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## The New Frontiers Of User Rights

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## ARTICLES

# THE NEW FRONTIERS OF USER RIGHTS

NIVA ELKIN-KOREN<sup>\*</sup>

I. INTRODUCTION.....	2
II. FAIR USE AND NEW CHALLENGES TO ACCESS TO KNOWLEDGE.....	5
A. ACCESS TO KNOWLEDGE.....	5
B. NEW FRONTIERS IN ACCESS TO KNOWLEDGE .....	8
C. BARRIERS TO ACCESS AND COPYRIGHT ENFORCEMENT BY ONLINE INTERMEDIARIES .....	13
III. FAIR USE ON THE GROUND: THE ISRAELI CASE STUDY .....	16
A. LIMITATIONS AND EXCEPTIONS UNDER ISRAELI LAW .....	18
1. From Fair Dealing to Fair Use.....	18
2. Permitted Uses .....	19
B. FAIR USE ON THE GROUND .....	23
1. Fair Use in Courts .....	23
2. Fair use in copyright enforcement by online intermediaries.....	26
IV. FAIR USE - NEW FRONTIERS.....	34
A. THE USER RIGHTS APPROACH.....	36
B. LENZ V. UNIVERSAL, AND BEYOND.....	39
V. CONCLUSION.....	42

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## I. INTRODUCTION

Access to knowledge is fundamental for thriving in a digital economy and digital society.<sup>1</sup> We live in an era of unprecedented access to online materials and can instantly access movies on Netflix, browse books on Google Books, and listen to numerous music clips on YouTube. However, access to knowledge remains a major challenge. Despite the fact that everything seems available online, it is not “free” in a way that can ensure freedom. In fact, over the past two decades, users’ freedom to access, experience, transform and share creative materials has constantly declined.

Much of the content available online is locked behind paywalls.<sup>2</sup> You cannot read the content without paying a fee or purchasing a subscription.<sup>3</sup> Full-time academic scholars, researchers and students may not even notice these barriers. They rely on their institutional subscriptions, which make most books and academic journals available on their systems. But some research institutions, especially outside the US and Europe, cannot afford the high subscription fees. They may also be too expensive for many small universities or NGOs.<sup>4</sup> The same is true for individuals unaffiliated with universities and businesses. What if, for instance, you or your relatives suffer from a medical condition and you wish to learn more about it? You will need to purchase several articles. A single copy of an article can cost as much as \$40. If you are a journalist, a freelance writer or an independent blogger, you will most likely be denied access. Businesses may purchase access to content, but if they expect to

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1. See generally Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 17, 20-21 (Gaelle Krikorian & Amy Kapczynski eds., 2010) (arguing that knowledge has become central to the global economy, and essential for economic growth, human health and political activism).

2. See Manon A. Ress, *Open Access to Publishing: From Principles to Practice*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 475, 475-478 (Gaelle Krikorian & Amy Kapczynski eds., 2010) (identifying the increasing prices of serial-subscription costs accompanied with the decreasing research-library budgets as one of the causes in the decline of access to knowledge).

3. See *id.* at 477.

4. See John Bohannon, *Who's Downloading Pirated Papers? Everyone*, Science (Apr. 28, 2016, 2:00 PM), <http://www.sciencemag.org/news/2016/04/whos-downloading-pirated-papers-everyone>.

generate some income, from making that content available to others, then they will also have to charge a fee to recover their investment. This places further barriers on generating open content that is freely available, and subsequently marginalizes the creation of non-commercial content by non-profit entities.

Yet, cost is not the only reason for the lack of freedom in access to knowledge. Major developments in design are affecting access to knowledge, including the transition to cloud computing and mobile internet, the shift from copies to streaming, and facilitation by online intermediaries.<sup>5</sup> Consequently, much of the access to content that is made available online, is shaped by the design, business models, and technological measures exercised by online intermediaries. We are often offered “free content” by online intermediaries, but “pay” with our personal data. Users should be free to explore any cultural, religious, professional, or political content without the monitoring by third parties. Yet today, access to content posted online is often subject to surveillance.

Overall, many of the threats facing access to knowledge lie beyond copyright. This new phase in managing access to creative content forces copyright to take the back seat, making room for more powerful mechanisms that govern access to cultural works: the design of online facilitating systems and contractual obligations.

These new challenges require a new thinking with respect to fair use. Fair use is often considered essential for securing access to knowledge.<sup>6</sup> Fair use was enacted as a statutory standard in section 107 of the 1976 Copyright Act,<sup>7</sup> authorizing the courts to consider and weigh four factors when determining whether certain use of a

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5. See Susan K. Sell, *A Comparison of A2K Movements: From Medicines to Farmers*, in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY* 391, 399-400 (Gaelle Krikorian & Amy Kapczynski eds., 2010) (detailing “preemptive measures” that make it illegal to perform acts associated with the circumvention of technology that is designed to limit access to materials).

6. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001) (“[T]he fair use right was codified to maintain the constitutionally mandated balance to ensure that the public has access to knowledge.”) See also Michael I. Madison, *Beyond Creativity: Copyright as Knowledge Law* 12 *VAND. J. ENT. & TECH. L.* 817 (2010); Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 *J. INTELL. PROP. L.* 49 (1993).

7. See 17 U.S.C. § 107 (1976).

copyrighted work is permissible without a license. This open-ended nature of fair use gives courts discretion to evolve the law. The flexibility rendered by this standard has certainly enabled U.S. courts to adjust exceptions and limitations to copyright in a rapidly changing world.<sup>8</sup> Many countries worldwide are seriously contemplating adapting more flexible norms in order to address these challenges.<sup>9</sup> However, fair use alone might not suffice to counterbalance the emerging challenges to access to knowledge.

An extensive study of enforcement practices pertaining to online copyright infringements in Israel offers empirical evidence of the impact of fair use in the digital era. Israel introduced fair use about a decade ago in the 2007 Copyright Act.<sup>10</sup> The study compared two major enforcement strategies following the enactment of the law: traditional court proceedings and Notice and Takedown procedures implemented by online intermediaries. The findings suggest that introducing a fair use provision in the statute might be an important step, yet, this alone cannot safeguard access to knowledge.<sup>11</sup>

Based on these findings, this Article argues that in order to secure a sufficient level of free and unlicensed access to knowledge, it is necessary to develop a more comprehensive approach to permissible uses that would incorporate fair use in new and innovative ways. The approach proposed in this Article is twofold: First, at the conceptual level, fair use should be interpreted as a user's right and not merely an affirmative defense. Second, fair use should be incorporated into online enforcement systems, by embedding fair use considerations in the design.

The Article proceeds as follows: Part II of this Article discusses access to knowledge and analyzes emerging challenges in the online setting. Part III presents empirical evidence of the impact of fair use in two enforcement contexts - court proceedings and online intermediaries. Part IV discusses the new frontiers of fair use. It

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8. See, e.g., *Authors Guild v. HathiTrust*, 755 F.3d 87, 95 (2d Cir. 2014); *Authors Guild v. Google*, 804 F.3d 202, 202 (2d Cir. 2015).

9. See, e.g., AUSTL. LAW REFORM COMM'N, REPORT NO. 122, COPYRIGHT AND THE DIGITAL ECONOMY, (2014) (recommending that Australia would adopt a flexible fair use copyright exception modeled after the United States statutory provision on fair use).

10. Copyright Law, 5768-2007, SH No. 2199, 34, §19 (2007) (Isr.).

11. See *infra* notes 80-82 and accompanying text.

demonstrates how an approach to fair use that focuses on user rights could enhance fair use and secure access to knowledge.

## II. FAIR USE AND NEW CHALLENGES TO ACCESS TO KNOWLEDGE

### A. ACCESS TO KNOWLEDGE

Knowledge is undoubtedly a key for participating in the information society. Access to knowledge is necessary for working and competing in the information economy, for participation in civil society, and for developing and enjoying culture.<sup>12</sup> In addition, it is no less important for active citizenship, making informed choices, and taking part in the democratic political process.<sup>13</sup>

Access to knowledge involves freedom to access materials and to read and learn from existing knowledge, as well as the freedom to make use of content, rearrange it, change it, or invoke new meanings. It also includes the freedom to engage in knowledge and to share information with others in the course of conversations and exchanges.<sup>14</sup> Access to knowledge is clearly a necessary precondition to freedom. That is not simply because it is necessary for self-expression, but because it is essential for a society that seeks to diversify the sources of knowledge available to the public.<sup>15</sup> When all individuals can potentially speak out and be heard, thoughts and views are less likely to be shaped by the governing “party line” or by corporate speech.

Much of our thinking about access to knowledge in the digital era assumes an environment of total availability, where users were directly connected and could freely share content of their choosing without any interference.<sup>16</sup> The Access to Knowledge framework has

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12. See William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1694-95 (1998).

13. See Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 216-17 (1996); see also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

14. NEIL NETANEL, *COPYRIGHT'S PARADOX* 63 (2008).

15. Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 565-66 (2004).

16. See Jessica Litman, *Sharing and Stealing*, 26 COMM. & ENT. L.J. 1, 2 (2004).

therefore focused primarily on free access to content and on the legal barriers placed by copyright law on free access.<sup>17</sup> Thus, “free access” was essentially conceived as freedom to copy and download without charge, but also as freedom to upload and share, and the freedom to change and adapt.<sup>18</sup> The steady expansion of copyright over the past two decades has threatened to limit the freedom available to users.<sup>19</sup> Consequently, efforts to secure access to knowledge have focused on copyright barriers, seeking to expand Limitation and Exceptions (L&E) to copyright, and advocating the introduction of new L&E or more flexible norms that could mitigate the extensive scope of copyright.<sup>20</sup>

Copyright law still plays a central role in shaping access to knowledge affecting users’ ability to read, view or listen to materials, to use and reuse original works, and to share them with others.<sup>21</sup> One example is the use of copyrighted materials for educational and research purposes. Teaching often involves the use of copyrighted materials. The unlicensed copying of works to make them available to students in the course of teaching may constitute a copyright infringement unless exempted under fair use.<sup>22</sup> In recent years, the scope of legitimate use of content for research and educational purposes has become contentious.<sup>23</sup> Many publishers of books,

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17. See JEREMY MALCOLM, ACCESS TO KNOWLEDGE FOR CONSUMERS: REPORTS OF CAMPAIGNS AND RESEARCH 2 (Jeremy Malcolm ed. 2010).

18. LAWRENCE LESSIG, REMIX: MAKING ART & COMMERCE THRIVE IN THE HYBRID ECONOMY 192, 249 (2008).

19. See generally JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 116-17 (2008).

20. See Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L. J. 1175, 1228 (2010); see, e.g., BERNT HUGENHOLTZ & MARTIN R.F. SENFTLEBEN, FAIR USE IN EUROPE - IN SEARCH OF FLEXIBILITIES 10, 21 (2011).

21. See Tina Amirtha, *The Open Publishing Revolution, Now Behind a Billion-Dollar Paywall*, FAST COMPANY (Apr. 17, 2015, 2:30 PM), <http://www.fastcompany.com/3042443/mendeley-elsevier-and-the-future-of-scholarly-publishing>.

22. See, e.g., William W. Fisher & William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age*, 20-21 (Berkman Ctr. For Internet & Soc’y, Research Pub. No. 2006-09, 2006) [hereinafter *The Digital Learning Challenge*].

