

# FAIR USE AND CULTURE: COMMENTS ON THE GOWERS REVIEW

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## I. INTRODUCTION

THE fair use of copyrighted works<sup>1</sup> is one of the most important issues facing copyright law and the digital world today. Many aspects of it, however, are unclear. For example, under what circumstances is it legally possible to create a private copy? What are the authors' rights that members of society should be aware of before members distribute copyrighted materials?

It is cliché to say that culture is constantly changing; yet, it is impossible to deny. Fields such as science, psychology, and sociology constantly alter the world. Technical developments often enhance these changes. Indeed, decades ago, stem cell research and cloning seemed unimaginable, much like the mass usage of computers today might have been perceived more than a century ago. Social judgment of such novelties changes constantly and these aspects of modernity will inevitably become part of our culture with time.

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1. This doctrine works in the United States as an "affirmative defense," according to which courts are permitted "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." See *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57 (2d Cir. 1980). In this sense, the user's activity "must necessarily constitute an infringement, unless the defendant is rendered immune from liability because the particular use that he has made of plaintiff's material is a "fair use." See MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.05 (2005). On the other hand, its Continental European counterpart (called "free use") shall be deemed as a statutory granted exception from the authors' rights, according to which the user's activity is *ab ovo* legal, supposing that the statutory provisions are met. Accordingly, free uses are not "rights of the users," but restrictions put on authors who must tolerate such uses. The British doctrine of "fair dealing" is somewhere between the two above mentioned doctrines. It is developed and maintained by the British judiciary, however, the UK Copyright, Designs, and Patent Act also has special "free use" exceptions, like in the Continental European systems. See Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 *MARQ. INTELL. PROP. L. REV.* 1, 21-24 (2005).