://english.ahram.org.eg/NewsContent/5/33/177290/Arts--Culture/Music/Egypt%E2%80%99s-Society-of-Authors,-Composers,-and-Publish.aspx>.

Scholars have been also calling for the promotion of the use of “Creative Commons”,<sup>86</sup> to regulate the information of authors and licensing process. Creative Commons is a flexible copyright regime that is provided through a digital platform which makes available to copyright owners a set of standardized licenses that they can grant to either public or users that wish to use their work in another creation.<sup>87</sup> This process is easy and wholly digitalized to facilitate the licensing to users and ensure ability to locate authors. It is necessary to raise awareness on the importance of providing authors’ information to be able to locate them, in addition to supporting the facilitation and digitalization of making the information available and the issuance of licenses process. However, this will only mitigate the problem of orphan works in the future without providing any mitigation to the current orphan works that are already existing. In addition, making authors’ information available is not an obligation, as it will be left to their discretion whether to provide their information or not, it is rather a recommendation.

Another solution that has been suggested for the problem is introducing indemnity or security to the use of orphan works. This secure the users’ right and indemnifying them from any future claims that could be brought against them by the copyright holder that may appear at any time. This can be operated by allowing a private organization to act as the right holder and collect royalty fees against granting a license for the use of orphan work. In return, this organization shall indemnify the user, who paid the royalty fee and is granted a license from any future potential claims that might be brought in case of the copyright holder appearance.<sup>88</sup> This model is applied in Netherlands, where there is a foundation called *Anoniem* that is associated to Dutch organization for professional photographers.<sup>89</sup> Users who wish to obtain a license to use any photographs that they

---

<sup>86</sup> When we share, everyone wins, CREATIVE COMMONS, <https://creativecommons.org/>.

<sup>87</sup> Ahmed, B.A. & Al-Salihi, *supra* note 75, at 427.

<sup>88</sup> Stef van Gompel & P. Bernt Hugenholtz (2010) The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It, *Popular Communication*, 8:1, 61-71, DOI: 10.1080/15405700903502361

<sup>89</sup> *Id.*

failed to locate its author, after diligence search is made, revert to Foto Anoniem, which grants them legal protection through an indemnity clause.<sup>90</sup>

There is also another suggested proposal that is of great importance. This proposal suggests including orphan works in the system of compulsory licensing. According to this system, an administrative authority will be entitled to grant license for the use of orphan works, after ensuring that an unsuccessful due diligence search has been conducted to locate the author, according to certain set up criteria. This is already applied in Canada, Japan, South Korea, and Hungary.<sup>91</sup> However, the United States copyright office has rejected this system, on the basis that it is an insufficient system, because it requires every user to make payment, and in most of the cases the unidentified author will likely not appear.<sup>92</sup> Moreover, economists criticized this system, because it is based on pre-payment or ex ante payment of licensing fees, which would likely lead to overpricing. The rationale behind such critique is that the economic value of the use of orphaned work appears after the use takes place, and the license fees should be determined according to this economic value.<sup>93</sup> However, this is refuted by proposing to offer a discounted license, which would easily overcome the fear of overpricing.

Finally, a proposal has been suggested to limit the remedies available for the reappearing holders of the right. The United States Copyright office previously suggested the introduction of a statutory limitation on remedies available to reappearing authors against the users of their orphaned work, after a reasonably diligent search has been conducted in good faith to locate the user without success. This proposal suggested to include the commercial use in the scope of the limitation, which differentiates this exception from the fair use exception, the will be discussed in chapter III. The suggested proposal also includes limiting the scope of available injunctions. By introducing this exception, that covers commercial and non-commercial use of orphan works, and limiting the injunctions, innovators will be incentivized to produce derivative works to the orphan

---

<sup>90</sup> *Id.*

<sup>91</sup> *Hansen, David R., Kathryn Hashimoto, Gwen Hinze, supra note 76, at 39.*

<sup>92</sup> *Id.*, at 40.

<sup>93</sup> *Stef van Gompel & P. Bernt Hugenholt, supra note 88.*

works, which will enrich culture in the society. This requires a clear, unambiguous and balanced system that regulates and defines what is an orphan work and what can be considered as a good faith diligent search.

## **B. The Ambiguity of the System**

The second problem that impacts the use of existing copyrighted works in new creations in a way that drive users towards the refrain from using these works, is the ambiguity of the copyright system. This is because users fear that they may misinterpret the system and their use turns to be infringing and thus exposing them to the risk of being disputed and subjected to huge and excessive damages.

It is well established among scholars that the copyright system, especially that of the United States, comprises very notable ambiguity and vagueness regarding the interpretations of its terms. This is well articulated in Bell and Parchomovsky's literature in which they affirm that "Copyright doctrine contains a high degree of uncertainty. It is easy for potential users of a work to mistakenly infringe due to misunderstandings about the legal protections afforded to works or the facts surrounding the work."<sup>94</sup> They both argued, as well as other scholars, that users frequently make mistakes because of the ambiguity of the copyright system.

### **1. Copyright Subject Matters**

Copyright grants authors of original created works exclusive monopoly rights over their creations. Nevertheless, it is not easy to determine what constitutes a copyrightable work and what does not, or whether a work is considered original creation or not; and, eventually, whether a borrowed existing idea that is transformed to new expression has just imitated an existing work, and so forth. For instance, although the US Copyright Act includes eight subjects matters of creative works that are copyrightable; it also states that copyright protection subsists in any type of original work, currently known or developed

---

<sup>94</sup>Abraham bell and Gideon Parchomovsky, *supra* note 12, at 718.

in the future, that is originally created and expressed through a tangible medium.<sup>95</sup> Users are still arguing on some matters to be expanded under copyright protection, such as the creation of mems, tattoos, the design of flower garden, fashion, etc.

## 2. Limits of Protection

Moreover, the scope and limits of protection of copyrighted works are not clear, which often lead users to fall into mistakes and find themselves guilty of copyright infringement. This was clear in the case *Three Boys Music Corporation v. Bolton*,<sup>96</sup> where Bolton issued a song titled “Love is a Wonderful Thing”, which had the same title used by *Three Boys Music* for a track released in 1991. Despite the similarity of both titles, it turned out, at the time of the suit, that 129 songs were registered under the same name.<sup>97</sup> Nevertheless, the court rendered Bolton guilty with copyright infringement based on the jury’s decision which found that Bolton had access to the plaintiff’s owned copyright and both titles were substantially similar. The court awarded Three Boys Music Corporation \$5.4 Million damages.<sup>98</sup>

## 3. Unpredictability of the Outcome

Since predictability is one of the fundamental elements of any legal system, it is important to underline the lack of such element in copyright. It is hard for users to predict what constitutes an infringement and how does courts demonstrate the occurrence of infringement, mainly because the case law seems to be inconsistent in this matter. *Warner Bros. Pictures v. Columbia Broadcasting*<sup>99</sup> case clearly illustrates the confusion users might fall into when determining the extent of the use of copyrighted work. In this case the authors of a serial novel “*The Maltese Falcon*” transferred the copyright of television, radio and movie of the novel to Warner Brother, who accordingly published different

---

<sup>95</sup> Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012), section 102 - Subject matter of copyright: In general, LII / LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/uscode/text/17/102>.

<sup>96</sup> *Three Boys Music Corp. v. Bolton* - 212 F.3d 477 (9th Cir. 2000).

<sup>97</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 694.

<sup>98</sup> *Id.*

<sup>99</sup> *Warner Bros. Pictures v. Columbia Broadcasting*, 216 F.2d 945 (9th Cir. 1954).

movies of the novel. The novel's main character was detective Sam Spade. The Author later granted an exclusive right to the use of the character Sam Spade and other characters included in the novel to Columbia Broadcasting. Such authorization resulted in a radio show titled *The Adventures of Sam Spade*. Warner brothers brought copyright infringement claim against the Author alleging that he was not entitled to grant such authorization to Columbia Broadcasting, since the rights of the novel were already transferred to Warner Brother. The US Court of Appeal found that the Sam Spade character is not copyrightable and ruled in favor of the Author stating, "if the character is only the chessman in the game of telling the story he is not within the area of protection afforded by copyright."<sup>100</sup>

Another interesting opinion that reflect the inconsistency in case law is the *Anderson v. Stallone*<sup>101</sup>, involving characters of the *Rocky* series of movies. In this case, Anderson – a fan of Sylvester Stallone – wrote a scene and presented it to the movie executives; including an idea of a fight in Moscow between Stallone and a Soviet officer. Anderson alleged that movie *Rocky IV* infringed his right and copied the scene he presented to the executives. The Court of Appeal ruled in favor of Stallone on the basis that Rocky characters are copyrightable and Anderson's scene was unauthorized derivative work using, illegally, Stallone's characters.<sup>102</sup> In its ruling the court stated, "the Rocky Characters were so highly developed and central to the three movies made before Anderson's treatment....and were, therefore, entitled to copyright protection."<sup>103</sup>

The above two cases illustrate well the inconsistency of courts' decisions, as well as the ambiguity of law in determining the scope and extent of copyright protection. This makes the copyright system unpredictable to users, which accordingly drives them to fall into mistakes of misinterpreting the laws or the facts surrounding the use of work. Thus, leaving them constantly exposed to the risk of being dragged to court in a copy right infringement claim. Moreover, this creates a depressing atmosphere for creators that

---

<sup>100</sup> Nimmer, Melville B. "Copyright 1955." *California Law Review* 43, no. 5 (1955): 791-808. Accessed March 10, 2021, at 794.

<sup>101</sup> *Anderson v. Stallone* - No. 87-0592 WDK (Gx), 1989 U.S. Dist. LEXIS 11109 (C.D. Cal. Apr. 25, 1989).

<sup>102</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 700.

<sup>103</sup> *Id.*



restricts their ability and freedom to innovate, which eventually leads to exacerbating the problems impeding the process of creativity and innovation, and impedes its flourishing.

#### 4. Interpretations of Authorizations

Lastly, even if an authorization to use the work is obtained, a user might easily fall into the mistake of speculating the scope of the authorizing licenses, like the case of *Boosey & Hawkes Music Publishing Ltd. v. The Walt Disney Co.*<sup>104</sup> In this case, Boosey issued a license to Walt Disney authorizing the use and distribution of “*The Rite of Spring*” music composition which features *Fantasia* the Walt Disney Movie. Walt Disney distributed the Movie that includes the motion picture and the music composition owned by Boosey in a video format. Boosey brought an infringement claim against Walt Disney alleging that the license did not include authorizing the video format release of the motion picture. The Court ruled against Walt Disney and established that the distribution of the video format indeed exceed the limits of the granted license.<sup>105</sup>

It is clear from above case law that there is unclarity and uncertainty in the copyright system in a way that affects directly the users and make it difficult for them to predict the legality of the use of copyrighted works. It is for those reasons and others – which will be illustrated in the following chapters – beside considering the significance of the predictability element in the legal system, it is vital to introduce to the copyright system measures that would alleviate this uncertainty and empower creators to use existing work and express their innovation without fear of encumbering legal liability.

---

<sup>104</sup> Susan S. Blaha, *Boosey & Hawkes Music Publishing LTD. v. the Walt Disney Co.* 145 F.3d 481 (2d Cir. 1998), 9 DEPAUL-LCA J. ART & ENT. L. 449 (1999).

<sup>105</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 710.

#### IV. More Flexible Copyright Protection and more Application of Fair Use

I have discussed in chapters one and two how imposing more restrictions and constraints on copyright could negatively affect the process of creativity. This restrains users from producing more creative works, fearing the tragic outcome of being dragged to courts in a copyright infringement claim. Courts' decisions, in such infringement claims, are not always predicable and would likely lead to the awards of excessive damages, which are generally hard borne for users. For these reasons, and to encourage the process of creation, the notion of exceptions to copyright has been introduced, including the famous "fair use" doctrine. In this chapter I will start by discussing the fair use doctrine and its adoption in the United States, as well as briefly exploring the adoption of similar doctrines in other countries. I will then analyze the courts' approach when alleged defense of fair use is invoked in the context of the impact of such decision on motivating freedom of creativity and innovation. Finally, in the last section, I will underline the scholarly calls for development of the fair use doctrine.