23. The scope of fair use for educational purpose was also a matter of controversy prior to the enactment of the 1976 Copyright Act. See WILLIAM F. PARTY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985) (discussing the debate over educational use).

academic journals, and newspapers have adjusted their business models to facilitate online delivery.<sup>24</sup> Academic publishers are introducing “paywalls,” that range from strict, where every access to content is subject to payment, to more flexible options, where some content is freely available (“soft,” “leaky,” or “freemium”).<sup>25</sup> Publishers have also exercised copyright to combat online sharing of scientific articles and the making available of excerpts for educational purposes.<sup>26</sup> For instance, in a recent lawsuit filed by major academic publishers against Georgia State University (GSU), the publishers claimed that copies stored in the university’s electronic course reserve system, which offered web access to excerpts from books and journals to the students enrolled in the course, violated their copyright.<sup>27</sup> GSU asserted that making these copies was within the boundaries of fair use.<sup>28</sup> The Court of Appeals for the Eleventh Circuit held that GSU might be liable for uploading excerpts of copyrighted books to its electronic course reserve system, as fair use analysis should always be performed on a work-by-work basis, “taking into account whether the amount taken—qualitatively and quantitatively—was reasonable in light of the pedagogical purpose of the use and the threat of market substitution.”<sup>29</sup>

At the same time, however, some courts offered a fairly broad

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24. See Amirtha, *supra* note 21 (emphasizing that digital sales have become a major source of revenue for the publishing industry. For instance, in 2014, Elsevier, one of the big four academic publishers, representing over 3000 academic journals, listed a profit of \$1.1 billion on revenues of 3.1 billion, largely by selling individual research papers and journal subscriptions).

25. *Id.* (explaining that some free content is funded by advertising, or becomes available following an embargo period, and that publishers have engaged in data collection, seeking to leverage their exclusive control of content).

26. See *Elsevier v. Sci-Hub*, No. 1:15-CV-04282, Compl. ¶¶ 1, 5, 6 (S.D.N.Y. 2015) (detailing Elsevier’s recently filed complaint against the Library Genesis project and Sci-Hub.org search engine); see also Amirtha, *supra* note 21 (discussing Elsevier also exercising its copyright in 2013 in order to put pressure on the open science social network, Mendeley, to remove access to any scientific articles published in one of its many academic journals. This pressure eventually led to the acquisition of the startup company. Elsevier demanded that abstracts from the API, and PDF previews be removed, claiming copyright infringement. After the acquisition, Elsevier’s materials are now fully available on the system).

27. See *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1241 (11th Cir. 2014).

28. *Id.* at 1242.

29. *Id.* at 1283.



interpretation of fair use, which permits important educational and scientific uses. In the case of *Authors Guild, Inc. v. HathiTrust*, for example, the Court of Appeals for the Second Circuit ruled on a digital library containing digitized versions of the library collections of partnering universities, holding that systematic digitization of copyrighted books by universities for the purpose of search was fair use.<sup>30</sup> The court found that full-text searchable database, which returns the book name and page number for matching search results, was transformative, since the copies served a different purpose than the original works.<sup>31</sup> These recent rulings demonstrate the advantage of fair use in allowing the court to enable new, innovative uses of copyrighted works, thus advancing the goals of copyright.

Similarly, in Canada, which follows the more rigid legal standard of *fair dealing*, the Supreme Court recently expanded the breadth of education-related purposes that qualify as fair dealing.<sup>32</sup> The court formulated a broad definition of *private study* that includes copies made by teachers for students' use.<sup>33</sup> In another decision, the Canadian Supreme Court broadly interpreted *research* to include sampling during consumer research for online purchase of music.<sup>34</sup>

But challenges to access to knowledge are no longer limited to copyright alone. Copyright law, which has been at the forefront of the access to knowledge campaign over the past two decades, now seems to be taking a back seat as emerging forces that limit free access come into play. These arising challenges are further discussed in the next section.

## B. NEW FRONTIERS IN ACCESS TO KNOWLEDGE

Copyright is no longer the sole form of constraint on access to knowledge. Limitations on access to digital materials are linked to

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30. See *Authors Guild v. HathiTrust*, *supra* note 8.

31. *Id.*

32. See *Alberta (Educ.) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345, 362 (explaining that “the word ‘private’ in ‘private study’ should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavors, whether they are engaged in with others or in solitude”).

33. See *id.*, at 362.

34. See *generally* *Soc’y of Composers, Authors & Music Publishers of Can.*, [2004] 2 S.C.R. 427 (Can.).

major shifts in design, emerging business models, and changes in alliances and interests as a result.

The rise of cloud computing and mobile internet has facilitated a fundamental shift in content delivery, as the distribution of copies is replaced with streaming and access services. The distributed network architecture of open access and total availability of content, which has characterized the evolution of the internet since the early 1990s, enabled every user connected to network to store, upload, and directly share content with other users of the network. This distributed design, is now being sidelined by a more centralized and closely-monitored environment in which use is no longer anonymous (e.g., mobile internet, social media) and content delivery is stored on the cloud rather than in end nodes. Consequently, management and control over the storage and delivery of content in this environment is centralized.<sup>35</sup>

A second technological shift that affects access to knowledge is the method of delivering content. Instead of delivering copies of content, cloud computing and mobile internet make it possible to offer content as services. Rather than buying printed books, records, CDs, or DVDs, users can purchase all-you-can-eat access subscriptions to music, books and movies, which are made available online through streaming technology. Netflix, Spotify, and Google Books are just a few examples. This shift facilitates ongoing technical control over the use and distribution of copyrighted materials. Users no longer control a physical copy of the material and their access to the content may expire at any time. This weakens users and limits their ability to choose how to use content and whether to share it.<sup>36</sup>

The result is a more centralized infrastructure, which enables control over data, content, applications and users. It shifts power from the end nodes to central operators. The shift to cloud computing has placed knowledge and cultural products (software, books,

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35. Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 *DÆDALUS*, 18 (2016).

36. A striking example of the lack of user control, in the shift to streaming, is the case of Amazon; Amazon.com apologized and settled a class action suit for violating its terms of service by remotely removing purchased copies of George Orwell's *Nineteen Eighty-Four* (1949) from Kindles. See Brad Stone, *Amazon Erases Orwell Books From Kindle*, N.Y. Times, July 18, 2009, at B1.

academic articles, music and videos) beyond the physical control of the end-user. The availability of content in online platforms such as Facebook or YouTube is governed by the platform, which shapes what becomes available, and which content will be removed.<sup>37</sup> Decisions on what to upload and download, what to watch, and what could be shared and how – are increasingly governed by publishers and online intermediaries.

The use of content and the terms of accessing the content will often be defined by a license or contractual provisions of the facilitating platform's Terms of Use.<sup>38</sup> Much of the content distributed online is subject to licenses, and many restrictions on users' freedom to access and use copyrighted materials are contractual.<sup>39</sup> Under licenses, users are often defined as non-owners of a copy of the work - as "licensees" - and the license often sets limits on the right to resell the accessed copy.<sup>40</sup> Some EULAs restrict permissible use to designated reading devices (e.g., iBooks for iPad), or permit the making of only a limited number of backup copies.<sup>41</sup>

Another dimension affecting the availability of free access is market structure. Access to knowledge is facilitated by a handful of online intermediaries (mega-platforms) with significant market power in a market with strong economies of scale.<sup>42</sup> Online intermediaries such YouTube, Facebook, and Google often converge control over content, access, and distribution channels and control of end users' personal data.<sup>43</sup> This may inhibit consumers' choices and

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37. Jonathan Zittrain, *Facebook Could Decide an Election Without Anyone Ever Finding Out*, NEW REPUBLIC (June 2, 2014), <https://newrepublic.com/article/117878>.

38. See B.J. Ard, *Notice and Remedies in Copyright Licensing*, 80 MO. L. REV. 313, 322 (2015).

39. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 10-12* (2011) (discussing problems associated with pervasive boilerplate agreements in modern society).

40. See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1103-04 (9th Cir. 2010).

41. See David R. Hansen, *A State Law Approach to Preserving Fair Use in Academic Libraries*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 32-33 (2011).

42. Nicolai Van Gorp & Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, EU Doc. No. IP/A/ECON/2014-12 (2015).

43. See ORG. FOR ECON. CO-OPERATION & DEV. (OECD), *THE ECONOMIC AND SOCIAL ROLE OF INTERNET INTERMEDIARIES* 9 (2010),

weaken competitive pressure.

Access facilitated by intermediaries is shaped by their business models. First, online intermediaries increasingly profit from selling content.<sup>44</sup> Emerging business models also generate revenues from content through alliances with right-holders. Aside from facilitating communication among end-users or offering new distribution channels to publishers, online intermediaries have also become publishers, producers, distributors, and marketers of music, movies, eBooks, and apps.<sup>45</sup>

Second, access to knowledge that mediated by online intermediaries is often offered as a service, and is tied to an ongoing contact of intermediaries with each user through a variety of content services (e.g., search, display, internet access, content access). Online intermediaries profit from data extracted from users who access content services.<sup>46</sup> Data collection on users' interests and online behavior creates a stream of revenue from targeted advertising.<sup>47</sup> Data and data-related services have become an

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<https://www.oecd.org/internet/ieconomy/44949023.pdf> [hereinafter OECD]. See Niva Elkin-Koren, *After Twenty Years: Revisiting Copyright Liability of Online Intermediaries*, in *THE EVOLUTION AND EQUILIBRIUM IN OF COPYRIGHT IN THE DIGITAL AGE* (Susy Frankel & Daniel J Gervais eds., 2014).

44. See *id.*

45. See Greg Bensinger, *Amazon to Begin Producing, Acquiring Original Movies*, WALL STREET J. (Jan. 19, 2015 3:20 PM), <http://www.wsj.com/articles/amazon-to-begin-producing-acquiring-original-movies-1421687531> (revealing that YouTube and Amazon are investing in the production of original movies); see also *Pricing Page for Amazon Kindle Direct Publishing*, AMAZON, <https://kdp.amazon.com/help?topicId=A29FL26OKE7R7B> (last visited Aug. 13, 2016) (offering another example in Amazon's Kindle Direct Publishing (KDP) that offers authors a whole range of self-publishing options through the Amazon Kindle Store); *Authors & Book Publishers: Frequently Asked Questions*, iTUNES, <http://www.apple.com/itunes/working-itunes/sell-content/books/book-faq.html> (last visited Aug. 13, 2016) (showing that authors can earn seventy percent of the royalties from the sale of such books).

46. *What Type of Content Can I Monetize*, YOUTUBE, <https://support.google.com/youtube/answer/2490020?hl=en> (last visited Aug. 13, 2016) (stating that online intermediaries, such as YouTube, offer free content in exchange for personal data).

