

**A South African Perspective on User-Created Content in Cloud Computing:
A Copyright Conundrum**

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Declaration

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SUMMARY

The term “cloud computing”, i.e. “the cloud”, is used to describe a virtual platform in cyberspace from and to which a user can process store data that is literary, musical, artistic or informative in nature, and which is accessible via an Internet connection. The cloud therefore functions as virtual container that holds, processes and distributes all forms of copyrighted content, and which operates outside the confines of recognised territorial boundaries. The cloud is not only distributive but participatory. It fosters a “cut and paste” culture by allowing users to access, store, remix and create content. The cloud promotes user-created content, a term that encompasses an insurmountable range of actions by users with respect to cloud content available on the World Wide Web. Prominent scholars have devised a taxonomy for the categorisation and classification of cloud content to some degree, but there is wide spread acknowledgement that the nature of the cloud cannot be confined to a decisive definition, nor its content exact parameters. The inexact nature of the cloud and its content poses challenges for copyright law, a regime that is premised on a distinctive subject matter, confined to territorial boundaries and aimed at identifiable parties with respect to its application. In the cloud traditional copyright law seems wholly inadequate to provide regulation on matters of infringement, fair dealing and copyright recognition. Moreover, the inadequacy of the regime for cloud application threatens to weaken its validity as a mechanism that aims to promote the innovation of works for the benefit of the general public. If copyright law is to remain a valid instrument for the regulation of user-created content in cloud computing there is a definitive need to re-evaluate, revise and expand some of the regulatory devices thereof to accommodate the expectations and interests of cloud users. Finding a means to balance the rights of copyright holders against the interests of the general public has never been more critical, and policy makers have become ever aware of the need to develop a robust copyright regime for cloud application. Accordingly, this study aims to investigate the insufficiency of South African copyright law to adequately regulate the conduct of users who can acquire, remix, upload, derive and share vast amounts of copyrighted works via the Internet. The purpose of this study is to analyse potential developments in copyright law for cloud application in order to gain insight on the regulation and adjudication of user-created content within a South African context.

OPSOMMING

Die term “cloud computing” of “the cloud” verwys letterlik na ‘n konsep waar rekenaars op ‘n virtuele platform in die kuberruim funksioneer, vandaar die verwysing na ‘n wolk in die lug (daar sal deurgaans verwys word hierna as die *cloud*). Van hierdie platform is dit dan moontlik vir rekenaargebruikers om data te stoor en te verwerk wat literêr, musikaal of artistiek van aard kan wees. Hierdie inligting is toeganklik via die Internet. Hierdie *cloud* funksioneer dus as ‘n virtuele stoor wat alle vorme van outeursregwerke kan stoor en vanwaar dit verwerk en versprei kan word buite erkende geografiese grense. Die *cloud* het nie net ‘n verspreidingsfunksie nie, maar moedig deelname aan tussen verskillende gebruikers deurdat dit ‘n kopieer-en-plak kultuur (“copy and paste culture”) daarstel. Gebruikers kan inhoud bekom, stoor, skeep en herskep. Gebruiker-gegenereerde inhoud (“user-created content”) word dus daardeur bevorder en sluit ‘n magdom van handelinge van gebruikers op die Internet in. Kenners het tot ‘n sekere mate terminologie ontwikkel vir die kategorisering en klassifikasie van die inhoud van die *cloud*, maar daar is ooreenstemming dat die aard van die *cloud* en die inhoud daarvan sodanig is dat dit nie beperk kan word nie. Hierdie onbepaaldheid bring sekere uitdagings mee vir outeursreg wat op ‘n eiesoortige vakinhoud binne vasgestelde grense gebaseer is en wat van toepassing is op identifiseerbare partye. Tradisionele outeursreg blyk ontoereikend te wees ten opsigte van outeursreginbreukmaking, billike gebruik en outeursregerkenning in die *cloud*. Hierdie ontoereikendheid kan tot gevolg hê dat die geldigheid van die *cloud* as meganisme wat die skeep van outeursregwerke tot voordeel van die algemene publiek bevorder in gedrang kan kom. Die voortbestaan van outeursreg as geldige instrument om gebruiker-gegenereerde inhoud in die *cloud* te reguleer noodsaak die herevaluering, hersiening en uitbreiding daarvan om aan die verwagtinge van die *cloud* se gebruikers te voldoen en na hulle belange om te sien. Om ‘n balans te vind tussen die belange van outeursregreghebbendes en die algemene publiek was nog nooit van groter belang nie en beleidsmakers is bewus van die behoefte aan ‘n behoorlike outeursregbestel vir toepassings in die *cloud*. Hierdie studie beoog gevolglik om die ontoereikendheid van die Suid-Afrikaanse outeursreg te ondersoek om sodoende die optrede van gebruikers in die *cloud* te reguleer wat verskeie outeursregwerke op die Internet kan bekom, herrangskik, oplaai, aflaai en deel. Die doel van hierdie studie is om potensiële

ontwikkelings in outeursreg vir toepassing in die *cloud* te analiseer om sodoende insig te kry oor die regulering en beoordeling van gebruiker-gegenereerde inhoud binne 'n Suid-Afrikaanse konteks.