##### A. Fair Use:

The Concept of fair use entails the restricted permission of using copyrighted works in certain contexts that are considered fair. It emerged in the beginning of the 18<sup>th</sup> century in the English Law, and was first introduced in the United States through the US Supreme Court decision in the *Folsom v. Marsh*<sup>106</sup> case. In the said case, the plaintiff claimed infringing his copyright by the defendant who published letters of the former president George Washington. The court held that despite some activities are inconsistent with the copyright statute, they do not give rise to liability because they constitute "Justifiable uses" or "Bona fide abridgments."<sup>107</sup> Followed by this decision, courts have been utilizing fair use defense in many cases, and, by the 20<sup>th</sup> century, courts started referring to fair use as a

---

<sup>106</sup> *Folsom v. Marsh* - 9 F. Cas. 342, 1841 U.S. App. LEXIS 468.

<sup>107</sup> *William Fisher, CopyrightX: Lecture 9.1, Fair Use: The History of Fair Use* (2015), 2:32-2:51, <https://www.youtube.com/watch?v=KV8dj-7WA4o>.

distinct legal issue. The fair use remained as a judge made doctrine, which was developed solely by courts, until it was codified under Section 107 of the 1979 Copyright Act.<sup>108</sup>

### **1. Fair User Under the US Copyright Act**

Section 107 of the 1976 Copyright Act laid down the fair use exception to copyrighted works, including the use by reproduction, phonorecords, or any other mean specified in that section, for the purpose of criticism, comment, news, reporting, teaching, scholarship, or research.<sup>109</sup> The statute added that there are certain factors that shall be considered when determining whether a use is fair or not. Such factors include: a) the purpose and character of the use, whether the use is of commercial nature or is for non-profit educational purposes; b) the nature of copyrighted work; c) the amount and substantiality of the portion used in relation to the copyrighted work as whole; and d) the effect of the use upon the potential market for value of the copyrighted work.<sup>110</sup> The language of the statute is clear in listing those factors as non-exhaustive factors.

Moreover, the language is clear that fair use is applied on all the exclusive rights granted to the copyright owner, including the Visual Artists Rights Act (“VARA”).<sup>111</sup> It is important to note that the statute did not provide any criteria for the courts to follow in assessing those four factors, and which of such factors shall weight more. Hence, fair use is considered a judge made doctrine, that is decided on ad hoc basis, considering the circumstances surrounding each case separately. For this reason, judges have been interpreting and applying the fair use differently, which led to inconsistency in the case law invoking fair use that will be further illustrated in this Chapter.

### **2. Fair Use in Other Countries**

Developed countries other than the United States who does not adopt the fair use doctrine adopt other legal doctrines that are similar to the fair use. This includes the fair

---

<sup>108</sup> *Id.*

<sup>109</sup> Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012), Section 107.

<sup>110</sup> *William Fisher, supra note 107.*

<sup>111</sup> *Id.*

dealing doctrine adopted by the English and Canadian legal systems. The Supreme Court of Canada for instance, in its decision in *Society of Composers, Authors, and Music Publishers of Canada v. Bell Canada*<sup>112</sup> decided that the music previews provided for consumers through stream services before purchasing certain music, such as Apple's iTunes service, is considered a fair dealing for the purpose of search.<sup>113</sup>

In the United Kingdom, fair dealing was demonstrated in the *British Broadcasting Corp v. British Satellite Broadcasting Ltd.*, where the two companies, BBC and BSB, disputed over BSB's use of highlights from BBC's exclusive coverage of the World Cup finals tournament.<sup>114</sup> The court held that broadcasts were brought within the general set of fair dealing defenses.<sup>115</sup> Moreover, The Court of Appeal, in the *Pro Sieben Media AG v. Carlton Television Ltd.*, considered the practice of copying off air other broadcaster's programs as fair dealing.<sup>116</sup>

The role fair use or fair dealing doctrines play in limiting the constraint of copyright is of great importance in the realm of incentivizing creativity. Thus, scholars have been calling for the development of these doctrines in the direction of expanding their interpretation, removing the ambiguity of their application as well as setting clear criteria and measures of such application, and limiting the constraint of copyright to help in incentivizing innovation and creativity.

## **B. Underlying Case Law and Existing Inconsistency:**

The call to expand the interpretation and application of the fair use doctrine is grounded in the need for allowing more freedom and space for users to innovate new ideas, technologies and services that would contribute to the welfare and culture of the

---

<sup>112</sup> *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326.

<sup>113</sup> Supreme Court of Canada, *Supreme Court of Canada - SCC Case Information - Search* (2001), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9996/index.do> (last visited Mar 13, 2021).

<sup>114</sup> What is the defence of fair dealing in copyright law?., INBRIEF.CO.UK , <https://www.inbrief.co.uk/intellectual-property/defence-of-fair-dealing-in-copyright-law/>.

<sup>115</sup> Will Tovey, *Copyright - Should Fair Dealing be replaced by Fair Use* 12.

<sup>116</sup> Copyright: fair dealing, PRACTICAL LAW, [http://uk.practicallaw.thomsonreuters.com/3-100\\_9507?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](http://uk.practicallaw.thomsonreuters.com/3-100_9507?transitionType=Default&contextData=(sc.Default)&firstPage=true).

society. If the production of such ideas and innovations is restricted, it would result in a significant loss to the society. For Instance, the Google Books project has made a significant contribution to the society and culture<sup>117</sup> by gathering books from all over the world in one digital library and facilitating the process of searching. One can imagine if Google's activities in this project were not justified under the fair use doctrine, Google would have been subjected not only to very excessive compensational award, but also injunctive relief, which could have resulted in stopping of the project. This could lead to catastrophic loss for the society in terms of culture and welfare.

This argument is clearly demonstrated in *A&M Records, Inc., v. Napster, Inc., Case* (“*Napster Case*”).<sup>118</sup> Napster was a software application that allowed users to time shift and exchange copies of music recording through file sharing, in a model that is very familiar nowadays and similar to the time shifting model relied on in the *Betamax Case*. Following the rationale of the court's decision in the *Betamax Case*<sup>119</sup>, where the court justified the copying act of Sony through VCR machines as fair use, Napster anticipated that same outcome for the similarity between the activities involved in both cases. Nevertheless, the United States Court of Appeal found that Napster did not meet the criteria of fair use on the ground that the behavior of Napster individuals is commercial in nature, even though Napster did not take any money in exchange, they were involved in a behavior that avoids paying money.<sup>120</sup>

Napster was not the only corporation who was misled by its misinterpretation of fair use, Aereo also unsuccessfully anticipated its copying activities to fall within the fair use, assuming that they could base their fair use argument on similar arguments used in the Google Books and *Betamax* cases. The similarity between the facts revolving around *Betamax Case* and Aereo is striking. Aereo used to sell a service that allowed its subscribers to watch television programs over the internet at the same time that the

---

<sup>117</sup> Abraham Bell and Gideon Parchomovsky, *supra* note 12, at 705.

<sup>118</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>119</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>120</sup> William Fisher, *supra* note 73.

programs are broadcast over the air.<sup>121</sup> Also, Aereo provided another time shifting service for programs, allowing the users to record the program and watch it in another time.<sup>122</sup> Aereo assumed that their copying is justified under fair use.<sup>123</sup> Nevertheless, the US Supreme Court disagreed on the basis that Aereo's business was similar to the cable television service, regardless of the fact of how actual transmission was provided.<sup>124</sup> This decision raised scholars' concerns because of its impact on the cloud storage services. Scholars believed that services like Google Music and Dropbox that also transmit copyrighted content to users, were justified on the same basis of justification adopted in the *Betamax* case. Now, the court's decision in *American Broadcasting Cos., INC., v. Aereo, INC.*, ("*Aereo's Case*") casted a threat on such cloud storing services because they operate the same way Aereo operated.<sup>125</sup> Scholars, as well as dissent opinion pointed out a significant problem in *Aereo's* case: that the court did not provide in its opinion any clear criteria on the fact that Aereo's model was similar to that of cable television, which was one of the core facts that the court relied its decision.<sup>126</sup>

### 1. More Inconsistent Fair Use Court Decisions

Another example of the inconsistency in case law on fair use is seen in the contradicting decisions of three court in cases that involved very similar acts of use. First, the *Campbell v. Acuff-Rose Music, Inc.* ("*Campbell's case*"),<sup>127</sup> where a rap group called 2 Live Crew unsuccessfully sought to obtain a license from the music owner of Pretty Woman's song composition. Despite failure to obtain license, 2 Live Crew produced and published a parody to the song. The court ruled in favor of 2 Live Crew justifying their copying as fair use. The court stated that the music composition published by 2 Live Crew

---

<sup>121</sup> 13-461 *American Broadcasting Cos. v. Aereo, Inc.* (06/25/14), 35 (2014).

<sup>122</sup> Marc Pelteret, *supra* note 29, at 226.

<sup>123</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 706.

<sup>124</sup> Marc Pelteret, *supra* note 29, at 206.

<sup>125</sup> *American Broadcasting Cos. v. Aereo, Inc.*, *supra* note 121.

<sup>126</sup> Timothy B. Lee, *The Aereo case, explained*, VOX (2018), <https://www.vox.com/2018/11/7/18073200/aereo>.

<sup>127</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

constituted a parody to the Pretty Women's composition and added that "parody is an obvious claim to transformative value."<sup>128</sup>

The second comparable case is *Dr. Seuss Enterprises, L.P., v. Penguin Books USA, Inc.*<sup>129</sup>, where the defendants published "*The Cat NOT in the Hat*", a parody book of the O.J. Simpson Trial. The defendants assumed that their copying is justified under fair use based on its transformative nature. Yet, the court disagreed, and ruled that the defendants used materials in a style not favored by fair use doctrine.<sup>130</sup>

The third case which manifests the paradox in deciding on fair use argument, is the *Seltzer v. Green Day, Inc.* In this case, Mr. Seltzer was the owner of a poster of a Shrieking Woman's face "*a la Munch*" a poster that publicly spread in Los Angeles. The defendant, Green Day, used in the background of one of his songs a transformative version on the poster. The Court of Appeal demonstrated that Green Day's act of copying justified under fair use, on the basis that the purpose and character of the use was transformative, because "the video altered the expressive content or message of the illustration."<sup>131</sup> These three cases demonstrate the existing unclarity and lack of determinative criteria on the application of fair use doctrine that lead to different outcomes in very similar cases.

Moreover, the court's decision in the *Castle Rock Entertainment, Inc., v. Carol Publ. Group* ("*Trivia Book Case*")<sup>132</sup> mirrors confusion in the interpretation of fair use, and the overlap between two main concepts; parody or creating a transformative work out of the existing work and producing a derivative work. In the *Trivia Book* case, the defendant published a book of trivia questions about the events and characters of *Seinfeld* television series.<sup>133</sup> The court found that the use was not justified under fair use and that

---

<sup>128</sup> William Fisher, *supra* note 107.

<sup>129</sup> *Dr. Seuss Enters., LP v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

<sup>130</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 682.

<sup>131</sup> *Green Day Wins Fair Use Claim*, CENTER FOR ART LAW (2013), <https://itsartlaw.org/2013/08/09/greenday-wins-fair-use-claim/>.

<sup>132</sup> *Castle Rock Entm't, Inc. v. Carol Publ. Group, Inc.*, 150 F.3d 132 (2d Cir. 1998).

<sup>133</sup> *Id.*

it affected the copyright owner's right to make derivative work out of Seinfeld in the form of Trivia Books.<sup>134</sup>

Another interesting decision, in the *Warner Bros. Entertainment, Inc. v. RDR Books*,<sup>135</sup> where the court found that there is transformation in the work, yet it ruled that the use was not fair. In this case, the defendant planned to publish Harry Potter encyclopedia that includes people, places and things from the Harry Potter novel. In its ruling, the court held that the work is indeed transformative in character; however, the significance of this transformative nature is diminished because of the verbatim copying of some of the entries from the novel. Thus, the court ruled that the use is not fair.<sup>136</sup>

In another decision which its fair use arguments were plausible, the court decided \$1 Million damages to the plaintiff. In the *L.A. Times v. Free Republic*, the defendant Free Republic owned a website where the members used to post newspapers published articles and add remarks or commentaries for other users of the website, who as well read the commentaries and also added their comments.<sup>137</sup> The court based its decision in denying the fair use justification on the fact that even though the character of the use is not commercial, the defendant failed to demonstrate the necessity of the verbatim copying they made to the articles.<sup>138</sup>

The above-mentioned decisions, along with many other decisions, do not only show the inconsistency of courts' decisions with regard to the interpretation and application of fair use, but they also show the effect of such decisions on the production of creative works, as well as their impact on motivating creation and innovation. A critical decision that manifests such outcome is the court's decision in the case involving "MP3.com." In the *UMG RECORDINGS, INC. v. MP3.COM, INC.* ("MP3.com Case")<sup>139</sup> the Plaintiff's

---

<sup>134</sup> *Id.*

<sup>135</sup> *Warner Bros. Entm't Inc. v. RDR Books* - 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

<sup>136</sup> *Id.*

<sup>137</sup> *L.A. Times v. Free Republic* - No. CV 98-7840 MMM (AJWx), 2000 U.S. Dist. LEXIS 5669 (C.D. Cal. Mar. 31, 2000).