47. *Study Finds Behaviorally-Targeted Ads More Than Twice as Valuable, Twice as Effective As Non-Targeted Online Ads*, NETWORK ADVERTISING INITIATIVE (Mar. 24, 2014), [https://www.networkadvertising.org/pdfs/NAI\\_Beales\\_Release.pdf](https://www.networkadvertising.org/pdfs/NAI_Beales_Release.pdf).

independent source of revenues.<sup>48</sup> Data may also be collected through playing devices (e.g., iPhone and Kindle).<sup>49</sup> Widespread monitoring and automated filtering by online platforms (e.g., YouTube Content ID) create further layers of protection that may threaten users' rights to privacy and freedom of expression.<sup>50</sup>

Access to Knowledge requires certain assurances of intellectual privacy.<sup>51</sup> Freedom from ongoing monitoring is necessary to protect the intimate and private nature of the educational experience that is essential for meaningful learning. Intellectual privacy is also important for maintaining academic freedom<sup>52</sup> and the freedom for users to be actively involved in creating culture.<sup>53</sup> Surveillance-free access is not simply a matter of privacy but can also affect the ability of user-authors to participate actively in the creative process by generating and disseminating cultural works. Fear of monitoring may

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48. Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO. TECH. 75 (2015).

49. See Corynne McSherry, *Adobe Spyware Reveals (Again) the Price of DRM: Your Privacy and Security*, ELECT. FRONTIER FOUND. (Oct. 7, 2014), <https://www.eff.org/deeplinks/2014/10/adobe-spyware-reveals-again-price-drm-your-privacy-and-security> (providing examples in which digital distribution involves built-in surveillance, such as the collection and storage of reading habits and intellectual preferences when users download music, apps, and eBooks to Smartphones and e-Readers, which turns formerly intimate and private experiences into public knowledge. The author also asserts that built-in surveillance exemplifies information collection methods, such as Adobe Spyware's tracking and reporting of Digital Editions reader habits, which illustrates the growing concerns for reader privacy and security).

50. See Michael S. Sawyer, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 388-90 (2009); see also Ira S. Nathenson, *Civil Procedures for a World of Shared and User-Generated Content*, 48 U. LOUISVILLE L. REV. 911, 938 (2010).

51. See generally Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008) (analyzing intellectual property with regard to the First Amendment and concepts of privacy).

52. Monitoring the use of copyrighted materials for collecting royalties may create a chilling effect on students and researchers who seek to explore different types of content in private. Copyright could facilitate access to such data. For instance, the plaintiff in the Georgia State University case the plaintiff sought access to the e-Reserve system and the original records for the three year period at issue in order to calculate royalties owed royalties. See *Patton*, *supra* note 27, at 1237.

53. See Richards, *supra* note 51, at 387 (arguing that a robust creative culture requires intellectual privacy in which creators can develop ideas free from the threat of their electronic distribution before showcasing them to the public).

create a chilling effect, causing users to refrain from seeking specific knowledge resources or reading particular materials for fear of their interests being monitored and recorded.<sup>54</sup> To promote creativity, copyright law should encourage freedom to explore any cultural, religious, professional, political, or other type of resource, without the surveillance of third parties.<sup>55</sup>

### C. BARRIERS TO ACCESS AND COPYRIGHT ENFORCEMENT BY ONLINE INTERMEDIARIES

As data consumption shifts from copies to streaming, users lose control over their data and applications as they are all stored on remote facilities and are subject to the terms and conditions dictated by an online provider. Indeed, Technological Protection Measures (TPMs) and Digital Rights Management (DRM) systems, which were perceived as the greatest threat to access to knowledge at the end of the 90's, did not prove useful for protecting copies of music and software.<sup>56</sup> Yet, online streaming, cloud computing, and mobile internet strengthen the effectiveness of technological measures and make algorithmic management of access much more robust. The shift to cloud computing and streaming services put users at a disadvantage. Users have become completely dependent on access providers, who can terminate access to any material at any time.

Cloud computing and streaming services effectively dominate mass distribution of content. Particularly, online intermediaries filter, block, and disable access to copyrighted materials to minimize their exposure to copyright liability.<sup>57</sup> The Digital Millennium Copyright

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54. Ernie Smith, *Writers Group: Surveillance Having a Chilling Effect*, ASS'N NOW (Jan. 6, 2015), <http://associationsnow.com/2015/01/writers-group-surveillance-chilling-effect/> (revealing that fiction and nonfiction writers in fifty countries expressed deep concern with surveillance and self-censored by avoiding controversial topics in work or personal communications, which threatens independent thinking by penetrating the intimacy of reading).

55. See *Global Chilling: The Impact of Mass Surveillance on International Writers*, PEN AM. (Jan. 5, 2015), <https://pen.org/global-chill>.

56. See Jane C. Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the United States Copyright Act*, 16 INFO. & COMM'N TECH. L. 191, 197 (2007) (giving the example of RealNetworks in which its Player did not allow user copying of music but its Server allowed 'copy switching' which enabled unauthorized copying of music).

57. See Niva Elkin-Koren, *Fair Use: Rights Matter*, COPYRIGHT AT HARVARD

Act<sup>58</sup> (DMCA) conferred safe harbor protection for online intermediaries that remove allegedly infringing content upon receiving notice according to the Notice and Takedown (N&TD) procedure defined by the law.<sup>59</sup> While some online intermediaries simply implement the DMCA safe harbor provisions, others go beyond the statutory requirements and apply voluntary measures to filter, block or remove certain content for various business purposes (“DMCA-Plus”).<sup>60</sup> YouTube’s Content ID is a classic example. The YouTube Content ID system has turned the algorithmic implementation of N&TD into a business opportunity by offering a platform that generates profit from DMCA-Plus services for YouTube and its business partners.<sup>61</sup> Content ID allows copyright owners to identify their works using a digital identifying code.<sup>62</sup> The system then notifies subscribed copyright holders whenever a video that matches content that they own is uploaded to YouTube.<sup>63</sup> System subscribers are then given four options: (1) mute audio that matches their music; (2) block a whole video from being viewed; (3) monetize the video by running ads against it; or (4) track the video’s

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LIBRARY (Feb. 26, 2016), <https://blogs.harvard.edu/copyrigh tosc> (arguing that false-positive removals of non-infringing materials threaten access to knowledge).

58. 17 U.S.C. § 1201 (1999).

59. See *infra* note 129.

60. Annemarie Bridy, Comment, *Copyright’s Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW (forthcoming 2016).

61. See Maayan Perel & Niva Elkin-Koren, *Black Box Tinkering: Beyond Transparency in Algorithmic Enforcement* (July 26, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2741513](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741513) (arguing for more accountability in algorithmic systems of online enforcement; see also *Statistics*, YOUTUBE, <https://www.youtube.com/yt/press/statistics.html> (last visited Aug. 5, 2016) (demonstrating that content ID currently scans over 400 years-worth of video and utilizes more than 25 million reference files of more than 5,000 partners, including US network broadcasters, record labels, and movie studios).

62. Content ID employs digital fingerprinting to sample an uploaded file and compare it against a database of reference files provided by participating copyright owners. See Brad Stone & Miguel Helft, *New Weapon in Web War over Piracy*, N.Y. TIMES, Feb. 19, 2007, at C1 (discussing fingerprinting technologies for identifying audio and video); see also Craig Seidel, *Content Fingerprinting from an Industry Perspective*, in 2009 IEEE INTERNATIONAL CONFERENCE ON MULTIMEDIA AND EXPO 1524, 1525 (2009) (discussing the technicalities of how fingerprinting is used to identify copyrighted content).

63. *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Aug. 11, 2016).

viewership statistics.<sup>64</sup>

The choices made by the online intermediaries on how online content is filtered, removed, disabled, or blocked, lack any transparency and legal oversight.<sup>65</sup> There are numerous anecdotal examples of erroneous removals and blocked access to non-infringing materials (false positive), but its overall scope remains unknown.<sup>66</sup> Access might be blocked based on copyright allegations but also for reasons other than copyright enforcement, thus basically performing robust censorship. For instance, a short clip from the highly controversial movie, *The Innocence of Muslims*, which sparked violent outbreaks across the Middle East, was blocked by Google in several regions following informal requests made by governments, and without any court order.<sup>67</sup> In another example, YouTube removed videos of *India's Daughter*, a documentary film based on the gang rape of a 23-year-old student.<sup>68</sup> This film was banned in India, presumably due to copyright infringement allegations.<sup>69</sup> YouTube also removed a series of important health-related videos that were created to debunk claims made in the movie *House of Numbers* against current treatments for HIV/AIDS and its argument that HIV positive people should stop taking life-saving medications.<sup>70</sup> Additionally, *Fitnah*, a satirical show on YouTube,

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64. *Id.*

65. See Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. (forthcoming 2016).

66. See, e.g., David Zielenzinger, *Google Blocking Access to 'Innocence of Muslims' In Middle East, India*, INT'L. BUS. TIMES (Sept. 14, 2012, 11:23 AM), <http://www.ibtimes.com/google-blocking-access-%E2%80%98innocence-muslims%E2%80%99-middle-east-india-789258>.

67. *See id.*

68. Unfortunately, however, YouTube removed most copies of the film soon after they became available due to copyright infringement allegations made by the British Broadcasting Corporation (BBC), who allegedly made the original broadcast from which the uploaded copies were taped. *See YouTube Removes India's Daughter Videos after BBC Copyright Request, Trademarks & Brands Online*, TRADEMARKS & BRANDS ONLINE (Mar. 9, 2015), <http://www.trademarksandbrandsonline.com/news/youtube-removes-india-s-daughter-videos-after-bbc-copyright-request-4289>.

69. *See id.*

70. See Timothy Geigner, *AIDS Denial Crazyies Go All DMCA on Videos Educating People of their Crazyiness*, TECHDIRT (Feb. 14, 2014, 1: 44 PM), <https://www.techdirt.com/articles/20140210/05172926163/aids-denial-crazyies-go-all-dmca-videos-educating-people-their-crazyiness.shtml>.



was censored when Rotana, the primary, state-funded Saudi TV channel, requested that DMCA remove several of their videos.<sup>71</sup> These examples show that removal of non-infringing materials that might be legitimately used without requiring a license, clearly threatens access to knowledge.

Overall, access to content provided by online intermediaries and the prevalence of algorithmic filtering, removal and blocking, is effectively changing the copyright default. If copyrighted materials were once available unless proven to be infringing, any materials detected by the algorithm are now unavailable unless explicitly authorized by the copyright owner.

### III. FAIR USE ON THE GROUND: THE ISRAELI CASE STUDY

Copyright law seeks to promote creation of new works for the benefit of the public.<sup>72</sup> Consequently, the law not only offers incentives to authors but also seeks to foster access to creative works for the purpose of further creation, learning, intellectual enrichment and progress.<sup>73</sup> Fair use is commonly viewed as facilitating a balance within copyright law to serve this purpose.<sup>74</sup>

Can fair use effectively secure access to knowledge in our era?

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71. *Copyright Law as a Tool for State Censorship of the Internet*, BEFORE IT'S NEWS (Dec. 3, 2014, 11:22 AM), <http://beforeitsnews.com/libertarian/2014/12/copyright-law-as-a-tool-for-state-censorship-of-the-internet-2589350.html>.

72. This is grounded in the constitutional purpose of copyright law, that is “[t]o promote the Progress of Science and useful Arts.” U.S. CONST., Art. I, § 8, cl. 8. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“[T]he economic philosophy behind the clause empowering Congress to grant copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare [by promoting the creation and dissemination of ideas] through the talents of authors.”).