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CHAPTER 1

INTRODUCTION

The Internet has emerged as the primary means for worldwide commercial, recreational and educational communication and most people understand the progression of the Internet in terms of what it can and cannot do.¹ Internet technologies have advanced exponentially over the last two decades resulting in what is termed the “generative Internet.”² Terms such as “Web 1.0,” “Web 2.0” and “Web 3.0” characteristically describes the stages of development of the Internet’s capabilities.³ In the Web 1.0 phase the Internet existed as a read-only medium with nominal user participation: the term “Web 2.0” is defined by escalation of participatory technology.⁴ As online users’ demands are met more effectively they have more freedom to interpret and incorporate online content into their daily lives.⁵ Web 2.0, and the advancement to Web 3.0,⁶ has given rise to what is commonly referred to as “the cloud” – a structure that fosters user participation and creativity.

The term “cloud” denotes a virtual platform, private or public, from and to which a user can process data – literary, musical, artistic, informative etc. In effect, a cloud is the structure that facilitates the function of sites such as Yahoo,⁷ Facebook,⁸ Google⁹

¹ G.J. Ebersohn: 20. T.M. Woods: 1145.

² The term “generativity” is used by Professor Jonathan Zittrain to explain cloud as a function of technology’s capacity for leverage across a range of tasks, it’s adaptability to a range of different tasks, the ease of mastery of such tasks and the accessibility thereto. T.M. Woods: 1144.

³ T.M. Woods: 1145.

⁴ T.M. Woods: 1145.

⁵ T.M. Woods: 1160.

⁶ The term “Web” 3.0 is characterised by the organisation and classification of data collected from users’ online activities. T.M. Woods: 1160. Web 3.0 is more intelligent than its precursors; intelligence referring to the way in which data is managed and connected. T.M. Woods: 1160.

⁷ Yahoo! is an Internet portal that incorporates both a search engine and a directory of World Wide Web sites which are organised in a hierarchy of topic categories. WhatIs.com. <<http://whatis.techtarget.com/definition/Yahoo>>. Retrieved 19 January 2014.

⁸ “Facebook is a popular free social networking website that allows registered users to create profiles, upload photos and video, send messages and keep in touch with friends, family and colleagues.” WhatIs.com. <<http://whatis.techtarget.com/definition/Facebook>>. Retrieved 19 January 2014.

⁹ Google is one of the five most popular websites in the world. About.com. <<http://google.about.com/od/googlebasics/p/whatisgoogle.htm>>. Retrieved 19 January 2014. Google is a web search engine that allows you locate other sites on the web based on keyword searches. About.com. <<http://google.about.com/od/googlebasics/p/whatisgoogle.htm>>. Retrieved 19 January 2014. Google also provides specialised searches by way of blogs, catalogues, videos, news items and more. About.com. <<http://google.about.com/od/googlebasics/p/whatisgoogle.htm>>. Retrieved 19 January 2014.

and iTunes.¹⁰ The cloud utilises the resources from computers as a “collective virtual computer,” and the applications it hosts can run independently from a particular computer or server configurations.¹¹ These sites and applications are basically floating around in a “cloud of resources”, making the hardware less important for the use of the application.¹² Web 2.0 and Web 3.0 thus describe the substantial increase in the number of web users who create their own content, be it by use of existing content or the creation of entirely new content.¹³

Prominent scholars agree that the cloud fosters a “semiotic democracy”¹⁴ whereby there is a decentralisation of the power to re-create social artefacts.¹⁵ The Internet has fundamentally renovated the possibilities for creation, distribution and reproduction of copyrighted content by users during their participation on the web.¹⁶ It is within this context that the law has seen an increase in the amount of attention given to online copyright management issues, particularly with respect to content created by users who utilise copyrighted works.¹⁷ Traditional copyright management and enforcement is premised on a discrete subject matter, territorial boundaries and the various set of rights thereto.¹⁸ Formalised copyright practices stem either from formal contracts or from approval by formal law – whether by statutory provision or

¹⁰ iTunes is an audio playback program developed by Apple Computer that allows one to import songs from CDs and other audio files from your hard drive. Techterm.com <<http://www.techterms.com/definition/itunes>>. Retrieved 19 January 2014. The program also facilitates the download of songs (for a small fee) from the iTunes Music Store. Techterm.com <<http://www.techterms.com/definition/itunes>>. Retrieved 19 January 2014. How Does Cloud Computing Work? [Technology Explained]: 1. <<http://www.makeuseof.com/tag/cloud-computing-work-technology-explained/>>. Retrieved 5 July 2013.