<sup>138</sup> *Id.*

<sup>139</sup> *UMG Recordings, Inc. v. MP3.com*, 92 F.Supp.2d 349 (S.D.N.Y. 2000).



record companies sued MP3.com for copying their recording to MP3 computer servers, and replaying the recording for MP3 subscribers.<sup>140</sup> MP3's model was based on ripping the CDs into a data base that MP3.com used to provide for its subscribers who already owned the CDs offered. Even though MP3 had purchased the CDS from which it ripped the music of, and offered the service to its users who had previously purchased the CDS, which means that both MP3 and its users had already paid the music owner compensation for their use, the court denied the fair use defense and obliged MP3 to pay \$53.4 million as compensational damages for its infringing use.<sup>141</sup>

The same outcome was reached in the *Infinity Broadcasting Corp, v. Kirkwood*,<sup>142</sup> where Kirkwood operated Media Dial-Up service that allowed consumers to listen to radio broadcasts, which they already paid for, in remote cities over the phone. The court of appeal held that Kirkwood's retransmission was not fair use, on the basis that the nature of the use itself was not transformative.<sup>143</sup>

Another decision that reflects how courts can award very excessive damages in a plausible fair use defense is the court's decision in *Lowry's Reports, Inc. v. Legg Mason ("Legg Mason Case")*.<sup>144</sup> The court awarded \$19.7 million compensational damages to be paid by Legg Mason, who is a subscriber of Lowry's financial newsletters and his employees made copies of some of the newsletters for their internal research and analytical use.<sup>145</sup>

## 2. Appropriation Art and Fair Use

Lastly, I will discuss below the problem of appropriation art and how courts perceive this type of art, and the impact of such perception on the innovative productions on this art. Appropriation art is a type of art that artists produce using preexisting objects or images in their art with little transformation of the original. Appropriation artists' intent

---

<sup>140</sup> *Id.*

<sup>141</sup> Ruth Gana Okediji, *supra* note 32, at 462.

<sup>142</sup> *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998).

<sup>143</sup> *Id.*

<sup>144</sup> *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737 (D. Md. 2003).

<sup>145</sup> Ruth Gana Okediji, *supra* note 32, at 463.

is that the viewer recognizes the images they copy. They claim their work is not infringing on the basis of fair use.

Jeff Koons is considered one of the most famous appropriation artists. In *Blanch v. Koons* case, the plaintiff (Blanch) alleged that Koons infringed his copyright in a photograph, by incorporating a portion of this photograph in collage painting created by Koons. The court found that Koons copying was justified under fair use on the basis that Koons's appropriation photograph was intended to be transformative.<sup>146</sup> On the other hand, the court in *Rogers v. Koons* case, where Koons copied a portrayal of a couple and their puppies, denied justifying Koons's work under fair use.<sup>147</sup> The court explained its decision on the basis that the photograph was not famous to be known to viewers of Koons's work.<sup>148</sup> In addition, the court stated that Koons could have copied parts of the work instead of copying the wholesale work, and it was not persuaded of the critique nature of the sculpture.<sup>149</sup>

Another significant decision that involved appropriation art, is the *Cariou v. Prince*,<sup>150</sup> where the plaintiff (Cariou) brought action against an art gallery and its owner, claiming that the artist copied thirty of his photographs of Jamaicans.<sup>151</sup> The Court of Appeal found that 25 of the artworks are justified under fair use, because they were transformative and provide total different aesthetic. While, the court did not deal with the remaining five artworks and left it to the district court to decide on them.<sup>152</sup>

Accordingly, the problem of appropriation art remains unsettled, while the appropriation artists are constantly exposed to the risk of being disputed before courts. It is also clear that court decisions are unpredictable, which accordingly makes it impossible for appropriation artists to foresee the risk of creating their art; thus, establishing another exacerbation element to the process of creation and invocation remains.

---

<sup>146</sup> *Blanch v. Koons* - 467 F.3d 244 (2d Cir. 2006).

<sup>147</sup> *Id.*

<sup>148</sup> Marc Pelteret, *supra* note 29, at 237.

<sup>149</sup> *Rogers v. Koons* - 960 F.2d 301 (2d Cir. 1992).

<sup>150</sup> *Cariou v. Prince* - 714 F.3d 694 (2d Cir. 2013).

<sup>151</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 702.

<sup>152</sup> *Cariou v. Prince* , *supra* note 150.

### C. Demands of a Clearer Fair Use Doctrine:

Fair use stands as one of the significant limitations on copyright. Not only does fair use promote creativity, through granting the users freedom to use pre-existing works in their creations, but it also protects socially desirable uses, regardless of their transformative nature, such as scholarship and news reporting.<sup>153</sup> Some literature has been calling for extended interpretation of fair use and the “transformative” nature of the works, as it is believed to be the key factor that courts consider when examining a fair use claim. Economists perceive fair use as the doctrine balancing between the right of public and their interest to access works and the right on authors and their interest of benefiting from the works they created on the other hand.<sup>154</sup> Ruth Okediji illustrated the importance of fair use on the welfare of the society by stating “the welfare concern... [is] preserving the measure of balance between owners and users of copyrighted goods through fair use ...[which] has served to provide a resource for future creativity.”<sup>155</sup>

The quantity and limits of copyright exceptions that preserves the mentioned balance is the point of debate between scholars. The difficult question here is to what extent shall the scope of fair use apply. Fishman stressed on this difficulty by saying: “how board or narrow constraint scope should be to promote creativity is ultimately a difficult empirical question that psychologists have yet to resolve”<sup>156</sup>

#### 1. Impact of Fair Use on Different Fields

In assessing how public welfare could be impacted by the interpretation of fair use doctrine, I will refer to its impact on various important fields like journalism, education and arts. For instance, according to a study in which 81 journalists were interviewed, they have stated that they received conflicting fair use advises in their studies and field of

---

<sup>153</sup> Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM LAW REV. 2537 (2009).

<sup>154</sup> Ruth Gana Okediji, *supra* note 32, at 146.

<sup>155</sup> Ruth Gana Okediji, *supra* note 32, at 168.

<sup>156</sup> Joseph P. Fishman, *supra* note 10 at 1385.

work.<sup>157</sup> Copyright is perceived as an impediment to the freedom of expression, which impair journalists in performing their work, thus it is common to rely on fair use to justify their copying. Nevertheless, courts' decision in this regard does not help in easing the problem; especially, where the awards in copyright infringements have been described as excessive despite of the plausible fair use defense and regardless of the existence of very minimal or close to zero damages. This exposes journalists to liability risk.<sup>158</sup> After all, the court, in *L.A. Times v. Free Republic*, found that New York Times's use was infringing.<sup>159</sup> Moreover, the court ruled in *Nuñez v. Caribbean International News, Corp.* that generally unlicensed use of professional journalism photographs is infringing; however, there could be fair use arguments to journalism mission.<sup>160</sup> The language used by the court is clear manifestation of the ambiguity of fair use concept that lead to the existing confusion among journalists on the concept. Moreover, such an unattractive work environment would hinder journalists from achieving their mission, which accordingly results in loss of societal welfare since journalism plays a significant role in generating the self-understanding of the society.<sup>161</sup>

Further, fields are also affected by the application of fair use, specifically the fields that directly relies on fair use in justifying their copying regardless the degree of transformation added to the work. Scholars fear that these non-transformative beneficial uses are undervalued, such as the cases for pure copying for educational, research and teaching purposes.<sup>162</sup> Professor Fisher in his Copyright course stated explicitly that some parts of the course materials are licensed, while he relied on fair use for the most materials.<sup>163</sup> Had fair use doctrine been clear enough, professor Fisher would have solely relied on it in providing the educational materials used in his course.

---

<sup>157</sup> Patricia Aufderheide, Jan Lauren Boyles & Katie Bieze, *Copyright, Free Speech, and The Public's Right to Know*, 14 JOURNAL. STUD. 875–890 (2013).

<sup>158</sup> Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009), at 460.

<sup>159</sup> *L.A. Times v. Free Republic*, *supra* note 137.

<sup>160</sup> *See* Patricia Aufderheide, Jan Lauren Boyles & Katie Bieze, *Supra* note 157.

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

<sup>162</sup> Kathleen K. Olson, *The Future of Fair Use*, 19 COMMUN. LAW POLICY 417–432 (2014).

<sup>163</sup> Marc Pelteret, *supra* note 29, at 211.

Finally, in the context of art, as discussed earlier, appropriation art mainly relies on the fair use doctrine. The artists are constantly exposed to risk considering the inconsistency in court decision in regard to copyright infringements. The decisions have varied between justifying the use as fair or not on different considerations including assessing the degree of transformation of the new work. This is a complex approach considering that appropriation is a type of art that is based on copying existing photographs. This explains scholars' concerns on demotivating the creation and production of appropriation art. Jacqueline Morley described this concern by stating that "the future of appropriation art within copyright law will be protected by perpetuation of the fair use doctrine."<sup>164</sup> She argues that the transformation factor of fair use remains unclear and courts does not employ a certain criterion in their assessment of the degree of transformation and the fair use in general. Professor Fisher also underlined the problem of the unclarity of the term "transformative" in the context of fair use doctrine.<sup>165</sup>

Consequently, even though arguments are divided on the extent of application of fair use, there is an agreement that the notion of fair use is still unclear and needs to establish a sort of criteria for the courts to follow to avoid the inconsistency of case law and unpredictable court decisions.

## 2. Expansion of Fair Use Application

Fair use doctrine is an important doctrine in the realm of copyright, since many authors rely on its justification for copying existing works in the process of creating new works, in addition to its benefits in justifying copying for criticism, comment, news, reporting, teaching, scholarship, or research as stated in the Copyright Act.<sup>166</sup> Moreover, some types of arts depend mainly of its justification for its survival, like the appropriation art discussed earlier. Appropriation art would have ceased to exist if it had no chances of

---

<sup>164</sup> Jacqueline Morley, *The Unfettered Expansion of Appropriation Art Protection by the Fair Use Doctrine: Searching for Transformativeness in Cariou v. Prince and beyond*, 55 IDEA 385 (2015).

<sup>165</sup> *Id.*

<sup>166</sup> Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).

justifying the copying under the fair use doctrine. Thus, fair use plays a key role in nourishing the welfare and culture of the society. Nevertheless, as earlier demonstrated, the interpretation of the fair use itself and its characteristic and features as a doctrine are not clear. Accordingly, there is a unified call from scholars requiring intervention that establishes clear standards on the interpretation of fair use and a measuring criteria for the factors that court needs to consider in determining whether a certain use is fair or not.

A sort of confusion arises from scholar calls for the expansion of copyright subject matters which is thought to be contradicting with the calls for the expansion of fair use. This confusion needs to be clarified. Expanding subject matters of copyright does not conflict the expansion of fair use doctrine as including new technologies and inventions in the scope of copyright protection is one thing, and allowing fair copying, in whole or in part of these protected inventions as a material used in producing a new creation or invention, is another distinct thing.

While there is an existing consensus regarding the need of developing a clearer fair use, there is a necessary fact that needs acknowledgment under this context; despite of all the efforts that can be made in developing the concept of fair use, it will never be able to embrace the rapid development of technology and digital communication innovations. Technology which its developments and innovations has made it hard for judges to comprehend all its related factors, including its creation, importance, role, impact, among many other factors, to be able to consider such factor when deciding to copyright infringements disputes specifically those which contain fair use defense.

Thus, scholar's calls need to be shifted from demanding the development of the interpretation of a doctrine, that will require constant development to cope with technology, to a more stable aspect that would impact fair use application, with less need for development. This type of development can be made through analyzing the copyright infringement and remedial system, which will be discussed in the next chapter.