73. *HathiTrust*, *supra* note 8, at 94-95 (quoting Leval to highlight that copyright law is acknowledged as “not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public”); accord Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

74. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’”)

Fair use advocates believe that it can.<sup>75</sup> They argue that the open-ended nature of fair use, offers flexibility that is particularly important for adjusting copyright limitations and exceptions to the dynamic requirements of rapidly developing technology.<sup>76</sup> The ruling in *Authors Guild, Inc. v. HathiTrust*, for example, demonstrates that authorizing the court to adjust limitations on copyright to dynamic technological and economic circumstances, could facilitate new, innovative uses of copyrighted works.<sup>77</sup> Here the court held that creating a new full-text searchable database of the books collection, in order to serve new purposes that do not replace the original use of the published books, constitutes fair use of the copyrighted works.<sup>78</sup>

Fair use will undoubtedly continue to play an important role in encouraging the development of new and innovative uses. Fair use matters, however, only when users are subject to copyright suit. What is the role of fair use in the current copyright ecosystem? Does fair use still matter for copyright enforcement? Does the shift in copyright enforcement from courts to online intermediaries alter the role of copyright? Does it marginalize the practical importance of fair use for day-to-day copyright disputes?

This Part discusses empirical evidence derived from a study of court cases in Israel, where defendant invoked the recently introduced fair use claim. I begin by briefly introducing Israeli copyright law and the legal reform that replaced the British fair-dealing doctrine with the American model of fair use. Next, I present

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75. See, e.g., Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 1, 33 (Ruth Okediji ed., 2016).

76. See, e.g., Samuelson, *supra* note 75, at 33; Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1834 (2009); Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 404-05 (2005) ("In addition, a structural analysis of fair use indicates that the doctrine is meant to be used as a flexible standard through which the judiciary can determine the application of copyright in response to social and technological changes - fair use was never intended to preserve the status quo in the face of change."); Gwen Hinze et al., *The Fair Use Doctrine in the United States – A Response to the Kernochan Report* (July 26, 2013), <http://ssrn.com/abstract=2298833>.

77. See *HathiTrust*, *supra* note 8 (enabling this authorization "adds to the original something new with a different purpose and a different character").

78. See *id.*; see also *Google*, *supra* note 8, at 215.

the findings of several studies that offer some empirical evidence on the role of fair use in copyright enforcement. I compare reliance on fair use in court disputes with its use in the context of enforcement by online intermediaries. Part IV will discuss several policy implications of these observations.

## A. LIMITATIONS AND EXCEPTIONS UNDER ISRAELI LAW

### 1. *From Fair Dealing to Fair Use*

Israel introduced fair use in 2007 as part of a major copyright reform, enacting the new 2007 Copyright Act).<sup>79</sup> The 2007 Copyright Act replaced the old British Copyright Act of 1911, which was in force ever since the establishment of the State of Israel in 1948.<sup>80</sup> The statutory *fair use* provision replaced the much more limited British *fair dealing* doctrine, which permits use only for purposes explicitly listed by the law.<sup>81</sup> *Fair use*, in contrast, defines an open-ended standard that gives the courts broad discretion to decide which unauthorized uses of a copyrighted work, might nevertheless be considered permissible.

The process of incorporating the fair use doctrine into Israeli

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79. See Copyright Law (2007), *supra* note 10. The Act was passed by the Israeli Parliament (the Knesset) on November 19, 2007, and came into force on May 25, 2008. See also *id.* § 77. Pursuant to the transitional provisions of the 2007 Law, the new copyright legislation shall apply to works made prior to the commencement of the law, subject to certain exceptions. Acts which were performed in relation to a work before the commencement of the 2007 Copyright Law, are governed by the former law. Yet, an act which is not an infringement of copyright or of moral rights under the 2007 Law, shall not be actionable according to the provisions of the former copyright law. This means that the exemptions listed by the new 2007 Copyright Law, including fair use, apply to acts which were done in relation to a work before the commencement of the new law. See *id.* § 78(c). In other words, an unauthorized use of a copyrighted work prior to the new law, which qualifies as fair use, will not be deemed infringing. See also TAMIR AFORI, COPYRIGHT ACT 540 (2012) (Hebrew).

80. See Copyright Act 1911, 1 & 2 Geo. 5 c. 46, § 37(2)(a) (Eng.); see also Copyright Ordinance, CURRENT LAW 389. The Copyright Ordinance was amended several times by the Israeli Parliament. See *id.* The transitional provisions of the 2007 Law provide that the Copyright Act of 1911, 3 Annotated Laws of Palestine 2475, and the Copyright Ordinance of 1924 continue to apply to certain matters. See Copyright Law (2007), *supra* note 10, § 78.

81. Fair dealing under the 1911 Copyright Act, permitted the use of a copyrighted work for a purpose strictly defined by law, as long as the scope of use was fair

copyright law began, however, years earlier in 1993 with the seminal ruling of the Israeli Supreme Court in *Geva v. Walt Disney Co.*<sup>82</sup> In *Geva* the Court addressed the use of the cartoon character Donald Duck in a satirical work.<sup>83</sup> To qualify as *fair dealing* under the British clause, the permitted use must be classified under one of the purposes enumerated by the law, e.g. criticism, research or self-learning.<sup>84</sup> The Court has given a broad interpretation to the notion of “criticism,” concluding that satire might also qualify as criticism, as well as any act “placing a work in a new context that sheds unexpected light upon it and reveals hidden layers.”<sup>85</sup> However, not every use for purposes of criticism would constitute fair dealing. A second condition that must be satisfied in order to qualify as *fair dealing* is *fairness* of use. As it lacked the criteria to evaluate fairness in this case, the Court applied the four-factor analysis per section 107 of the US 1976 Copyright Act.<sup>86</sup> Thus, the American *fair use* doctrine was applied within the framework of the British *fair dealing* provisions.<sup>87</sup> Following *Geva*, this hybrid doctrine of fair dealing/fair use evolved in the lower courts as judge-made laws, and was eventually codified as fair use in the 2007 Copyright Act.<sup>88</sup>

## 2. Permitted Uses

Under the 2007 Copyright Act, any unauthorized use of a copyrighted work that has been granted exclusive rights may constitute an infringement,<sup>89</sup> provided that the use is not permitted by any of the exceptions and limitations listed in Chapter Four.<sup>90</sup> The

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82. See CA 2687/92 *Geva v. Walt Disney Inc.* 48(1) PD 251 (1993) (Isr.).

83. See *id.*

84. Copyright Act (1911), *supra* note 80, §2(1)(i).

85. See *Geva*, *supra* note 82.

86. General Revision of Copyright Law, Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (1976) (codified at 17 U.S.C. § 107).

87. Eventually, the Court denied fair dealing in that case, holding that it was a commercial use that may cause economic harm to the plaintiff. See *Geva*, *supra* note 82.

88. See Copyright Law (2007), *supra* note 10, § 19.

89. *Id.* § 47 (stating that the exclusive rights include reproduction, publication of a work which was not yet published, public performance, broadcasting, making the work available to the public, making a derivative work, and the rental of physical copies to the public for a commercial purpose (if it is a computer program, provided the program is not only ancillary to the primary rental object)).

90. *Id.* § 47. (“A person who does in relation to a work, any of the acts

Israeli law further extends moral rights for authors to include the right of attribution and the right of integrity.<sup>91</sup> These rights are not subject to the exception and limitations, including fair use.<sup>92</sup>

Chapter Four of the Copyright Act, entitled Permitted Uses,<sup>93</sup> defines the circumstances under which exploitation or use of a copyrighted work would be permissible by law even in the absence of a license from the copyright owner.<sup>94</sup> In addition to fair use, the law lists multiple uses that are permitted without authorization of the copyright owner, such as preparation of certain copies by public libraries and archives;<sup>95</sup> public performances in educational institutions;<sup>96</sup> transient and incidental copying of a work, provided that this is an integral part of communication conducted by an intermediary network;<sup>97</sup> or making transient copies when necessary

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specified in section 11, or who authorizes another person to perform any such act, without the consent of the copyright owner, infringes the copyright, unless such act is permitted pursuant to the provisions of Chapter IV.”).

91. *See id.* § 45(a) (highlighting that this moral right of attribution and integrity applies to authors of artistic works, dramatic works, musical or literary works, but not computer programs).

92. The right of integrity is subject, however, to a reasonableness test. § 50(b) provides that any derogatory acts in relation to the work, that would otherwise may violate the author’s moral right, “shall not constitute an infringement of the said moral right where the act was reasonable in the circumstances of the case.” *See id.* § 47(b).

93. *See* Copyright Law (2007), *supra* note 10, § 18-32.

94. *Id.* § 18 (“Notwithstanding the provisions of section 11, the doing of the actions specified in sections 19 to 30 is permitted subject to the conditions specified respectively in the aforesaid sections and for the purpose of carrying out the objectives specified therein, without the consent of the right holder or payment, however with respect to the activities specified in section 32 – upon payment and in accordance with the provisions of that section.”).

95. *Id.* § 30-31. These sections exempt certain uses in libraries and archives of the type prescribed by the Minister of Justice and the Minister of Education, for the purpose of preservation.

96. *Id.* § 29 (explaining that the law permits public performance in an educational institution, provided that it is made to an audience composed strictly of students and employees of the educational institution, the students’ relatives or others directly connected to the educational activity of the institution. A more limited exemption applies to the public performance of films where performance is permitted for teaching or examination purposes only); *see also id.* § 67(a)-(b)(2) (stating that the minister responsible for prescribing such regulations for the implementation of the law is the Minister of Justice subject to approval by the Minister of Education).

97. *Id.* § 26.

to enable lawful use of the work, provided that the said copy does not have significant economic value in itself.<sup>98</sup>

Fair use was modeled after the U.S copyright law, with the explicit intention of the legislator to allow Israeli courts to rely on US case law for its interpretation. The fair use provision under the Israeli Copyright Act is similar, but not identical, to the U.S. provision. Section 19 provides that:

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

In determining whether a use made of a work is fair within the meaning of this section, the factors to be considered shall include, *inter alia*, all of the following:

The purpose and character of the use;

The character of the work used;

The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;

The impact of the use on the value of the work and its potential market.<sup>99</sup>

Section 19(c) authorizes the Minister of Justice to “make regulations prescribing conditions under which a use shall be deemed a fair use.”<sup>100</sup> The purpose of establishing this authority was to reduce the uncertainty resulting from the open ended nature of the

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98. *Id.*

The transient copying, including incidental copying, of a work, is permitted if such is an integral part of a technological process whose only purpose is to enable transmission of a work as between two parties, *through* a communications network, by an intermediary entity, or to enable any other lawful use of the work, provided the said copy does not have significant economic value in itself.

This exemption should be understood in the light of the broad definition of the exclusive right to reproduce works in § 12. The statutory definition covers, among other things, the storage of a copyrighted work by any technological means, and the making of a temporary copy of a work.

99. Copyright Law (2007), *supra* note 10, § 19.

100. *Id.* § 19(c).

fair use doctrine.<sup>101</sup> So far, however, no regulation under this provision has been issued.

Since the effective date of the law, Israeli courts developed the fair use doctrine through adjudication. As is often the case with legal transplants, fair use doctrine in Israeli law has developed a unique meaning that may depart from its origin.<sup>102</sup> For instance, courts generally apply the four factors analysis when determining fairness of use, yet some courts have also added an original requirement by which appropriate credit (attribution) must be accorded to the original author in order for the use to be considered fair.<sup>103</sup>

Israeli courts acknowledged the importance of access to knowledge, by holding that maximizing access to copyrighted materials by the general public serves the ultimate goal of copyright law.<sup>104</sup> Courts have also recognized the significance of transformative use for fostering the goals of copyright law,<sup>105</sup> although noting that this interest must be balanced against the proprietary interests of the copyright owner.<sup>106</sup>

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101. See Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 395-96, 434, 437 (2009) (proposing an administrative tribunal that would offer declarative judgment on fair use); see generally Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007); see also Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 122, 151-52 (2004); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1483 (2007) (proposing “safe harbors”).