## **V. Copyright Infringement System and Proposed Reforms**

It has been explained that Copyright entitles authors with exclusive rights to control the use of their creations. Without obtaining copyright owner's consent, users will not be able to use the copyrighted work, subject to the exceptions stated by law such as the compulsory licenses, first sale, and fair use doctrines. Accordingly, any unauthorized use of copyrighted work, that has not been explicitly permitted by law, is considered a copyright infringement. which entitles the copyright owner to claim remedies in accordance with the law. Because of the ambiguity of the interpretation of copyright doctrines that is earlier explained, particularly the interpretation of fair use doctrine being the most used in justifying the use of copyrighted works, it should be analyzed whether eliminating this ambiguity is the optimal reform required for the copyright system from the perspective of maximizing innovation and creativity, or reforms should better address different aspects of the law, particularly the infringement and remedial system.

In this chapter, I will analyze the last problem of copyright system, that is, the unified structure of the copyright's infringement system and how this structure affects the rights of users and its indirect impact on achieving the copyright goal of incentivizing creativity. Structurally, I will start by explaining the current copyright infringement system and remedies available therein. Then I will explore its impact on the process of creativity through analyzing the case law, and emphasizing the outcome in the context of incentivizing creativity and innovation. Finally, in this context, I will display and analyze the suggested reform proposals to the current system.

### **A. Infringement System**

The structure of the copyright infringement system is featured as a unified infringement system, that does not differentiate between different types of infringements. Once an infringement is established, there are certain remedies available to be claimed by the copyright owner, regardless of the type of infringement and facts surrounding it.

## 1. Establishing Infringement and available Remedies

Section 102 of the Copyright Act provides protection to authors of original work that is expressed and fixed in any tangible medium.<sup>167</sup> The Copyright Act includes 8 Subject matters of copyright's protection: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculpture works, motion pictures and audiovisual works, sound recordings, and architecture works.<sup>168</sup>

Section 106 grants copyright owners certain type of monopoly over their created works, by allowing them to exclusively enjoy four economic rights: 1) the right to reproduce the copyrighted work; 2) the right to make modifications to the work "derivative works"; 3) the right to control distribution; and 4) the right to control public performances of the work.<sup>169</sup>

Anyone who violates any of the exclusive rights granted to the copyright owner is an infringer of the copyright of the owner, which entitles the copyright owner to institute an action against any infringing act committed. The copyright infringer, according to section 504, is liable for either the actual damages suffered by the copyright owner in addition to any additional profits of the infringer, or statutory damages.

Section 504 (c) grants the copyright owner whose work is registered the option to elect to receive award of statutory damages for all infringements involved in the action, instead of the actual damages and profit stated in 504 (b). The amount of statutory damages award shall range between \$750 to \$30,000 per infringed copyrighted work. The second paragraph of the same section adds if the court found the infringement is willful, the amount of statutory damages award may increase to \$150,000 per infringed work.

The strict language of the statute identifies clearly an infringer as a person who, without authorization, performs one of the acts that are exclusively reserved for the copyrights owner, regardless the state of mind of the infringer and the degree of

---

<sup>167</sup> Copyright Acts of 1976, 17 U.S.C. §§ 101-1332 (2012), Section 102.

<sup>168</sup> *Id.*

<sup>169</sup> Marc Pelteret, *supra* note 29, at 156.



culpability. Once the act is established there is a single standard compensatory scheme, except in the case where the defendant's conduct was willful, as such, the range of statutory damages could be increased to the sum stated in section 504 (c).<sup>170</sup> The statute then adds that statutory damages are applied in the cases of plausible fair use defense, where the infringer believed that his or her use of the copyrighted work was fair use.

## 2. Features of Infringement System

The structure of statutory damages bases its calculation on the “per infringed work” standard. Which means that the key element here is the number of works the defendant has infringed and not the occasions on which the defendant has engaged in an infringement. This language may seem clear enough; nevertheless, it illustrates one of the problems of ambiguity of the system, that lead users to misinterpreting the law and being exposed to the risk of facing excessive damages. Determining the number of infringed work could be confusing; for instance, in the incident of ripping a CD containing many sound recordings, the infringement could either be considered as one infringement since it is only one CD that was ripped, or could be considered as multiple infringements in proportionate to the number of ripped sound recordings.<sup>171</sup> In some cases the confusion gets more complicated; for instance, if some made a derivative work out of an existing one, and produced several and different copies of this created derivative work, how would the number of infringements be calculated. It could either depend on the number of copied works, the number of the different types of produced derivative work, or even the number of the copies made in each type of derivative work. Neither the statute nor the courts laid down a certain criterion for the calculation of the number of infringed work to satisfy the “per infringed work” structure of statutory damages.

In addition, by examining the case law, it is observed that the “per infringed work” structure in statutory damages leads to excessive statutory damages awards, which tends to disregard the amount of harm suffered by the copyright owner and the benefits gained

---

<sup>170</sup> Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012), Section 504.

<sup>171</sup> William Fisher, *Copyright X, Lecture 12.2, Remedies: Damages* (2015), 16:57, <https://www.youtube.com/watch?v=8fv5FF0zugU&feature=youtube>.

by the infringer, as well as disregarding the degree of culpability of the infringer. This structure voluntarily forces the copyright owner to elect the statutory damages reward option, because it automatically waives the burden of proof. In such cases plaintiffs will neither need to prove that they actually suffered any damages, nor that the infringer made any profits. Only in the cases where it is proved that the conduct of the infringer was willful, regardless of his or her good faith or the degree of culpability, the award will be maximized to reach \$150,000 per infringed work.

Moreover, the copyright infringement system is distinguished for having a single standard of liability and a single standard of compensatory scheme.<sup>172</sup> Once an exercise of one of the exclusive rights of the copyright owner is performed, the liability is established. The courts do not consider the degree of culpability of the infringer, his state of mind, or the efforts made to avoid infringing. Neither will courts take into consideration the unclarity of the law that leads to the misinterpretation of the use or the infringing act. Thus, infringement is established so long as there is a copyright owned by someone and the unlicensed exercise of one of the exclusive rights conferred upon the copyright owner.

Furthermore, the statute grants the plaintiff the right to ask for injunctions. Section 502 of the Copyright Act allows the court to grant temporary or permanent injunctions as it may deem reasonable to prevent or restrain infringement of a copyright.<sup>173</sup> Before 2006, courts were likely to grant injunctions, whether permanent or temporary, in most of the copyright disputes. The courts were likely to grant injunctions once there exists a presumption of irreparable harm.<sup>174</sup> After 2006, precisely after the Supreme Court's decision on *eBay v. MercExchange*<sup>175</sup> (a case that involved patent right infringement, in which the court had to decide on the question of whether injunction reliefs are proper in

---

<sup>172</sup> Abraham Bell and Gideon Parchomovsky, *supra* note 12, at 711.

<sup>173</sup> Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012), Section 502.

<sup>174</sup> Marc Pelteret, *supra* note 29, at 310.

<sup>175</sup> *eBay Inc. v. MercExchange, L.L.C.* - 547 U.S. 388, 126 S. Ct. 1837 (2006). The defendant eBay operated a website on which sellers used to show items they wish to sell, the business method patent for the designed electronic market that the website relied on was owned by the plaintiff, who entered into unsuccessful negotiations with the defendant to license the patent rights. Despite the failure of negotiations, eBay proceeded with publishing the website.

patent disputes) courts started to change their practice.<sup>176</sup> Currently, it became harder for courts to grant injunctions in copyright infringements; however, courts created a new compulsory licenses notion. Where the court determines an amount to be paid for the copyright owner against allowing the continuation of the work, in equivalence with the license fees if the use was permitted. Plaintiffs do not have the right to deny this fee and restrict the continuation of the work, they are obliged to accept this amount of fee and tolerate the continuation of the work.<sup>177</sup>

Finally, the court allows plaintiff that prevails in a copyright infringement dispute to recover the court's cost and attorney's fees. It is important to note here that attorney's fees, specifically in the United States, can be very high.<sup>178</sup>

After describing the remedies available for a copyright owner against any infringement for his or her exclusive rights guaranteed by the statute and granted by virtue of copyright, it could be observed that, if a potential infringer did not escape liability and the infringement was determined, he or she will be exposed to heavy damages. If the plaintiff selected to claim the remedies available under section 504(b), the infringer will not only forfeit all the profits they gained, but will also compensate the damages suffered by the copyright owner. If the plaintiff selected to claim statutory damages, then the infringer will be subject to the amount of penalty that jury elects in accordance with Section 504 (c). There is also possibility for the payment of license fees; the new notion taking injunctions role. In addition, the court's cost and attorney's fees if the plaintiff prevailed. These remedies created an unfavorable environment for the users to feel free to express their innovations, use existing works and build on them, and produce their expressive contributions to the society. Such remedial structure puts users under pressure of the fear of expanding their use and expressing their ideas in an infringing way. After explaining the remedial structure of copyright infringements, we

---

<sup>176</sup> Marc Pelteret, *supra* note 29, at 311.

<sup>177</sup> *Id.*, at 312.

<sup>178</sup> *Id.*

will turn to the awarded remedies and analyze the courts application of this structure, and its impact on achieving the goals of copyright.

## **B. Awarded Remedies and Innovation Anxiety**

The remedies awarded by courts in cases of copyright infringement are often described as unpredictable, inconsistent and excessive. This shakes the users trust in the system and causes frustration in expressing their ideas the way they wish. This outcome is not promising and has its adverse impact on the society. In explaining this outcome, it has been observed that “the penalties that are imposed on all unauthorized users comes with a social cost: they drive away potential users of copyrighted content who derive positive value [to the society].”<sup>179</sup> This is clearly seen by analyzing the case law on copyright infringements. The inconsistency of court’s decisions pertaining the adoption of the fair use doctrine was earlier illustrated in chapter three. However, this inconsistency is not limited to the application of fair use. There is also inconsistency in interpreting other copyright doctrines such as the idea/expression dichotomy and the inspiration/copying distinction, as well as other terms and doctrines that are not the focus of this research.

In addition, the inconsistency of court decisions is extended to decisions on the compensations and remedies in cases of copyright established infringement. Furthermore, it has been noted that such decisions are often excessive. Awards of damages are described as excessive when they are not proportional and far exceeds the actual damages suffered by the copyright owner.<sup>180</sup> For instance, in cases of weak evidence of willfulness and where the infringer is not a repeat and awarding high amount of damages would be described as excessive, because the ratio of punitive to actual damages in exceptionally high.

---

<sup>179</sup> Adi Libson and Gideon Parchomovsky, *Toward the Personalization of Copyright Law*, The University of Chicago Law Review, Vol. 86, No. 2, Symposium: Personalized Law (March 2019), at 527-550.

<sup>180</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 477.

In this section I will present some contradicting court decisions in awards with very similar facts. In addition, I will refer to decisions where minimum amount of available damages were awarded despite of the existence of high degree of culpability, evidential damages suffered by the copyright owner and profits made by the infringer like in counterfeiting cases. I will explore on the other hand decisions where there is zero or minimal degree of culpability, or plausible fair use defense and awards of maximum or heavy amount of damaged were rendered, even when the nature of the use was not profiting. This inconsistency of court decisions is the outcome of the structure of copyright system, which comprises unclear terms that are left for judges to interpret on ad hoc basis according to the facts surrounding each case. Hence, I argue that this unclarity of the law and inconsistency of court decisions, as well as the excessive awards rendered in some cases, creates anxiety for users when deciding to use copyrightable works in their new creations. This has its outcome of incentivizing innovation and creativity.

The damages awarded in *Corp. v. Harrison's Music, Ltd.*<sup>181</sup> manifests the risk exposure composers face in expressing their creations. George Harrison who has heard *The Chiffons*, “*He’s So Fine*” song six years earlier to his composition, was alleged to have copied its composition in his composition of *My Sweet Lord*. Although the Court of Appeals found that he was not aware of his copying during recording the song. Nevertheless, the court found substantial similarity between the two compositions and ordered \$1.6 million as a compensation of the infringing act. In its decision, the court laid down the following principle in stating “it is settled that the intention to infringe is not essential under Copyright Act.”<sup>182</sup>

In another resembling case, where Robin Thicker was accused to copy the work of Marvin Gaye’s “*Got to Give It Up*” composition in his “*Blurred Lines*” collaboration with Pharrell Williams.<sup>183</sup> The court found that the similarity between the two works raised to the level of “improper appropriation” and awarded the plaintiff \$5.6 million

---

<sup>181</sup> *Bright Tunes Music Corp. v. Harrison's Music, Ltd.* - 420 F. Supp. 177 (S.D.N.Y. 1976).

<sup>182</sup> Marc Pelletier, *supra* note 29, at 159.

<sup>183</sup> *Williams v. Bridgeport Music, Inc.*, Case No. CV13-06004-JAK (AGRx) (C.D. Cal. Dec. 2, 2015).

damages, in addition to 50% of future proceeds of the song, that were reduced subsequently to \$3.5 million, and the suspension of the 50% royalty of future proceeds.<sup>184</sup>

In these two cases, the damages awarded are substantially harsh for unintentional copying, specifically since the boarder lines separating between what constitutes infringing copying and licit inspiration are not clear. In addition, the lines determining when the use is fair and when it is not, is also unclear. In this context, *Campbell's* case can be recalled and how the court demonstrated there was actual intentional copying; nevertheless, because of the transformative nature of the created work the copying was justified under fair use.<sup>185</sup>

On the other hand, in *Arclightz & Films Pvt. Ltd. v. Video Palace, Inc.*<sup>186</sup> a counterfeit infringement in which the defendant distributed unauthorized copies of a motion picture, despite the willful conduct and high degree of culpability the court awarded \$750 (the minimum amount of statutory damages available). In this case the defendant reproduced and distributed DVD and VHS copies of a movie that were either sold or rented to consumers.<sup>187</sup> Thus, it could be noted that the intend to infringe is not an aggravating factor. Yet, in a much similar case, *Macklin v. Mueck*<sup>188</sup>, the court ruled \$300,000 award for posting two poems over the internet. The two cases include similar circumstances and defendants who are both involved in willful copying act; nevertheless, the awarded damages were contradicting. The court awarded the minimum amount of statutory damages available in one case and the maximum amount of statutory damages available in the other case. The basis of the courts decisions is not clear. This illustrates the unclarity and inconsistency of court decisions. Setting such wide range of statutory damages, ranging between \$750 to \$30,000 and up to \$150,000 in willful infringements, without establishing the criteria upon which courts could refer to in calculating the

---

<sup>184</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 681.

<sup>185</sup> *Campbell v. Acuff-Rose Music*, *supra* note 127.

<sup>186</sup> *Arclightz and Films Pvt. Ltd. v. Video Palace Inc.*, 303 F. Supp. 2d 356 (S.D.N.Y. 2003), JUSTIA LAW, <https://law.justia.com/cases/federal/district-courts/FSupp2/303/356/2504197/>.

<sup>187</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 479.

<sup>188</sup> *Macklin v. Mueck*, 373 F. Supp. 2d 1334 (S.D. Fla. 2005).

amount of damages is controversial, and leads to the criticized inconsistency of court decisions.

Another excessive award of statutory damages in a plausible fair use case, is the court's decision in the *L.A. Times v. Free Republic*<sup>189</sup>, where the court rendered an award of \$1 million. This decision is deemed excessive considering the nonprofit nature of the use and the facts of the case earlier explained, where L.A Times owned a website that posted news articles for commentators to express their thoughts on liberal bias.<sup>190</sup> The court also rendered a similar excessive award of \$ 19.7 million in *Lowry's Reports, Inc. v. Legg Mason*<sup>191</sup>. According to the facts of the case, Legg Mason's staff made a copy of Lowry's newsletter, to which Mason was a subscriber. The purpose of copying was for internal research use. On this basis, Legg Mason thought their use was fair. Nevertheless, despite the copying was not made directly by Mason and the nature of the use of copying was analysis for internal use, the court did not justify the copying under fair use doctrine and ordered \$82,000 damages per infringed work. Whereas a contradicting decision was issued in *Quinto v. Legal Times of Washington Inc.*<sup>192</sup>, a case which have very similar facts. The court awarded \$250 (the minimum amount of statutory damages available) against Legal Times of Washington newspaper that published a Harvard law school student's article.<sup>193</sup> Which is another manifestation of both facts featuring case law in copyright infringements, excessiveness of some of the awards and inconsistency.

Moreover, in disputes around broadcasting activities, courts issued two contradicting decisions. In *Feltner v. Columbia Pictures Television, Inc.*<sup>194</sup> ("Feltner case") the court awarded damages of \$20,000 per infringed work, which resulted in \$8.8 million. The case involved licensing agreement of several television series; Columbia Pictures sought to terminate the broadcasting licenses when Feltner was delinquent in paying its royalties. The Jury rendered even larger statutory damages award amounting

---

<sup>189</sup> *L.A. Times v. Free Republic*, *supra* note 137.

<sup>190</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 460.

<sup>191</sup> *Lowry's Reports, Inc. v. Legg Mason, Inc.*, *supra* note 144.

<sup>192</sup> *Quinto v. Legal Times of Washington, Inc.*, 506 F. Supp. 554 (D.D.C. 1981).

<sup>193</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 475.

<sup>194</sup> *Feltner v. Columbia Pictures Tv* - 523 U.S. 340, 118 S. Ct. 1279 (1998).

\$72,000 per infringed work that resulted in total award exceeding \$31 million.<sup>195</sup> In *Infinity Broad. Corp. v. Kirkwood* the court rendered a contradicting decision.<sup>196</sup> Recall Kirkwood operated Media Dial-Up service and allowed consumers to listen to radio broadcasts they already paid for. Even though the infringing act is similar to the act of *Feltner* Case, the court awarded the minimum amount of statutory damages available, because fair use claim was plausible.<sup>197</sup>

Decisions including infringements of file sharing are also provocative. For instance, in *Sony BMG Music Entertainment v. Tenenbaum*, the court awarded \$22,500 per infringed work against a student for illegal file sharing. The award resulted in total of \$675,000.<sup>198</sup> In *Capitol Records, Inc. v. Thomas Rasset*<sup>199</sup>, a case that included file sharing for 24 sound recordings. The court decided \$80,000 statutory damages for each infringed work, despite the court's recognition that the actual damages were evaluated to approximate \$50. While the total award exceeded \$1.92 million.<sup>200</sup> Today the use of file sharing and online streaming websites is popular among individuals, who are mostly not aware of the infringing nature of their acts, and even if they acknowledge the infringing nature of their act, they are not aware of the consequences of this infringing act and the amount of remedies they could be exposed to. There have been several incidents where copyright owners deceitfully uploaded content on internet websites to induce users to use this content and then threaten to sue them.<sup>201</sup> This happened in the case where two attorneys uploaded pornographic films on the internet and threatened to sue the individuals who downloaded these films.<sup>202</sup>

The underlined case law reflects the copyright's system composite environment. It is thought of as an unhealthy environment for inducing users to perform spontaneously and produce creative works for the society to benefit from. This environment is perceived

---

<sup>195</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 442.

<sup>196</sup> *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), *Supra* note 140.

<sup>197</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 474.

<sup>198</sup> *Sony BMG Music Entertainment v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013).

<sup>199</sup> *Capitol Records, Inc., et al v. Thomas-Rasset*, No. 11-2820 (8th Cir. 2012).

<sup>200</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 443.

<sup>201</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 732.

<sup>202</sup> *Id.*



as more biased towards copyright owners, who are often large firms that runs huge industries, or individuals that are attached to their works and seek earning its benefits to the extent of depriving the rest of the society from a significant part of its benefit, that is allowing the use of this work as a building material to produce new creative works.

Moving back to the utmost excessive awards of damages in the *MP3.com* case discussed earlier. The court issued an award that was described as extremely excessive, and “hardly necessary as a deterrent for a defendant who has not made a penny in profit of its use, and where the plaintiff had conceded that it could not prove any actual damages”<sup>203</sup>. When MP3 provided a beaming service to its consumer through MP3.com cloud to listen to CDS both MP3 and the consumer had already paid for, it involved in an act of use that is of great similarity to the act of use of Kirkwood in *Infinity Broadcasting Corp, v. Kirkwood*<sup>204</sup> case discussed before. The court rendered an award against Kirkwood with the minimum statutory damages available by law because the fair use claim was plausible and the plaintiff did not suffer real damages.<sup>205</sup> In contrast, in *MP3.com* case, the court issued and award \$53.4 million, despite the fact that the plaintiff could not prove any actual damages and that the fair use was plausible, especially when analyzed in the context of the *Betamax* case decision.<sup>206</sup> Likewise, the award of the *Feltner case*, in broadcasting copyright infringements whose facts were earlier illustrated, which amounted to \$31 million, is also considered as one of the most excessive awards.<sup>207</sup>

Copyright owners claim exaggerated damage in terms of the losses they suffer or the profit the user gains relying on statutory damages. In the *Napster* case for example, a German company extended \$80 million loan to Napster in an attempt to reach a settlement with the music recording companies.<sup>208</sup> In the Google books project, if the

---

<sup>203</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 442.

<sup>204</sup> *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), *Supra* note 192.

<sup>205</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 502.

<sup>206</sup> *Id.*, at 442.

<sup>207</sup> Calloway, Karen M. "Feltner v. Columbia Pictures Television, Inc." *Berkeley Technology Law Journal* 14, no. 1 (1999): 23-41. Accessed March 27, 2021. <http://www.jstor.org/stable/24115610>.

<sup>208</sup> Marc Pelteret, *supra* note 29, at 290.

court had not found the copying justified under fair use, it would have rendered an award amounting to \$4.5 billion if it settled for the minimum amount of statutory damages which is \$750 per infringed work. Noting that Google's act was willful so the amount of statutory damages that were to be available before the court could have reached \$150,000 per infringed work.<sup>209</sup> In *Arista Records LLC v. Lime Group LLC*<sup>210</sup>, a file sharing copyright infringement, plaintiffs claimed damages around \$75 billion damages.<sup>211</sup> Eventually, Lime Wire settled for \$150 million.<sup>212</sup>

Finally, it was stated that the statute grants the copyright owner the right to claim injunctions, as well as attorney's fees. Likewise, the damages awards, injunctions could be severe and attorney fees are presumably high. In *Metro-Goldwyn-Mayer, Inc. v. Honda Motor Co.* the court ordered as a preliminary injunction Honda Motor to post a bond with the amount of \$6 million (a large amount of injunctions).<sup>213</sup> In *Feltner* case, the court awarded Columbia \$722,621 in the motion of attorneys' fees, and \$30,646 in costs.<sup>214</sup> Moreover, in *BMG v. Cox*<sup>215</sup>, a contributory and vicarious infringement claim around peer to peer file sharing, the Court of Appeal vacated an award with \$8.4 million for attorney's fees and costs.

The enormous number of awards involving copyright infringements create a tense environment to inspire users' creation and innovation. It is very hard for users to predict the criteria courts rely on; neither in determining the establishment of an infringement, nor in determining the amount of statutory damages. Users face constant anxiety due to

---

<sup>209</sup> Pamela Samuelson, Phil Hill, & Tara Wheatland, A Rarity in Copyright Laws Internationally, But For How Long?, 60 J. Copyright Soc'y U.S.A.

<sup>210</sup> *Arista Records LLC v. Lime Group LLC*, 06 CV 5936 (KMW) (S.D.N.Y. Apr. 20, 2011).

<sup>211</sup> Pamela Samuelson, Phil Hill, & Tara Wheatland, *supra* note 209, at 12.

<sup>212</sup> Greg Sandoval, *Lime Wire settles with RIAA for \$105 million*, CNET, <https://www.cnet.com/news/lime-wire-settles-with-riaa-for-105-million/> (last visited Mar 28, 2021).

<sup>213</sup> *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.* - 900 F. Supp. 1287 (C.D. Cal. 1995).

<sup>214</sup> *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 152 F.3d 1171 (9th Cir. 1998).

<sup>215</sup> *BMG Rights Management v. Cox Communications*, No. 16-1972 (4th Cir. 2018). BMG alleged Cox's contributory liability for copyright infringement by granting its subscribers access musical compositions owned by BMG. The jury held Cox liable and awarded \$ 25 million statutory damages. While the court of appeal reversed the case due to errors in the jury instructions denying cox safe harbor defense.

their fear of being litigated and ending up with an unaffordable damages award. The use of today's technology and communication among the world requires wide and liability free access to knowledge and works. It is essential to grant users freedom to innovate and express their creations, as well as the permission to use existing works as a material for their creations – this is indeed acknowledged to foster the society and culture.

### **C. Proposed Reforms**

knowledge solutions like compulsory licensing and Creative Commons; establishing measuring criteria for statutory damages decisions; reforming infringement structure of copyrights; amending the copyright act; expanding the copyright's subject matter; and even limiting the grant of copyright as much as possible. This part will focus on analyzing some of the suggested reforms that control and minimize the copyright system's problems we discussed above.