102. See generally Michael Birnhack, *Judicial Snapshots and Fair Use Theory*, 5 QUEEN MARY J. INTELL. PROP. 264 (2015) (warning against under theorized legal transplants).

103. See CA 2790/93 Eisenman v. Qimron 54(3) PD 817 ¶ 20 (2000) (Isr.) (holding that a use could not be considered fair when the user did not give appropriate credit to the original author); see also Niva Elkin-Koren, *Users' Rights*, in READINGS IN THE NEW COPYRIGHT ACT 327 (Michael Birnhack & Guy Pessach eds., 2009) (Hebrew). For further discussion of the cases following the enactment of the new law, where the court held that fair use is not available when the defendant fails to provide credit to the copyright owner, see AFORI, *supra* note 79, at 213.

104. CA 326/00 City of Holon v. N.M.C. Music Ltd., 57(3) PD 658 (2003) (Isr.); CA 9183/09 Football Ass'n Premier League Ltd v. Anonymous (2012) (Isr.) (describing fair use as reflecting an internal balance within copyright law, between various goals of the law: incentivizing authors to create new works, and enriching the public domain).

105. See Geva, *supra* note 82; CA 513/89 Interlego A/S v. Exin-Line Bros. S.A., 48(4) PD 133, 163 (1994) (Isr.).

106. CA 5977/07 Hebrew Univ. of Jerusalem v. Schocken Publ'g Ltd. 64(3) PD

## B. FAIR USE ON THE GROUND

The introduction of the fair use doctrine into Israeli copyright law created high hopes for promoting access to knowledge. Did the introduction of fair use reinforce user rights and secure more access? Law on the books tells only a partial story. In order to assess the significance of fair use, it is also necessary to explore how law is put into practice. It is difficult to measure the impact of fair use on Access to Knowledge for several reasons, including the difficulty to define the group of *potential fair users* of copyrighted materials and to identify *potential uses* that would not have taken place in the absence of fair use.<sup>107</sup> Yet, studying the impact of fair use on copyright enforcement may offer some insights on the significance of this doctrine.

Does fair use matter in copyright enforcement? An extensive study of enforcement practices pertaining to online copyright infringements in Israel offers empirical evidence on the impact of fair use.<sup>108</sup> The study compared two major enforcement strategies following the enactment of the law: traditional court proceedings and the Notice and Take Down (“N&TD”) procedure implemented by online intermediaries.<sup>109</sup> The study analyzed copyright lawsuits pertaining to online infringements filed in Israeli courts during 2010-2013. These findings were compared to an extensive analysis of data on notices filed under the N&TD procedure, as reported in the Google Transparency Report, and a study of actual N&TD practices of local intermediaries. The findings are discussed in detail below.

### *1. Fair Use in Courts*

It might be too soon to fully assess the significance of introducing fair use in Israeli law, as the law came into force less than a decade ago. Some trends in litigation, however, can already be identified.

During the seven-year period that commenced on the date that the

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740 (2011) (Isr.).

107. See generally R. van der Noll et al., *Flexible Copyright The Law and Economics of Introducing an Open Norm in the Netherlands* 37-46 (2012), <http://www.ivir.nl/publicaties/download/760> [hereinafter *Flexible Copyright*]; JEREMY MALCOLM, *supra* note 17, at 141-206.

108. See Niva Elkin-Koren & Sharon Bar Ziv, *Online Copyright Enforcement: The Israeli Arena* (University of Haifa, July 2015) (Hebrew).

109. See *Id.*



Copyright Act came into force, there was a sharp increase in the number of rulings by Israeli courts that addressed fair use.<sup>110</sup> In only seven years, between 2008-2015, Israeli courts issued approximately 48 rulings that address *fair use*.<sup>111</sup> In comparison, during the period of sixty years between 1948 and 2008, commencing on the date of the establishment of the State of Israel and ending on the date that the Copyright Act came into force, *fair dealing* was addressed by roughly 30 rulings.<sup>112</sup>

Published rulings only partially present the role of fair use in copyright litigation. The reason is that many lawsuits do not end in a ruling. An empirical analysis of lawsuits and briefs may offer a broader view of the legal proceedings, interim decisions, and lawsuits that were concluded by Alternative Dispute Resolutions.<sup>113</sup> The current study therefore analyzed all of the lawsuits filed in Israel for online copyright in the years 2010- 2013.<sup>114</sup> The findings show that fair use was claimed by defendants in only 11% of the cases.<sup>115</sup> In the vast majority of cases, the claim of fair use was not even raised.

This small number of fair use claims is somewhat surprising. Indeed, lawsuits are self-selected by plaintiffs; therefore, it could be reasonably assumed that plaintiffs would avoid filing a lawsuit that explicitly raises fair use. Yet, defendants who do not believe that their claims are set in stable ground may avoid litigation altogether

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110. Elkin-Koren & Bar Ziv, *supra* note 108.

111. *Id.*

112. A caveat: this data should be understood in light of the general increase in litigation and the increase in copyright litigation in particular.

113. See generally Matthew Sag, *Empirical Studies of Copyright Litigation: Nature of Suit Coding* 1-7 (Loyola Univ. Chi. Sch. of Law Pub. Law & Legal Theory, Research Paper No. 2013-017, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2330256](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330256); see also *id.* at 2 (citing George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984)); Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 155, 168 (2006).

114. The relevant cases were identified using the electronic case management system of the Israeli Courts System ("NetLaw") and appropriate legal databases. The analysis included the identity of the litigants (distinguishing between individuals, corporate and public players), the types of works which were the subject of the lawsuit, the types of remedies sought by litigants and granted in practice, and the different types of rulings that were handed by the court.

115. See generally Elkin-Koren & Bar Ziv, *supra* note 108.

and opt for a settlement. Choosing to face litigation may therefore signal a certain basis for denying the suit. Consequently, the finding that defendants who chose to litigate rather than settle will refrain from raising fair use claims is surprising. Indeed, defendants' claims are not limited to fair use. The defendant could raise an entire range of issues, including denying the plaintiff's copyright or refuting the claim that their action constitutes an infringement under the law. Yet, in view of the broad discretion afforded to the court in fair use cases, it was predicted that more defendants would raise this legal claim.<sup>116</sup>

These findings suggest that fair use had a relatively small impact on copyright enforcement. There is one important caveat to these findings. One should keep in mind that the study analyzed lawsuits that were filed in court. Legal actions, however, also take place outside of court via negotiations, settlements, and cease-and-desist letters sent by potential claimants who believe that their copyright has been infringed. At times, this activity is more extensive than litigation in the courtroom. Legal actions outside of the court may also influence litigation and the outcome of the legal proceedings. Settlements are reached in the shadow of the law and are shaped, among other factors, by the prospects of winning in court.<sup>117</sup> Consequently, the importance of fair use should be measured outside of the courtroom as well. One example that demonstrates the mobilizing significance of fair use is the struggle to secure access to educational materials in Israel. The introduction of fair use inspired the establishment of a coalition of Israeli academic institutions that proactively developed a Code of Fair Use Best Practices, which governs fair use for educational purposes.<sup>118</sup> These principles were eventually adopted in a settlement agreement between Hebrew

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116. *Id.*

117. See Leah Chan Grinvald, *Policing the Cease-and-Desist Letter*, 49 U.S.F. L. REV. 411, 411 (2015) (arguing that in the US only a small proportion of legal disputes ends up in court). One reason for the large discrepancy between the number of legal disputes and the extent of court litigation in the field of copyright is the widespread use of legal threat and of removal requests. There are several reasons why potential claimants prefer to use threatening letters requesting removal rather than going to court: the cost of litigation, uncertainty regarding the results of litigation, and success in previous cases using removal request letters.

118. See generally Amira Dotan et al., *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience*, J. COPYRIGHT SOC'Y U.S.A. (forthcoming).

University and two major academic publishers, which was approved by the court.<sup>119</sup>

Israeli adjudication on *user rights* suggests that simply introducing fair use into the statute is not the culmination of copyright reform. Instead, it is only the beginning of an ongoing struggle to safeguard unlicensed use that is deemed necessary to the very creativity which copyright law is designed to foster.

## 2. *Fair use in copyright enforcement by online intermediaries*

As discussed above, a large portion of online copyright enforcement nowadays is performed via online intermediaries. Online intermediaries are generally not held liable for infringing materials posted by their subscribers unless they knowingly contributed to the copyright infringement.<sup>120</sup> Moreover, the safe harbor regime established by the US DMCA grants immunity to online intermediaries from monetary liability, provided that they comply with the DMCA safe harbor provisions.<sup>121</sup> To qualify for safe harbor, a hosting facility must meet several requirements, including applying the Notice and Take Down (N&TD) procedures.<sup>122</sup> The

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119. For an English translation of the settlement, see [http://weblaw.haifa.ac.il/en/AcademyInCommunity/ClinicList/tech/Documents/Code%20of%20Best%20Practices%20\[English%20Translation\].pdf](http://weblaw.haifa.ac.il/en/AcademyInCommunity/ClinicList/tech/Documents/Code%20of%20Best%20Practices%20[English%20Translation].pdf)

see also Ariel Katz, *Israeli Publishers and Hebrew University Reach Historic Agreement on Fair Use*, ARIEL KATZ ON INTELLECTUAL PROPERTY, COMPETITION, INNOVATION, & OTHER ISSUES (Nov. 28, 2013), <http://arielkatz.org/archives/3042>; Kevin Smith, *Fair Use, Georgia State, and the Rest of the World*, DUKE UNIV. (Dec. 2, 2013), <http://blogs.library.duke.edu/scholcomm/2013/12/02/fair-use-georgia-state-and-the-rest-of-the-world>; CrivBlog, *GSU Updates and a Way Forward*, CRIVBLOG (Dec. 3, 2013), <https://crivblog.com/2013/12/03/gsu-updates-and-a-way-forward-from-israel>.

120. See Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512 (2016); Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS J. 375, 376 (2009).

121. See *id.* § 512(c)(1)(A)(ii) (stating that to qualify for immunity under the N&TD regime, an OSP cannot have actual knowledge that infringing content is on its system or be “aware of facts or circumstances from which infringing activity is apparent”); see also *id.* § 512(c)(1)(B) (providing that if OSPs later become aware of such content, they must expeditiously remove it from their system; moreover, it should not receive a direct financial benefit from any infringing activity, which it has the right and ability to control).

122. See *id.* § 512(a)-(d), (i) (immunity from monetary liability for materials that are transmitted over networks, cached on a server, linked to, or stored at the

N&TD procedure established by the DMCA requires online intermediaries to respond “expeditiously” to notices of infringement by removing or disabling access to allegedly infringing material when certain conditions are met.<sup>123</sup> The DMCA further encourages compliance with N&TD by exempting OSPs from liability for mistaken, yet good faith removal of material.<sup>124</sup>

It is important to note that currently, online intermediaries are encouraged to remove materials expeditiously upon receiving a notice, without exercising any discretion regarding the substantive claims.<sup>125</sup> As further explained below, until recently right-holders were also exempted from considering fair use prior to issuing a removal request.

Israeli law, like many jurisdictions outside the United States, has no clear statutory framework that governs the N&TD procedure. Israeli courts have applied the doctrine of contributory infringement in the case of online intermediaries, holding that intermediaries will be held liable for infringing materials posted by their users if they knowingly contributed to the infringement.<sup>126</sup> Therefore, similar to U.S. law, online intermediaries might be subject to contributory liability for copyright infringing materials posted by their subscribers, if they fail to remove the materials upon receiving a notice.

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direction of a user, OSPs are required to adopt and implement certain policies. In particular, OSPs must comply with two preliminary policies. First, they must adopt and reasonably implement a policy to terminate the accounts of repeat infringers and must notify users of this plan. Second, they must also accommodate “standard technical measures” used by copyright owners to identify infringing material).

123. See *id.* §§ 512(b)(2)(E)(i)-(ii), 512(c)(1)(C).

124. Digital Millennium Copyright Act, *supra* note 120 § 512(g)(1) (stating that intermediaries that fail to act in good faith may lose safe harbor and may be required to pay damages to content providers whose material was unlawfully removed under the intermediaries’ stated terms of use).

125. See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”?* Takedown Notices Under Section 512 of the Digital Millennium Copyright Act, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 626 (2006).

126. See, e.g., *Schocken*, *supra* note 106; CC (CT) 567-08-09 ALIS, Ass’n for the Protection of Cinematic Works v. Rotter.net Ltd. (Aug. 8, 2011). Note that liability for contributory copyright infringement under Israeli case law requires *actual knowledge* of the infringing acts. Constructive knowledge would be insufficient for establishing liability.

The Google search engine has become a focal point for enforcing copyright. Google is the main platform for locating sites and gaining access to materials posted on the internet. Content that is inaccessible via Google is difficult to find. Consequently, when Google removes links to allegedly infringing materials or even simply relegate links to the bottom of the search results,<sup>127</sup> the allegedly infringing content might still be available online on the original website, but this may significantly reduce traffic to the site.

The study reported above, further sought to record the scope of online copyright enforcement targeting Israeli websites, by analyzing data released by Google. Google, which is a U.S.-based OSP, is following the DMCA, and applying the N&TD to notices targeting Israeli websites. Google regularly receives requests (notices) from apparent copyright owners to remove links to allegedly infringing materials from the search results returned by the engine. Notices are conveyed to Google through an online form.<sup>128</sup> Each request lists the name of the sender, the name of the copyright owner, and one or more webpages (URLs) that Google is asked to remove from the search results. After receiving the removal request, Google often removes the link, to comply with the DMCA.<sup>129</sup> To increase transparency with regard to this activity, Google publishes periodic transparency reports (Google Transparency Report, GTR).<sup>130</sup>

The analysis of Google GTR yielded a high volume of notices that is consistently increasing. Based on the analysis of data reported by

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127. Google's Pirate algorithm, revised in 2014, changes its search algorithm in such a way that sites for which a large number of removal requests have been received are assigned a low ranking in search results, relegating them to the bottom of the search results, where it is difficult to locate them. See *Continued Progress on Fighting Piracy*, GOOGLE PUB. POLICY BLOG (Oct. 17, 2014), <https://publicpolicy.googleblog.com/2014/10/continued-progress-on-fighting-piracy.html>.

128. *Removing Content from Google*, GOOGLE, <https://support.google.com/legal/troubleshooter/1114905?rd=1#ts=1115655> (last visited Jul. 22, 2016).

129. Digital Millennium Copyright Act, *supra* note 120, § 512(d).

130. The GTR contains data related to the removal requests it received, including information on the entities that sent the requests, the allegedly infringing content, and the manner in which the requests were addressed and the materials in question handled. <https://www.google.com/transparencyreport/>. The data published by Google relate both to the handling of the specific removal requests and to the "suspected domain names." See *Transparency Report*, GOOGLE, <https://www.google.com/transparencyreport/> (last visited Jul. 22, 2016).

the GTR, the study found that during the period between July 2011 and December 2013,<sup>131</sup> a total of 7091 removal requests concerning Israeli URLs (i.e. with an “.il” extension) were submitted to Google.<sup>132</sup>

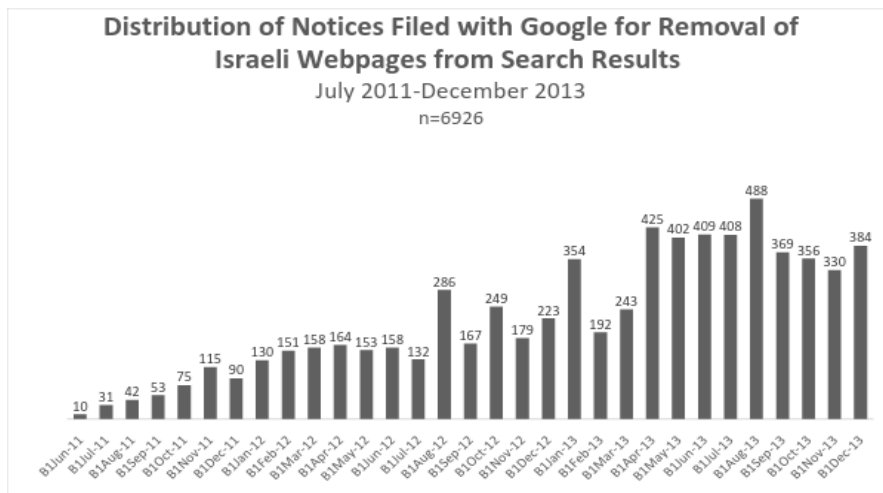


Figure 1: Distribution of requests filed with Google for removal of Israeli webpages from search results, July 2011-December 2013

By comparison, during the years 2010-2013 a total number of 687 copyright infringement lawsuits were filed.<sup>133</sup> The majority of lawsuits involving copyright infringement during that time concerned infringements outside the internet (60%), while only 40% of the lawsuits addressed online infringements.<sup>134</sup>

131. See *infra* Figure 1: Distribution of Requests Filed with Google for Removal of Israeli Webpages from Search Results, July 2011-December 2013 (showing the distribution of requests submitted between July 2011 and December 2013. To avoid an edge effect, we do not present data before July 2011 and after December 2013, which is the reason for the gap between the 6926 requests shown in the graph and the 7091 requests submitted according to the Google reports).

132. Elkin-Koren & Bar Ziv, *supra* note 108.

133. *Id.*

134. Only 32% of the lawsuits (216 cases) exclusively addressed online infringements, and the remaining 8% involved both online and offline infringements.

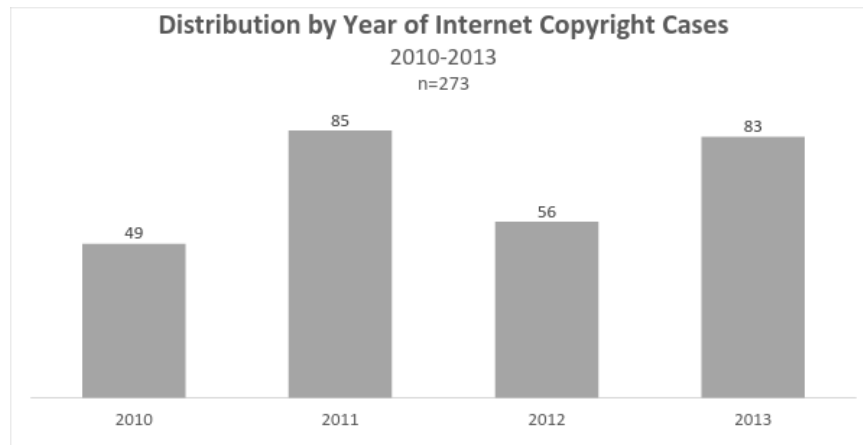


Figure 2: The Number of Internet Copyright Cases per Year, 2010-2013

These findings demonstrate the prevalence of copyright enforcement by online intermediaries. Its scale is unparalleled to copyright enforcement in court. In other words, the vast majority of disputes related to allegedly copyright infringing materials rely on N&TD procedures, and, currently, these procedures do not involve any fair use claims.<sup>135</sup>

As explained, fair use plays a relatively minor role in the enforcement procedures of online intermediaries. An experiment, which was part of the same study, took a closer look at the actual practices of local online intermediaries and confirmed this conclusion.<sup>136</sup> The study sought to systematically test how hosting websites implement the N&TD policy.<sup>137</sup> In order to do so, different types of infringing and non-infringing materials, including content that clearly qualifies as fair use, were uploaded to designated hosting facilities.<sup>138</sup> After uploading the content, a takedown notice was sent

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135. Elkin-Koren & Bar Ziv, *supra* note 108.

136. Perel & Elkin-Koren, *supra* note 66.

137. These platforms were designated by various Israeli forums as being the most popular file sharing platforms in Israel, a designation that was also confirmed by the second biggest advertising company in Israel. *Id.*

138. The researchers have attempted to upload three types of images to the image-sharing platforms: (1) an infringing image of a known work with a copyright notice ©; (2) a non-infringing image; (3) a non-infringing image with a copyright notice ©. The researchers have also attempted to upload different types of videos snippets to the video-sharing platforms: (a) a 2:42 minutes infringing video with Content ID (a snippet of an original, copyright-protected video, can trigger an automatic content filtering technology, such as YouTube's

to the platform claiming that the content infringes copyrights and requesting its removal.<sup>139</sup> During all stages, the response time and follow-up actions of the various platforms were systematically recorded.<sup>140</sup>

The findings show that local hosting facilities in Israel behaved inconsistently and thus were unpredictable in how they detected online infringements and enforced copyrights. Specifically, 25% of video-sharing platforms and approximately 10% of image-sharing platforms seemed to employ a system of *ex ante* filtering of presumed infringing online content, indicating that online intermediaries occasionally go beyond N&TD and remove content automatically before receiving complaints of copyright infringement.<sup>141</sup> Furthermore, 50% of video-sharing platforms and 12.5% of image-sharing platforms removed infringing content after

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Content ID); (b) a similar snippet of the same video, but without Content ID (a snippet of an already-copied video may not be identified by an automatic content filtering technology such as YouTube's Content ID); (c) a non-infringing short video; (d) a Fair Use homemade video clip; (e) a 19 seconds non-infringing video with a copyright notice ©, and (f) a 3:22 minutes video of non-infringing photos with a copyright notice © and with an infringing music. *Id.*

139. The study proceeded in several steps, each of which was systematically recorded by the researchers: First, different types of content were submitted to the examined platforms. When upload was unsuccessful, the researchers assumed that an *ex ante* mechanism of filtering was used. Second, when upload was successful, the researchers checked periodically whether the content remained online or was otherwise blocked/removed. Third, if the content remained online after 72 hours, the researchers sent a notice to the platform complaining it was probably hosting copyright infringing content. Fourth, if the content was removed by the platform after receiving the notice, the researchers reported whether they received a notice of removal. In the case that they were notified about the removal, the researchers reported whether that notification contained information about the removal reason; whether it contained information about the complainant and whether it provided any dispute opportunities. Fifth, the researchers examined periodically whether the removed content remained offline. Sixth, after two weeks, the researchers attempted to reload the removed content and reported whether reload was successful, partly successful or unsuccessful. *Id.*

140. The study sought to determine whether they filter infringing content *ex ante* by automatically blocking presumably infringing uploads, or whether they only remove such posts *ex post*, upon notice of copyright infringement; whether they verify the rights claimed by the complainants; whether they notify alleged infringers and complainants about content removals; whether the content becomes accessible following the removal and whether they learn from past incidents and automatically block second time attempts to reload infringing content. *Id.*

141. Perel & Elkin-Koren, *supra* note 66.



receiving a complaint notice, while one-third of the image-sharing platforms also removed non-infringing content after receiving a complaint notice.<sup>142</sup> In other words, some platforms allow content that is filtered by others; some platforms rigidly respond to any notice requesting removal of content despite it being clearly non-infringing; while other platforms fail to remove content upon receiving notification of alleged infringement.