#### **1. Calls for Reform**

As discussed earlier, strong copyright system limits the use of existing works and has a significant effect on the process of innovation and creativity. Economists have focused their scholarship on the discussion of copyright constraints and the impact of tightening or loosening such constraints on the production of creative and innovative works and its outcome on the social welfare. Part of this scholarship illustrates the importance of balancing between the rights of the copyright owners and the rights of the users of the copyrighted works to the public welfare. While there is consensus on the importance of having an incentive structured system that ensures the sustainable production of creative works and innovations.<sup>216</sup> The heated debate is centered around the extent of narrowing down the constraints and the borderline between narrowing down the constraints in a way that encourage and incentivize creativity, without extremely narrowing it down in a way that deprives authors from their exclusive rights granted by law through copyright.

---

<sup>216</sup> Ruth Gana Okediji, *supra* note 32, at 146.

It is observed that the stronger the copyright system is and the more constraints it enforces on copyright, the less freedom it provides for users to build on existing work and express their creations. The debatable issue among scholars is the extent of diminishing or eliminating these constraints so as not to dismantle the essence of copyright. There are no existing arguments in favor of permitting copying or imitating: the arguments incline towards allowing copying to a certain extent so long as it will lead to the production of a new transformative work that is beneficial to the society. The limit of copying that is allowed is the point of conflict between scholars.

Therefore, I will move on to analyze some of the proposed reforms suggested to mitigate the problems we earlier discussed, which would lead to creating a more proper environment that encourage creativity.

## **2. Reforms Addressing Sole Problems**

In this part, I will analyze reform proposals that focuses only one of the earlier discussed problems of copyright. Those proposal do not suggest a reform for the whole copyright system in an aim to restore the balance of the system. It rather aims to solve one problems that is considered a great obstacle in the creation process and its mitigation will incentivize creativity and flourish social welfare.

### **a. Fair Use:**

It had been earlier demonstrated that there is consensus among scholars on the unclarity of the fair use doctrine and the way of its application by courts. Hence, scholars have been calling for the reform and development of this doctrine and establishing clear criteria for courts to use in deciding on fair use disputes. One of these calls for fair use reform suggested changing the nature of fair use application, by applying fair use as a right to “alleviate some of the doctrine’s inherent problems and is the best long-terms solution for eliminating abusive litigation from copyright law.”<sup>217</sup> This proposed reform

---

<sup>217</sup> Lauren Gorab, A Fair Use to Remember: Restoring Application of the Fair Use Doctrine to Strengthen Copyright Law and Disarm Abusive Copyright Litigation, 87 Fordham L. Rev. 703 (2018). Available at: <https://ir.lawnet.fordham.edu/flr/vol87/iss2/7>.

targets the application of the doctrine by judges, as well as reform of the legislative and administrative framework of fair use.<sup>218</sup> Such proposal appears as an adequate solution for the problem of fair use and the inconsistency of its application through courts, whether in deciding on its adaption or on deciding on the damages compensated for infringements in plausible fair use cases.

Despite the agreement between scholars on the need of developing a clearer fair use doctrine. Yet, all efforts of law reform, to regulate copyright system by removing the identified vagueness of fair use and other involved terms (e.g., “transformative”), will not able to embrace the rapid development of technology and its related innovations, which makes it impossible for the reform of such doctrines like fair use to embrace all the new creative ideas and innovations. Thus, to focus on developing the fair use doctrine it will need constant reform, which is will not be easily implemented because of two main factors. First fair use is currently an ad hoc doctrine interpreted according to judges’ discretion which will take years to influence and change along with technological changes. Second, if the law aims to regulate the interpretation and application of fair use more clearly, it will not be easy to constantly change and reform the legislation with the rapid digital and technology development.

Thus, we cannot ignore the fact that regardless the number of amendments applied on the statue and the introduction of a measuring criteria that direct courts in deciding whether a certain use is fair or not; fair use would still not be able to accommodate the expedite progress of technology and digital communications. Between the time researchers identify a certain problem and calls for its reform and the time when the system actually responds to such calls, hundreds if not more of unforeseen new innovation would be produced. This will make it impossible for the statute and the adopted measures to embrace these new innovations in a way that mitigates the problem, and leads to a more clear and efficient application of fair use, to encourage users’

---

<sup>218</sup> *Id.*

expression of their ideas and works. Thus, copyright is situated in a position that needs frequent and fast change.

### **b. Personalizing Copyright Protection**

Another proposed reform is personalizing copyright protection based on the characteristics of copyright users and personalizing the damages awards based on the same characteristics.<sup>219</sup> This reform focused on the economic lens of copyright and achieving its optimum goal through taking measures that expand the benefits of the copyrighted work and reduce deadweight loss. It included the proposal to decide on statutory damages on the basis of consideration of the users' personal characteristics. The suggestion is that statutory damages shall be diminished if the infringers are not interested in purchasing the copyrighted content. In addition to introducing a whole liability exemption to certain group of users if their purchase expectancy is close to zero.<sup>220</sup> As said, this proposal focuses on maximizing the benefits of copyrighted works and reducing the deadweight loss from economic perspective, without referring to the core of copyright system problems that need adjustment, which basically revolves around the unclarity, unpredictability and ambiguity of the system.

### **c. Orphan Works**

Recalling chapter two that discussed the problem of orphan works and some suggested proposals to unravel it. This proposal is one of the proposals emphasized in the context of avoiding the cost of inconsistent court decisions and excessive remedial awards; however, it is especially designated to alleviate the orphan works problem.

It has been suggested that the use of orphaned work shall be interpreted within the realm of fair use doctrine. However, this suggestion is not evidently suitable, since fair use is a doctrine applied by courts on ad hoc basis according to each court's interpretation and justifications. This does not mitigate the threat that users fear in utilizing orphaned work, which would not have the expected impact of maximizing creativity. The problems

---

<sup>219</sup>See Adi Libson and Gideon Parchomovsky, *supra* note 179.

<sup>220</sup>*Id.*

of unclarity of fair use doctrine and its application by courts needs to be addressed and settled before considering incorporating orphan works within the doctrine.

An alternative, more suitable, adjustment is limiting the remedies available for the use of orphan works through a statutory exception or limitation. This adjustment was proposed by the US Copyright's Office. This limitation applies to good faith users who conducted reasonable diligent search in attempt to locate the owner of the orphan work; nevertheless, this search was unsuccessful, in addition to attributing the work to its author if possible.<sup>221</sup> Moreover, the proposal suggested limiting the scope of injunctions. This way the users' fear of the consequences of the reappearance of the copyright owner is alleviated, and thus the users can confidently use the orphaned work in their new creations. It will also encourage the users to provide the necessary information to be easily allocated to guarantee earning the benefits of their creation.

This suggestion seems constructively suitable, especially when applied properly through providing clear definitions and interpretation to its terms, especially by clarifying what is considered an orphan work, what is the criteria of the due diligence search and good faith requirements and so forth. Nevertheless, it only addresses one of the many problems of copyright system, leaving the remaining problems unsolved, which still impairs the process of creation and innovation.

### **3. Reforms Addressing Boarder Problems**

Reforms subject to this sub-section's discussion are addressing specifically the remedies awarded by courts in copyright infringements. The copyright owner, as explained in section one of this chapter, in claiming remedies for a copyright infringement has the right to elect either to receive an award with the actual damages he suffered in addition to infringer's profits, or elect receiving statutory damages. The first proposal that is discussed suggests a reform in statutory damages structure. While the second proposal suggests reform in the infringement structure itself and accordingly all available monetary damages.

---

<sup>221</sup> Hansen, David R., Kathryn Hashimoto, Gwen Hinze, *supra* note 76.

### a. Statutory Damages Reform

This proposal is suggested by Pamela Samuelson and Tara Wheatland to address the problem of statutory damages. They believed that statutory damages are perceived “frequently arbitrary, inconsistent, unprincipled and sometimes grossly excessive.”<sup>222</sup> This is due to the unclarity of copyright law in many of its aspect, in addition to the wide range of damages amount available for judges to decide on statutory damages. Moreover, there are no criteria or indication provided by the statute to guide the court or the jury in determining the appropriate amount of statutory damages. This proposal suggests reforms of the statutory damages regime which considers other damages provided by the Copyright Act to deter infringements, in addition to developing principles that would guide courts to decide on the appropriate amount of statutory damages.<sup>223</sup>

A distinction must be made between the compensational function of awards and the deterring function.<sup>224</sup> It is necessarily fair to compensate the copyright owner for the actual damages they suffered from the infringing act. However, as we earlier observed there is a significant number of cases in which huge damages were awarded without the copyright owners ability to successfully prove the damages they suffered. Likewise, in observing courts awards in the context of deterring function, we will find that in some counterfeiting cases the court awarded the minimum available amount of damages, while awarding the maximum in very plausible fair use cases. Thus, it is hard to understand the determining criteria courts follow in their decisions.

While discussing statutory damages, the Congress stressed on its compensatory nature and clarified that it is intended to compensate copyright owners who are not able to prove the damages they suffered, because damages in copyright disputes are not always easily demonstrated. In addition, the Congress also referred to its deterring intentions. However, it had not been clarified neither by the Congress nor courts the limits of the compensatory part and the deterring part of the damages scheme.<sup>225</sup>

---

<sup>222</sup> Pamela Samuelson & Tara Wheatland, *supra* note 158, at 441.

<sup>223</sup> *Id.*, at 497.

<sup>224</sup> *Id.*, at 498.

<sup>225</sup> *Id.*, at 499.



Accordingly, courts have been left to decide, based on their discretionary powers or jury's decision, which resulted in the inconsistent decisions we discussed.

Therefore, the suggested reforms of this proposal created a set of principles, which the courts shall follow, in determining the amount of statutory damages in copyright infringements.<sup>226</sup> These principles are classified into what the court should do or consider when awarding statutory damages, and what they should not do.<sup>227</sup>

The proposal suggested first that courts should award minimum amount of statutory damages in cases of innocent infringers in plausible fair use cases, in ordinary infringements cases where the copyright owner did not suffer any or suffered minimal damages, and in cases where plaintiff's misconduct is found.<sup>228</sup> The proposal stated that in ordinary infringements the plaintiff should be awarded statutory damages equivalent to the damages they suffered. Ordinary infringements are classified as cases where the infringer did not know or expect that their conduct was infringing. Either because of misinterpretation of the law or a reasonable reason to assume that the conduct is not infringing. The second suggestion is that courts shall award statutory damages equivalent to the damages suffered by the copyright owner plus the profits of the infringing user, in secondary liability cases.

The proposal goes further to suggest a scheme for certain cases where the infringer knew about their infringing conduct, the court would amount the damages to multiple two or three times the profits of the infringer. In addition to including the other monetary awarded decisions, like attorney's fees, when deciding the amount of statutory damages.<sup>229</sup>

Afterwards, for willful infringers with aggravating circumstance, such as repeat infringer or counterfeiters, courts shall decide damages equivalent to more than three multiples of the defendant's profits, in addition to compensating the damages they suffered.

---

<sup>226</sup> *Id.*, at 500.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*, at 503.

The proposal includes other suggestions such as obliging the judges to explain why they consider the awarded damages “just.” Then it suggests what the courts should avoid doing in awarding statutory damages, which includes among others, not maximizing statutory damages on the basis of finding willful infringement, and not awarding statutory damages per infringed work.<sup>230</sup>

This proposal, as said, addresses solely the problem on statutory damage and developing criteria for the courts to follow to avoid the existed unclarity, inconsistency of court decisions, and rendering excessive damages awards, which has been demanded by many scholars. Nevertheless, the existence of the scheme of statutory damages per se is questionable. Do we actually need the scheme of statutory damages in copyright infringements while the statute provides that the infringer shall be liable for copyright owner’s actual damages and infringer’s additional profits?

Supposing that the courts apply the developed criteria, proposed by Samuelson and Wheatland, in awarding statutory damages. What would that outcome be in case like *MP3.com*, where the infringer knew that his conduct is infringing and yet decided to take the risk and proceed with it. If the courts found that the defendant’s arguments are close to fair use justification then it would award the minimum amount of statutory damages. If this amount is applied according to the “per infringed work” principle, then it would also lead to very excessive damages award. If the courts followed the suggestion and avoided applying the “per infringed work” principle, then it would award an equivalent amount of the suffered damages. In this assumption, what would be the difference between statutory damages awards and other copyright infringement damages award. Moreover, this proposal did not deal with the award of injunctions and awarding attorney’s fees, which also have a significant impact on the users and threat they face.

On the other hand, this proposal did not deal with the problem where users still face other monetary awards that are still described as excessive, unpredictable and

---

<sup>230</sup> *Id.*, at 506.

inconsistent, and are considered a threat for users which incumbers their innovation and creativity process.

#### 4. Infringement Classification Reform

Moving to the second proposal, as suggested by Abraham Bell and Gideon Parchomovsky. The proposal, based on an analysis of the types of copyright infringements, suggests classifying copyright infringements into certain categories and therefore the remedies that applies to each category.<sup>231</sup> The aim of this proposal is to avoid the excessive fear of copyright infringement penalties that lead to diminishing socially desirable uses of existing works, which impact the production of more beneficial creative works for the society.<sup>232</sup>

It is observed that the fixed one standard design of copyright's liability regime serves against the goals of copyrights. It casts threats over the users of existing works, and does not manage the problems of copyrights, which makes the structure of copyright more complex.

Therefore, this proposal suggests "a radical reform in the way copyright law assigns liability."<sup>233</sup> by introducing three categories of infringements. First, the "inadvertent infringements", which include cases where the infringer is unaware or could have not been reasonably aware of the nature of their infringing act.<sup>234</sup> Thus, there is no culpability demonstrated in this category. This applies to cases we previously discussed such as *Harrisongs Music*,<sup>235</sup> and *Pharrell William*,<sup>236</sup> where they both were unaware of their copying act. Generally, cases involving the inspiration/copying principles, where courts apply the total "concept and feel" test, are classified under this category. In addition, cases which includes misinterpretation of facts due to the unclarity of copyright system itself should also be included under this category. An example of such type of

---

<sup>231</sup> See Abraham bell and Gideon Parchomovsky, *supra* note 12.

<sup>232</sup> *Id.*, at 735.

<sup>233</sup> *Id.*, at 683.

<sup>234</sup> *Id.*, at 721.

<sup>235</sup> *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, *supra* note 181.

<sup>236</sup> *Williams v. Bridgeport Music, Inc.*, *supra* note 183.

infringements is the *Rite of Spring* case,<sup>237</sup> where Walt Disney misinterpreted the limits of the license granted by Boosey and believed that their act was not infringing. Such cases shall be included in this category, if the infringer reasonably misinterpreted the facts because of the ambiguity of the system itself.

The remedies available for this category are only compensational, as there is no intention to infringe, and accordingly no role for deterrence in this type of infringements. Remedies here are constructed to compensate the actual losses suffered by the copyright owner. The copyright owner shall not be entitled to neither statutory damages nor profits of infringer. Injunctive reliefs should also be excluded from this category.<sup>238</sup>

The second category is “standard infringements”, which includes a certain degree of culpability. It includes infringement cases where the infringers had a reasonable justification to believe that their acts are not infringing.<sup>239</sup> This applies to plausible fair use cases that we earlier discussed such as *L.A. Times v. Free Republic*,<sup>240</sup> *Legg Mason*<sup>241</sup>, *Kirkwood*,<sup>242</sup> and many other cases analyzed in the previous chapters. The users in this category are aware of the copying act; nevertheless, they assumed for a reasonable justification that the copying act is not infringing. In such case the court decides whether to accept the alleged justification and find the act non-infringing, or disagrees and establishes the infringement.

In this category, if the court established the infringement, the plaintiff should be able to recover the actual damages they suffered, in addition to a portion of the infringer’s profits. In this type of infringement, courts are required to find a fair profit sharing scheme, where the infringer does not lose all its profits and the copyright owner does not make a fortune out of the infringer’s use. It is proposed by bell and Parchomovsky that under this category the plaintiff can substitute profits with statutory damages. In this case statutory damages should be reduced. Besides, injunctions could be granted under this

---

<sup>237</sup> *Supra* note 104.

<sup>238</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 721.

<sup>239</sup> *Id.*, at 736.

<sup>240</sup> *L.A. Times v. Free Republic*, *supra* note 137.

<sup>241</sup> *Lowry's Reports, Inc. v. Legg Mason, Inc.*, *supra* note 144.

<sup>242</sup> *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), *Supra* note 200.

category if it was proved that the continuation of the infringing act would inflict a non-compensational harm on the copyright owner.<sup>243</sup>

The remedial structure for this category of infringements promotes copyright's goals. This is because it encourages users to seek licenses before the use of existing works to avoid being litigated before courts. At the same time, it does not inflict great threat on users who do not obtain licenses in a way that repels them from using the work to produce their creations. Because even if they are litigated and the infringement is established against them, the award would be affordable. Since they will only forfeit part of the profits they gained. Moreover, this structure will limit the copyright owner's powers, in a way that balances the bargaining powers between the copyright owner and the user in negotiating licenses.

The third category is willful infringements, whose infringer are found culpable. This includes acts of mere copying without neither authorization nor justification for the act. Counterfeits, pirates and repetitive infringers are included under this category.<sup>244</sup> Deterrence is necessary in this case, and thus plaintiffs should be allowed to claim all types of remedies available by law. This includes losses suffered by the copyright owner, profits of the infringer, injunctive reliefs, and can opt to elect claiming statutory damages.<sup>245</sup>

In this proposal Bell and Parchomovsky also provided a forecast of the administrative cost of such reform. They clarified the reason of reducing the infringement categories in their proposal into three categories only. They reasoned this reduction to efficiently minimize the administrative cost of its application. Since tools were not available to precisely measure the degree of moral wrong upon which the multiple categories shall be grounded.

This proposal appears to be the most suitable for reforming copyright's system structure. It will lead to a great extent of flexibility in encompassing all the problems and obstacles the copyright system suffers, whether the current or the future unforeseen ones.

---

<sup>243</sup> Abraham bell and Gideon Parchomovsky, *supra* note 12, at 725.

<sup>244</sup> *Id.*, at 723.

<sup>245</sup> *Id.*

This is because it does not rely on analyzing the infringing act per se to establish its classification, which accordingly would be frequently changed with its perceptions, along with the technological and digital progress. It rather, when classifying the infringements, focuses on the user's degree of guilt and culpability. This, contrary to the nature of the act of copying, is not impacted by the technological and digital progress.

The only problem that was not included in this proposal is dealing with orphan works. If a user has made in good faith diligent search to locate a copyright owner but failed and decided to proceed with using the work, this user should not suffer the outcome of the reappearing copyright owner. Thus, it is suggested that this case should be included in the first category "inadvertent infringements".

Additionally, allowing the election of statutory damages in the second category "standard infringements" needs to be reconsidered. Statutory damages with its current scheme that provides a wide range for damages, starting from \$750 to \$30,000 and up to \$150,000 in willful cases, calculated on the "per infringed work principle", would lead to excessive damages in cases of plausible fair use, which is an outcome we seek to avoid. Even if such statutory damages are decreased to its minimum, in cases such as *MP3.com* and *Feltner*, it would lead to excessive damages. In addition, if in a future unforeseen case, such as the *Google books* project where the court did not justify the copying act, this would lead to enormous penalty.

Accordingly, it is suggested that statutory damages claims be restricted to the cases of the third category "willful infringements", since such cases demonstrate a high degree of culpability and deterrence will be necessary to prevent them. Moreover, this allows the plaintiff to be compensated in cases where they were not able to prove the actual damages they suffered.

Adopting this proposed reform and applying the mentioned two suggestions would lead to a full infringement structure that addresses most of the significant copyright problems. This results in creating a more stable and favorable environment that helps the users to assess the outcome of their use and thus encourages them to make easier decision in their use and expressions.

## **VI. Conclusion:**

The Optimum goal of copyright is to maximize the production of creative works through incentivizing authors to produce more creative works. This is done by granting these authors exclusive monopoly rights that enable them to control the work they have created and benefit from its use. The problem emanates when it becomes notable that the tools copyright relies on to incentivize creativity actually hinder its process and diminish the production of more creative works.

Granting authors this type of monopoly resulted in depriving the creators from using the existing copyrighted work as a material for new creations and innovations. This has its outcome on the society: it reduces the number of new works that should benefit the society, either culturally or for its social welfare. The net result is that the interest of the copyright owner is privileged over the interest of other users and the entire society.

Moreover, the copyright system itself is not clear enough to enable its users to assess their acts and predict the outcome of their use. The ambiguity of many copyright terms; the lack of having a clear criterion that measures the infringing work; the unclarity of distinguishing copying from inspiration; the orphan's work problem; the misinterpretation of copyright doctrines like fair use; parody; and even examining the licenses and their scope, all these reasons attribute to the creation of an unfavorable environment that eliminates the freedom of creation and innovation.

Furthermore, the inconsistent court decisions in deciding on disputes of copyright infringements exacerbates the problems of the copyright system, as it makes it more difficult for users to understand the system. Adding that courts tend to frequently render very excessive damages, more than what an ordinary user could afford, especially when rewarding a statutory damage.

All these factors serve against achieving the goal of copyright and strikes the balance sought to be achieved between the interest of copyright owner and the interests of the users and therefore the society on the other side. This situation made it essential to

call for a system reform in a way that retrieves this balance. Accordingly, in this paper I discussed the significant problems that exacerbate the process of creation and innovation. Then, I analyzed some of the proposed reforms that facilitate the access to and use of existing copyrighted work to produce new creative works. Finally, I came to the conclusion that the proposals addressed to reform the infringement and remedial structure are more convenient than those suggesting to establish certain criteria to clarify the unclear doctrines and terms. This is because all efforts of law reform to regulate copyright system by identifying and regulating the vague terms and doctrines will not be able to embrace the rapid development of technology, communication and their related innovations. Addressing infringement and remedies conveniently appears to be a more stable solution.

I also concluded that the reform proposed by Bell and Parchomovsky in classifying the types of infringements and their available remedies is the most suitable proposal for achieving copyright's goal. This reform suggested introducing three categories of infringement. First, inadvertent infringements, for users who were unaware of the infringing nature of their acts. Such users should be only liable for the actual losses suffered by the copyright owner due to their use. Second, standard infringements, which includes cases where users reasonably believed that their copying act is justified under law. Those users should be liable for the actual damages suffered by the copyright owner, in addition to some of the profits they made. This could be granted through a fair profit sharing scheme or reduction of statutory damages. Third, the willful infringements, which includes those who blatantly copied the existing work, and thus, should be subjected to all remedies available by the law.

I suggested including in the first category of infringement cases the use of orphan works, to lift the threat casted on these users and encourage their use by creators. I also recommended to remove the option for the plaintiff to elect statutory damages in "standards infringements" cases, even if reduced to its minimum, to avoid having excessive awards.



## The Egyptian System

Lastly, while exploring the Egyptian copyright system, with the aim to understand its position from the discussed problems and analyze their reforms, I found limited literature addressing the problems of copyright in the Egyptian system. Critically, all of the existing literature addresses only one aspect of public interest in copyright, that is protecting author by securing their rights in their expressed works. On the other side, the literature ignored the other aspect of the equilibrium, which is of the same importance, that is protecting the right of public interest through allowing wide access to copyrighted works and allowing their use as a building material for new creations and innovations which benefits the society. Therefore, I explore the possibility of applying the outcome I have reached, from analyzing the problems of the US copyright system and the proposed reforms, on the Egyptian system. My aim is to call for the Egyptian legislature and judges to consider easing the constraints on copyrights and encourage users to produce new creations.

This can be achieved through two steps. First, by introducing the “transformative” nature into the notion of fair use in the Egyptian system. Second, by reclassifying the infringements and remedies available under the Egyptian copyright law.

Before discussing the suggested reforms, on the one hand we need to explore the Egyptian copyright system in the context of fair use doctrine and on the other hand we need to analyze infringements and available remedies. Copyright in Egypt is governed by Law No. 82 of 2002 pertaining the protection of intellectual property right (“EIPC”).<sup>246</sup> In addition, to the Egyptian Civil Code that generally regulates property and tortious liability in Egypt (“ECC”).<sup>247</sup> Article 141 of the EIPC provides for exceptions to copyright protection, including official documents and news.<sup>248</sup> In addition, Article 171 provided that the author may not prevent third parties from performing the work in family

---

<sup>246</sup> Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights, 66.

<sup>247</sup> Law No. 131 of 1948 (The Egyptian Civil Code), *al-Jarīdah al-Rasmīyah*, vol. 108 (Duplicate) A, 29 July 1948 (Egypt).