Overall, the study revealed that copyright enforcement by online intermediaries in Israel is robust in terms of scale and volume. These findings are consistent with global trends. Copyright owners prefer to vindicate their rights by resorting to online resolution systems, instead of going through the hustle of filing an expensive and time-consuming suit for copyright infringement. Copyright enforcement thus becomes algorithmic: right holders are using robots to search the web for infringing activity, and submit voluminous amounts of automatic removal requests simultaneously to all platforms identified as containing allegedly infringing material.<sup>143</sup>

These findings also raise concerns regarding Access to Knowledge. The first concern is that while fair use can be invoked in a copyright infringement lawsuit, there is little room for fair use under the current enforcement procedures implemented by online intermediaries. Second, the findings show that online intermediaries remove non-infringing materials, including materials that clearly qualify as fair use.<sup>144</sup> These findings are consistent with anecdotes reported elsewhere on the removal of fair use materials.<sup>145</sup>

Third, it is apparent that fair use is not incorporated into the current Israeli N&TD practices in any way. On the contrary, in the absence of any procedure similar to the DMCA, Israeli

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142. *Id.*

143. See Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* (UC Berkeley Pub. Law Research Paper No. 2755628, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628)

144. A fair use home-made video, in which a toddler is singing 48 seconds of a copyrighted song, was removed upon a notice in 1/4 of hosting sites to which it was uploaded. *Id.*

145. See Dineen Wasylik, *Take Down Abuse: From Harry Potter to Legos*, DPW LEGAL (Feb. 7, 2014), <http://ip-appeals.com/take-down-abuse-from-harry-potter-to-legos> (recounting how a ten-year-old boy's self-authored original video starring his LEGO mini-figures and garbage truck was blocked despite the fact that he used royalty-free music).

intermediaries have a strong incentive to remove any material expeditiously upon receiving a notice. Otherwise, they might be exposed to contributory liability for hosting infringing materials.

Also, under the DMCA online intermediaries have strong incentives to take down or block access to allegedly infringing content to avoid the risk of facing liability for their users' infringements.<sup>146</sup> Indeed, the N&TD procedure established by the DMCA requires OSPs to take "reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material"<sup>147</sup> and promptly forward any counter notices from alleged infringers back to the original complainant.<sup>148</sup> If after ten to fourteen days following receipt of a counter notice, the complainant does not notify the OSP that she had filed a lawsuit, the OSP must reinstate the contested material.<sup>149</sup> Yet the DMCA's counter notice procedure places the burden of responding to notices on alleged infringers. Recipients of removal notices may often lack important information about the allegations and the legal expertise necessary to address them. Given the volume of notices in the robust sphere of online copyright enforcement, a counter notice is often impractical. The handful of cases addressing the counter notice procedure suggest that this procedure is long, the burden of proof is high, and it does not effectively deter right-holders from issuing mass notifications.<sup>150</sup>

All in all, the findings of the study suggest that the presence of fair

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146. See Digital Millennium Copyright Act, *supra* note 120, § 512(c)(1)(A)(iii) (2016); see also Seth F. Kreimer, *Censorship by Proxy: the First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 23 (2006) (discussing the dangers of using proxy censors on free speech); Neil Weinstock Netanel, *First Amendment Constraints on Copyright after Golan v. Holder*, 60 UCLA L. REV. 1082, 1120-27 (2013).

147. See Digital Millennium Copyright Act, *supra* note 120, § 512(g)(2)(A) (2016).

148. See *id.* § 512(g)(2)(B) (2016). A counter-notification must include the following: (A) a physical or electronic signature; (B) identification of the material removed and its former location; (C) statement under penalty of perjury that the user has a good faith belief the material was mistakenly removed; (D) the user's name, address, and phone number; and (E) consent to the jurisdiction of Federal District Court. See also 17 U.S.C. § 512(g)(3) (2016).

149. Search engines, on the other hand, are not required to notify the alleged infringer of removal because they are not expected to have any service relationship with the alleged infringer. See Digital Millennium Copyright Act, *supra* note 120, § 512(d) (2016); Urban, *supra* note 143.

150. Urban, *supra* note 143.

use in the actual practice of copyright enforcement is minimal. For fair use to remain significant in the new digital frontiers, it must be incorporated into the N&TD procedures. This will be further discussed in part IV below.

#### IV. FAIR USE - NEW FRONTIERS

Does fair use matter for access to knowledge? Fair use leaves the courts broad discretion, allowing them to develop a space for unlicensed use and adjust the law to new needs and circumstances. Therefore, fair use will undoubtedly continue to play an important role in encouraging the development of new and innovative uses. Fair use matters, however, only when copyright claims are invoked. Where barriers to access are not tied to copyright, fair use may become secondary. The shift in copyright enforcement from courts to online intermediaries alter the role of copyright, and may marginalize the practical importance of fair use for day-to-day copyright disputes. Can fair use secure some space for non-infringing use of copyrighted materials in this environment?

The Israeli case study demonstrates that online intermediaries have become the primary enforcers of copyright law.<sup>151</sup> This enforcement arena differs from copyright enforcement in court in many respects,<sup>152</sup> two of which might be particularly relevant to fair use. The first is that enforcement takes place in private facilities, and the second is its algorithmic implementation. The fact that online intermediaries are private facilities raises a whole new set of issues related to the increasingly obscured boundaries between the public and private domains. For instance, when intermediaries choose to filter allegedly infringing materials or to remove some materials upon notice, they may simply be making private choices regarding content that is made available on their platforms.<sup>153</sup> At the same time however, when online intermediaries monitor, filter, block and remove allegedly infringing materials they engage, de facto, in copyright enforcement.<sup>154</sup> Are online intermediaries free to decide

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151. See *supra* notes 149-54 and accompanying text.

152. Elkin-Koren & Bar Ziv, *supra* note 108.

153. James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868, 870-71 (2014).

154. Perel & Elkin-Koren, *supra* note 66.

which content to carry? Are they subject to any duties in exercising discretion on which content to remove? Another set of issues relates to cost and the reasonable scope of law enforcement duties that might be imposed on private entities.<sup>155</sup>

A second characteristic of copyright enforcement by online intermediaries is that it is algorithmic. Over the past two decades, the N&TD regime has become ubiquitous and embedded in the system design of all major intermediaries. Major copyright owners increasingly use robots to identify unauthorized use of their work online and send large numbers of takedown requests. In response, major online intermediaries use algorithms to filter, block, and disable access to allegedly infringing content automatically, with little or no human intervention.<sup>156</sup> The N&TD procedure mandates immediate removal and pushes fair use aside.

Copyright enforcement by online intermediaries introduces new frontiers. If fair use is narrowly interpreted as merely a legal defense (“the legal defense approach”), its impact on Access to Knowledge is likely to decline in the new copyright frontiers. Indeed, fair use may still offer a powerful legal doctrine – enabling the court to adjust the law to accommodate new technological changes. Yet, in the emerging environment that is regulated by online intermediaries, governed by licenses, terms of use and algorithms, copyright is neither the problem nor the solution.

Fair use as an affirmative defense merely offers an excuse for circumstances in which an otherwise infringing copying will impose copyright liability. But fair use as a legal defense might be largely irrelevant to online enforcement, and consequently the legal defense approach to fair use might be insufficient for counterbalancing these developments. In a N&TD regime, online intermediaries are required to comply with the notice expeditiously and exercise no discretion regarding the allegedly infringing materials. In voluntary blocking, filtering and removal by online intermediaries (DMCA Plus), there might not be a copyright claim to confront at all, and there is often

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155. See Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH* ( March 27, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=572548> (showing that cost was one of the issues addressed by a recent decision of the CJEU on site-blocking order).

156. See *infra* note 157 and accompanying text.

no procedure for raising fair use claims. Therefore, these new frontiers call for a different approach to addressing the freedom of access that is protected under fair use.

The following discussion proposes an approach that could help revive fair use in this context. First, at the conceptual level, fair use should be interpreted as a user's right and not simply an affirmative defense. Second, fair use must be incorporated into online enforcement processes, either by clarifying legal procedures or by embedding fair use considerations in the design. The following discussion briefly introduces the user rights approach to fair use and demonstrates how it could become useful for ensuring access to copyright materials in an environment of robotic notices and algorithmic enforcement. The recent decision of the Ninth Circuit in *Lenz v. Universal Music Corp*<sup>157</sup> is discussed in order to demonstrate how the user rights approach could be incorporated in the N&TD procedure and offer fair use by design.

#### A. THE USER RIGHTS APPROACH

The *user rights approach* to fair use presumes that incentives to authors are only one means of promoting creativity, while other, equally important mechanisms focus on securing adequate access rights for users. In other words, the rights of authors (for incentives or just reward) and the rights of users to use creative works (e.g., read, learn, disseminate, re-use, and transform) are different mechanisms for promoting copyright goals.<sup>158</sup> From this perspective, the fair use doctrine significantly limits the scope of the monopoly granted to authors under copyright law. It is designed to identify the circumstances in which unlicensed use should be permissible in order to promote the goals that copyright law seeks to achieve. The right to perform these uses without a license is derived from copyright intended goals, and therefore fair use is not simply a non-infringing use, but rather it is mandated by copyright policy.

The Supreme Court of Israel addressed the issue of user rights under the new copyright act, in several cases pertaining to the legal

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157. See *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

158. Niva Elkin-Koren, *Copyright in a Digital Ecosystem: A User-Rights Approach*, in *COPYRIGHT LAW IN AN AGE OF EXCEPTIONS AND LIMITATIONS* (Ruth Okediji ed., 2015).

status of permissible uses.<sup>159</sup> Initially, in 2012, the Court explicitly rejected the position that fair use is a user right. The case *Football Association Premier League Ltd v Anonymous* (2012)<sup>160</sup> involved a petition to unmask the identity of an anonymous user who streamed unauthorized broadcasts of football matches owned by the English Premier League. Although the petition was dismissed on procedural grounds, the Israeli Supreme Court held that streaming constituted copyright infringement and that fair use did not apply.<sup>161</sup> The Court further clearly stated the legal defense approach to fair use. The Court described fair use as facilitating copyright internal balance, between incentivizing authors and enriching the public domain, yet, it explicitly rejected the position that fair use was a right. The Court explained that fair use, as an affirmative defence, could still serve that purpose. Moreover, the Court reasoned that even though the new law explicitly defined fair use as “permitted use,” it did not accord fair use the legal status of a ‘right’ which is equivalent to copyright.<sup>162</sup>

Soon afterwards, the Supreme Court questioned this approach in *Telran Ltd. v Charlton Communications* (2013).<sup>163</sup> The case involved the legality of marketing decoding cards that enabled Israeli customers to decode the encoded broadcasts of the World Cup games, which were transmitted from foreign channels via satellite. The Court held that merely distributing the decoding cards did not amount to a copyright infringement, nor was it a contributory infringement, since simply watching copyrighted materials did not constitute a copyright infringement.<sup>164</sup> The Court explicitly rejected the defense approach to fair use held by the Premier League Court, noting that fair use is not merely a technical defense for copyright infringement but a permissible use.<sup>165</sup> Consequently, even if users of

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159. *See id.*, at 327 (arguing that the new Israeli copyright act offered a new legal framework for conceptualizing users’ rights).