<sup>248</sup> Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights, *supra* note 242.

or educational context; making a single copy for personal use; or making analysis of the work for the purpose of criticism, discussion, or information. The law provides nothing on the creation of transformative nature of works or parody.<sup>249</sup> The Egyptian Ministry of Communication and Information Technology, in one of its presentation in a WIPO summit, stated in regards to the application of fair use in Egypt: “we must often look to the nature and objects of selection made, the quantity and value of material used, and the degree in which the use may prejudice the sale, or diminish the profits, of the original work.”<sup>250</sup> In the same summit, the Ministry’s representative added that “exceptions are meant to achieve a balance between the rights of the copyright holder with the rights of the public.”<sup>251</sup> Except for the discussed nothing regarding fair use was explicitly stated in the EPIC.

On the other hand, for a copyright infringement to be established under the Egyptian law, the user has to perform one of the acts stated in Article 181 of the EIPC, the most relevant in our discussion is the act of infringing any of the moral or economic copyrights or related rights provided for in this law.<sup>252</sup> The same Article provides the available remedies concerning copyright infringement. First, there is an imprisonment penalty for a period not less than one month, in addition to a monetary fine ranging between EGP 5,000 and EGP 10,000. This amount increases in case of repetition to range between EGP 10,000 and EGP 50,000, and the imprisonment duration increases to be not less than three months. The monetary fine is multiplied according to the number of infringed works.<sup>253</sup>

From the above explained structure, it is observed that copyright infringements in Egypt are also structurally unified. Infringement is established regardless of the intention and degree of culpability of the infringer. Which actually complies with the Egyptian

---

<sup>249</sup> *Id.*

<sup>250</sup> African-Arab Seminar on Copyright Limitations and Exceptions: Addressing the Needs of Affected Constituencies, [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=19882](https://www.wipo.int/meetings/en/details.jsp?meeting_id=19882).

<sup>251</sup> *Id.*

<sup>252</sup> Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights, *supra* note 243.

<sup>253</sup> Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights, *Id.*

civil law principles of tortious liability that expects a compensation to any act causing harm in accordance with Article 163 of the ECC.<sup>254</sup> It is also observed that the only monetary remedy available under the EIPC is the fines stated in Article 181. This remedial scheme resembles the remedial scheme of statutory damages available under the US Copyright Act. As explained earlier, while analyzing the US system's problems, this structure creates a non-favorable environment for users that discourage them to build up on existing works and produce new creations. This is an obvious result since the users will fear being subjected to excessive damages awards as a result of their use, moreover there is the threat of being imprisoned according to the EPIC.

Having said that, it is important to highlight that the Egyptian copyright system did not face the same problem of inconsistency in the case law found in the United States. This is due to the fact that the number of copyright disputes involving good faith copying or fair use before courts is limited. The reason for this is not clear and it is out of the scope of this research. However, among the general reasons may be that the relevant party obtained licenses, settlement agreements being pushed by the delay of the litigation process, or unawareness and ignorance of copyright issues, all of this could be the reason for not bringing disputes to the court. Which makes it difficult to analyze the situation given that the Egyptian courts do not measure fair use the way it is measured by the US courts. This means that the courts do not consider the degree of "transformation" of the alleged infringing work to decide whether the copying is justified under fair use or not, alternatively they refer to the copyright exceptions stated by the legislator in Article 171 of the EPIC.<sup>255</sup> This can be explained considering that Egypt is a civil legal system, which only allows judges to render their decisions based on codified legal rule stated in the law. Nevertheless, it is important for the Egyptian judges to consider balancing between the rights of the copyright owner from one side and the right of the user and the public interest benefiting from the new creations on the other side.

---

<sup>254</sup> Law No. 131 of 1948 (The Egyptian Civil Code), *Supra* note 245.

<sup>255</sup> Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights, *supra* note 249.

Considering the above limitation in the civil legal system, Egyptian courts would not be able to expand the application of fair use unless it is based on a codified rule of law. The closest principle that could be deployed by courts in justifying fair use in transformative works is the general principle stating that there should be no harm or foul (“no harm”) and its subsequent principles. “No harm” is an Islamic Sharia’ principle that is adopted by the Egyptian courts in determining the limitation and restrictions on the use of rights.<sup>256</sup> Deriving from it the subsequent principle that states greater damage pushes lighter one,<sup>257</sup> this consequently means that the public benefit prevails over the private. This is also confirmed by principle prohibiting the abuse of right articulated in Article 4 and 5 of the ECC, which provides that the exercise of rights is limited by the misuse or abuse of its exercise. According to the Egyptian Court of Cassation, the exercise that its results are far less beneficial than the damages inflicted upon other by such exercise, is considered as an abusive exercise of right.<sup>258</sup>

By applying this on copyright we can justify the lighter damages suffered by the copyright owner, in case of using his work as a building material to produce new creative work, with the heavier damages lifted from the public and the benefits they gain from the new produced work.

Yet, this leaves us with the same questions that were asked before: to what extent should fair use be expanded, how can we measure the degree of transformation of created works, how can we ensure that the measuring criteria covers all aspects, including unforeseen ones, of possible use. Moreover, the copyright owner could chase the alleged infringer and claim compensation in accordance with the “enrichment without cause” principle of the Egyptian law.

Enrichment without cause is a principle provided under Article 179 of the ECC which provides that any person that gets richer, without a legitimate cause, at the expense of another has to compensate the latter for the damage they suffered.<sup>259</sup> To establish an

---

<sup>256</sup> Mah. kamat al-Naqd. [Court of Cassation], petition no.3204, session of 1 July 2008, year 66.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Law No. 131 of 1948 (The Egyptian Civil Code), *Supra* note 250.

enrichment without cause claim, there are three condition that needs to be fulfilled. First, the defendant getting richer. Second, the plaintiff suffering damages. Third, having no legitimate cause behind this enrichment (i.e., contract, rule of law).<sup>260</sup>

This means that the copyright owner can establish that they suffered damages and the alleged infringer made profits out of his use, in addition to the lack of a contract or rule of law regulating the alleged infringer's use, which entitles the copyright owner to claim compensation for the damages they suffered. In such a claim, the judge will rule in accordance with the general principles of ECC regardless of remedies available under the EIPC.<sup>261</sup>

This suggestion lessens the harm that could be inflicted upon a user that builds his new creative product on an already existing work; nevertheless, it neither negated the threat nor created a favorable environment that encourage users to flourish the society with their creations.

On the other hand, it is important to explore the imprisonment sanctions available under the EPIC. Article 181 of the EPIC provides seven types of acts which are considered copyright infringement and are punished by the sanctions introduced in the same Article.<sup>262</sup> One of these sanctioned acts is infringing any of the moral or economic copyrights or related rights provided for in this law (the EPIC).<sup>263</sup> The first paragraph of this Article provide the sanctions available which includes imprisonment for a period of not less than one month, that is exceeded to three months in case of repetitive infringer.<sup>264</sup> The Egyptian legislator in this part provided the criminal sanction of the infringing act without stipulating any criteria or measures to be followed in determining such imprisonment sanction, leaving it to be determined upon the discretion of the judge based

---

<sup>260</sup> Mah. kamat al-Naqd. [Court of Cassation], petition no.6294, session of 18 December 2017, year 80.

<sup>261</sup> See e.g., WIPO/ACE/2/3, at 3, (discussing the application of enrichment without cause claims in the German law), available at file:///C:/Users/80079518/Zotero/storage/X8QK3JVW/search.html.

<sup>262</sup> Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights, *supra* note 251.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

on the facts of each cases independently. It is also observed that the willfulness nature of the infringing act or the degree of culpability were not referred to in the law.

On the contrary, the US legislator when providing the criminal sanctions for copyright infringement, even though such sanctions are harsher than those provided by the Egyptian law, the US legislator explicitly stated in Section 506 of the Copyright Act that sanctions are applied to any person who infringes a copyright willfully. The statute then added that the purpose of the infringement must be for commercial advantage or private financial gain.<sup>265</sup> Moreover, in determining the proper criminal sanction, the statute in Section 2319 classified the infringing acts and provided a fix penalty for each of these acts. The statute even provided measures for some of the infringing acts classified under Section 2391, by stating the minimum required number of copies produced or distributed, the duration of such distribution and the monetary value of the made copies.<sup>266</sup> Without meeting these requirements the infringer will not be subjected to such criminal sanctions.

These criminal sanctions of the US copyright system have not been praised by many of the scholars because of the extraordinary nature of the copyright system and its sensitive nature that affects directly the process of creation and personally the creators themselves. Scholars fears the excessive use of criminal sanctions and its impact on the copyright system and creation.<sup>267</sup> This unfavorable outcome is manifested in the incident of Aoron Swartz was a fellow at Harvard's Safra Center. He downloaded on a hard a large number of journal articles from JOSTR website aiming to make them available to the public. He was arrested before making such articles available to the public and returned all the data to JOSTR. Despite JOSTOR's affirmation that they did not suffer any losses and are not pursuing to claim damages from Swartz, he was still indicted and

---

<sup>265</sup> Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012), Section (a).

<sup>266</sup> *Id.*, Section 2319.

<sup>267</sup> Marc Pelteret, *supra* note 29, at 338.

his prosecution moved forward and was exposed to up to 35 years of imprisonment if convicted. This outcome pushed Swartz to finally commit suicide at the age of 26.<sup>268</sup>

Even though the Egyptian system did not face similar incidents, and provides less imprisonment sanctions for copyright infringement cases. The law does not provide any measuring criteria to decide upon such sanctions and does not require culpability or willfulness to a condition for the entitlement of these sanctions, it leaves it to the discretionary powers of the judge. This power vested to judges allows for the expansion of use of criminal sanctions in copyright disputes which will impact copyright's goal and create imbalance in its system.

Accordingly, and considering the civil nature of the Egyptian legal system, I recommend introducing the transformative works into the fair use justification and amending the legislation itself to create a legal rule that specifically classifies the copyright infringement into categories with sanctions scheme specified for each category, to avoid any unpredicted outcome that would arise from judges' trials to base their justification of a copying act on extensively broad existing rules of law. This can be made through either, as expressed before, developing the fair use doctrine through introducing the production of transformative works, which is not preferable considering the rapid technological development as illustrated earlier, which will make it hard to predict future innovation and predetermine them in the fair use exception. The sought result of eliminating the threat caused upon users will not be achieved in this proposal. Another proposal is to amend the legislation through introducing a new infringement structure, using a similar proposal to the one suggested by Bell and Parchomovsky with few alterations that fit the Egyptian legal structure.

Based on the second proposal, the infringement can be divided into three categories. The first category is "simple infringement" for those who used the copyrighted work as a building material in their new creations. Those users should only be liable for paying a determined fair amount that is equivalent to license fees. The second category is "gross

---

<sup>268</sup> *Id.*

infringements” which includes infringements made by users in good faith without being aware of their infringement action; nevertheless, the copyright owner suffered damages due to this infringing act. Under this category infringer should be asked to compensate for all the actual damages suffered by the consumer and loss of profits that could be proved. This complies with the general principle stipulated in Article 221 of the ECC that requires the compensation to include the actual damages and loss of profits.<sup>269</sup> The third category is “willful infringements” this includes counterfeiters, pirates, illegal copying, or any other willful copying that is not justified under fair use or by the production of a new transformative creative work. In this case the penalties stated in the EIPC shall apply, including the imprisonment penalty for a duration not less than one month. Plus, monetary fine ranging between EGP 5,000 and EGP 10,000, which shall be increased in case of repetition to imprisonment penalty for a duration not less than three months and monetary fine ranging between EGP 10,000 and EGP 50,000.

I also recommend that in this case we calculate the actual damages suffered by the copyright owner and the profits made by the infringer and award whichever is greater form the fine stated by the EIPC or the actual damages suffered by the copyright owner plus the profits made by the infringer. This infringement and remedial structure can substitute the second part of Article 181 of the EIPC which identifies the remedies available in case of establishing a copyright infringement.

Finally, I conclude that both copyright systems in the US as well as Egypt have focused on securing the rights of the copyright owner while neglecting to regulate and protect the rights of potential users that the public also benefits from their creations. Thus, there is a necessity to develop and reform the copyright system to address such an issue. Such efforts should be especially directed towards the copyright infringement structure and available remedies, rather than expanding the exceptions on copyrights, precisely, the fair use doctrine. Creating a system that relies on the type of infringement and available remedy is more stable and predictable; while on the other hand, relying on the

---

<sup>269</sup> Law No. 131 of 1948 (The Egyptian Civil Code), *Supra* note 260, Article 122 states: amount of damages includes losses suffered by the creditor and profits which he has been deprived of.



interpretation of a doctrine is inflexible and would accordingly fail to foresee future technological progress and innovations.