160. CC (TA) 1636/08 Football Ass’n Premier League Ltd. v. Anonymous (Sept. 2, 2009) (Isr.), [http://www.nevo.co.il/psika\\_word/mechozi/me-08-1636-11.doc](http://www.nevo.co.il/psika_word/mechozi/me-08-1636-11.doc).

161. *Id.* at 2.

162. *Id.* at 9-10.

163. CA 5097/11 Telran Commc’n (1986) Ltd. vs. Charlton Ltd., 45 Int’l Rev. Intell. Prop. & Competition L. 233 (Isr. Sept. 2, 2013).

164. *Id.* at 233.

165. *See Israeli Supreme Court: circumvention of copyright protection is not*

these decoding cards were making unauthorized copies which were nevertheless considered fair use, there were no grounds for holding the defendant liable for contributory infringement. According to Justice Zilbertal, users who exercise user rights do not commit an excusable infringing act, but instead act in a manner that is explicitly permissible by law and therefore there is no infringement to begin with. Consequently, “when no infringement materializes, there is no infringement to “contribute” to.<sup>166</sup> Hence, since the end-users carried out a permissible act, the middleman “contributed” to a permissible act – and in any event did not infringe any rights of the copyright owner, since these rights were not violated in the first place.”<sup>167</sup>

Subsequently, in the case of *Safecom v Raviv* (2013),<sup>168</sup> the Supreme Court reaffirmed this approach. The decision addressed copying drawings of a functional electric device in a patent application submitted to the USPTO. The Court adopted and cited the user rights approach upheld in *Telran* and noted the judicial controversy on this issue, commenting that the time was ripe for an extended judicial panel to consider this matter.<sup>169</sup>

Canada was a pioneer in promoting user rights.<sup>170</sup> User rights were first explicitly recognized by the Supreme Court of Canada in 2004, in the landmark case of *CCH Canadian Ltd. v. Law Society of Upper Canada*.<sup>171</sup> This approach was recently reaffirmed in a series of copyright decisions.<sup>172</sup>

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*prohibited*, LAW.CO.IL (Sept. 5, 2013), <https://www.law.co.il/en/m/#/news/7601/>.

166. *Telran Commc'n*, *supra* note 163, at 237.

167. *Id.*

168. CA 7996/11 *Safecom Ltd. v. Raviv* (Isr. Nov. 18, 2013), <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Safecom%2C%20Ltd.%20v.%20Raviv.pdf>.

169. *Id.* at ¶ 35.

170. See Teresa Scassa, *Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada's Decision in CCH Canadian Limited et al. v. Law Society of Upper Canada*, 3 CAN. J.L. & TECH. 89 (2004) (discussing how *Théberge v. Galerie D'Art du Petit Champlain*, [2002] 2 S.C.R. 336, and *CCH Canadian*, *infra* note 171, illustrated an area of law where Parliament has been strongly lobbied to restrict users' rights).

171. [2004] 1 S.C.R. 339 (Can.). See generally Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 462 (Michael Geist ed. 2005).

172. *Soc'y of Composers, Authors & Music Publishers of Canada (SOCAN) v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326; Canadian Copyright Licensing Agency, *supra* note 33.

These recent developments in Canada and Israel suggest that the legal status of fair use might have far-reaching consequences. Canadian copyright law includes *fair dealing* provisions, which are far more limited than fair use. Under *fair dealing* the use not only has to be proven fair, but must also fall under one of the strictly defined purposes enumerated by law. The Supreme Court of Canada held that since fair dealing was a user right “it must not be interpreted restrictively.”<sup>173</sup> Accordingly, the Court broadly interpreted *research*, under *fair dealing*, as also including sampling conducted during consumer research, and *private study* as also including copying by teachers.

The user rights approach to fair use could also help to set limits on the rights and duties of copyright owners who issue removal notices, and on copyright enforcement performed by online intermediaries. Following this approach, a copyright owner cannot limit fair use (right) by a unilateral license. A user rights approach to fair use may also affect the corresponding duties of online intermediaries, offering a legal framework for invalidating terms of use that unfairly restrict fair use and fundamental freedoms. For instance, as further demonstrated in the next section, right holders might be required to consider fair use before issuing a notice. Moreover, online intermediaries might be required to consider fair use in designing DMCA Plus procedures such as filtering. Overall, a user rights approach to fair use may offer more robust safeguarding of users’ liberties in the digital ecosystem.

#### B. LENZ V. UNIVERSAL, AND BEYOND

The recent decision of the Ninth Circuit in *Lenz v. Universal Studios*<sup>174</sup> demonstrates some of these issues. In this case, the court addressed the question of whether fair use should be considered by the copyright holder prior to sending a takedown notice. Stephanie Lenz uploaded a 29-second home video to YouTube in which her two toddlers are seen dancing in the family kitchen to the song “Let’s Go Crazy” by Prince. Universal, who represented Prince’s copyright,

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173. See *CCH Canadian*, *supra* note 171, at 364 (describing that the rights should be given the “fair and balanced reading that befits remedial legislation”).

174. See *Lenz*, *supra* note 157, at 1133 (holding that a copyright holder “must consider the existence of fair use before sending a takedown notification under Section 512(c)).



requested the removal of this video in a takedown notice sent to YouTube.<sup>175</sup> After receiving the takedown request, YouTube removed the video and notified Lenz of its removal. After sending two counter-notifications, YouTube eventually reinstated the video.<sup>176</sup> Lenz filed a suit claiming that Universal was liable for misrepresentation under § 512(f) of the DMCA.<sup>177</sup> The question addressed was whether the law requires a copyright holder to consider whether the potentially infringing materials constitute fair use before issuing a notice. The DMCA requires that notifications include a statement that the complaining party “has a good faith belief” that the use of the materials “is not authorized by the copyright owner, its agent, or the law.”<sup>178</sup>

Fair use, the court held, “is not just excused by law, it is wholly authorized by law.”<sup>179</sup> According to the language of the statute, the court explained that “fair use of a copyrighted work is permissible because it is non-infringing use.”<sup>180</sup> The court denied Universal’s argument that fair use is an *affirmative dense* that excuses otherwise infringing conduct. Fair use, the court held, should be viewed as a right, and therefore it is “authorized by law.”<sup>181</sup> Consequently, issuing a takedown notice without forming a good faith belief that the allegedly infringing work was not authorized by law (i.e., did not constitute fair use) may amount to misrepresentation.<sup>182</sup>

Accordingly, the ruling in the Lenz case requires right-holders to

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175. *Id.* at 1130.

176. *Id.*

177. *See* Digital Millennium Copyright Act, *supra* note 120, § 512(f) (2016) (providing “Any person who knowingly materially misrepresents under this section— (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages . . .”).

178. *Id.* § 512(c)(3)(A)(v) requires a takedown notification to include a “statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”

179. *See Lenz*, *supra* note 157, at 1132.

180. *Id.*

181. *Id.*

182. The court examined whether “Universal knowingly misrepresented that it had formed a good faith belief the video did not constitute fair use.” That is not to say that Universal should have known that the video was fair use. It only had to form a subjective good faith belief that a use is not authorized (i.e., it is not fair use). *Id.* at 1134.

consider fair use prior to sending takedown notification. If the right-holders fail to consider fair use, they might face liability. If, however, they consider fair use but mistakenly believe in good faith that the allegedly infringing materials does not constitute fair use, they will not be held liable.<sup>183</sup>

The court notes that “good faith belief” is subjective, yet, it offers several guidelines on what is required in order to comply with the statutory standard (i.e., forming a good faith belief that a use is not fair). Accordingly, the rights-holder should not overlook evidence to the contrary, yet the consideration of fair use need not be “searching or intensive.”<sup>184</sup> The court was well aware of the burden involved in exercising discretion of this sort:

We are mindful of the pressing crush of voluminous infringing content that copyright holders face in a digital age. But that does not excuse a failure to comply with the procedures outlined by Congress.<sup>185</sup>

Therefore, the court implied that consideration of fair use prior to issuing a takedown notice may not necessarily require a human review<sup>186</sup> and might be implemented by an algorithm.<sup>187</sup> Human review could be employed for the “minimal remaining content a computer program does not cull.”<sup>188</sup> Yet, the court refrained from explicitly ruling on this issue. This language was eventually removed from the revised opinion. Algorithmic implementation of “good faith” considerations regarding the existence of fair use may raise a

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183. At the same time, however, the court emphasizes that, “A copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to § 512(f) liability.” *Id.* at 1135.

184. *Id.*

185. *Lenz*, *supra* note 157, at 1135.

186. *Id.* (“We note, without passing judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA’s requirements to somehow consider fair use.”).

187. *Id.* (“For example, consideration of fair use may be sufficient if copyright holders utilize computer programs that automatically identify for takedown notifications content where: “(1) the video track matches the video track of a copyrighted work submitted by a content owner; (2) the audio track matches the audio track of that same copyrighted work; and (3) nearly the entirety . . . is comprised of a single copyrighted work.”).

188. *Id.* at 1136.

whole new set of questions regarding liability for discretion exercised by such systems. For instance, who would be held accountable for errors, and what rate of false positives and false negatives would be acceptable?<sup>189</sup>

## V. CONCLUSION

One of the greatest challenges to access to knowledge in the 21<sup>st</sup> century is private ordering. Terms of use, restrictions by design and robust algorithmic enforcement threaten to wipe out many of the safeguards of access created by fair use.

The *user rights approach* to fair use could help set limits on private ordering. According to this approach, limits on fair use fall beyond the bundle of rights defined by copyright, and therefore cannot be unilaterally restricted by a license. A user rights approach to fair use may also affect the corresponding duties of content providers and online intermediaries, offering a legal framework for invalidating terms of use that unfairly restrict fair use and fundamental freedoms.

At the procedural level, since the targets of the complaint do not have the option of defending themselves prior to removal of their content, fair use is not contested at the initial stages of algorithmic enforcement. Therefore, to revive and strengthen fair use in this arena, it is necessary to ensure that fair use considerations are applied prior to filing a notice. Fair use analysis might also be incorporated into the filtering, blocking and removal design, of online intermediaries, basically introducing “fair use by design.”

Overall, adapting a user rights approach to fair use and incorporating fair use in the enforcing design of online intermediaries may offer more robust safeguards for users’ liberties in the digital ecosystem. More universal adoption of fair use might be a positive development. Nevertheless, without strengthening the legal status of fair use and developing a jurisprudence of fair use rights, we may end up fighting the battles of the past.

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189. See Perel & Elkin-Koren, *supra* note 66.