¹¹ How Does Cloud Computing Work? [Technology Explained]: 1. <<http://www.makeuseof.com/tag/cloud-computing-work-technology-explained/>>. Retrieved 5 July 2013.

¹² How Does Cloud Computing Work? [Technology Explained]: 1. <<http://www.makeuseof.com/tag/cloud-computing-work-technology-explained/>>. Retrieved 5 July 2013.

¹³ T.M. Woods: 1145.

¹⁴ The process whereby individuals collectively altering society by changing the meaning of cultural signs. The term was coined by media studies professor John Fiske in his 1987 book, *Television Culture*. <<http://fkhan3.wordpress.com/2011/07/09/5th-post/>>. Retrieved 21 June 2013. In that book, Fiske noted that television treats its viewers as members of semiotic democracy capable of assigning their own meaning to images they see on the screen. <<http://fkhan3.wordpress.com/2011/07/09/5th-post/>>. Retrieved 21 June 2013. According to this interpretation a semiotic democracy is defined as engaging with, altering, and re-shaping cultural products. <<http://fkhan3.wordpress.com/2011/07/09/5th-post/>>. Retrieved 21 June 2013.

¹⁵ M.W.S. Wong: 1080.

¹⁶ D. Gervais: 850.

¹⁷ T.M. Woods: 1145.

¹⁸ T.M. Woods: 1146.

¹⁹ T.M. Woods: 1146.

by a court decision.¹⁹ The Internet has changed this, and the copyright management systems that relied on these notions have begun to unravel.²⁰

The Internet has resulted in the increase of raw information and materials available to individuals, the government and businesses, and many barriers to distributing expensive works has fallen away.²¹ Territorial boundaries have become blurred, and the number of people making use of protected works has increased and the reason for these uses is no longer limited to commercial use.²² The application of copyright law to user-created content (UCC) is currently a contentious issue among scholars, and there is a great amount of uncertainty concerning the regulation thereof under copyright law. It is much easier to approach copyright from a black and white perspective, but copyright in cloud computing rarely conforms to the precise mechanisms for copyright application. It seems that the application of copyright law in cloud computing requires a new course of action to render it a more effective tool for regulating copyright matters in cloud computing without weakening copyright law as a set of abstract principles. It is on the premise of the uncertainty surrounding the application of copyright law to the regulation of cloud computing that this study endeavours to analyse the manner in which copyright law needs to be adapted to effectively address copyright enforcement and recognition in cloud computing for South African application.

By its very nature the cloud, and the content generated therein, move beyond the definitive standards of copyright law. In fact, the rigidity of traditional copyright law makes its application to the cloud - a structure unrestrained by territorial, geographical or legislative boundaries - challenging. The reason therefore seems to stem from the fact that the relationship between the cloud, the content generated therein and copyright law seems undefined, especially if one considers the purpose of copyright in a broader social context. Chapter 2 of this study will analyse the defining characteristics of each component which underlines the purpose of this study to - establish the role copyright law fulfils towards fostering social and cultural

²⁰ E.Lee: 1470.

²¹ T.M. Woods: 1160.

²² R.T. Nimmer: 827.

participation by cloud users. Accordingly, Chapter 2 takes a look at the legal substance of each component in order to determine the challenges that need to be overcome in order to effect the balance that needs to be struck between the user and the copyright holder in the virtual realm.

The delineation of the relationship between the cloud, the content generated therein and the principles of copyright law will lay the foundation for the contemplation of affecting the necessitated balance between enforcing the right of copyright holders and allowing users to use copyrighted works. Traditional copyright law attaches strict liability to the infringement of a copyright holder's rights. The practice of attaching strict liability has long been an issue of great controversy with various arguments having been made for its illegitimacy. However, the strict liability that attaches to copyright infringement stems from its deeply rooted proprietary recognition, a characteristic that has long tipped the scales in favour of the copyright holder.

For the purpose of this study, Chapter 3 will evaluate the relevance of strict liability, the proprietary premise upon which it is based and the much needed alleviation therefrom in the context of cloud computing. Chapter 3 will therefore also set out and analyse the fair dealing and fair use doctrines of Australia, the United Kingdom (U.K.), Canada, the United States (U.S.) and South Africa in order to determine whether and how each jurisdiction has realised the widely acknowledged need to create a more "user-friendly," technologically neutral copyright system. This analysis will thus lay the foundation for the contemplation of the development of copyright law to secure a balance between the rights of users and copyright holders with respect user-copied content and user-derived in the following Chapters.

The need for a universal approach to regulate the application and enforcement of copyright law in the virtual realm is not a new notion: the application of copyright law in a virtual context, i.e. the cloud, was addressed with the enactment of the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT). The WCT contains various new provisions to aid the utilisation of copyright law for application to the cloud to some extent. However, the WCT provides a broad framework rather than a distinct structure for regulating copyright in the virtual realm. Its provisions provide some context for regulating copyright in cloud computing, but its provisions

are non-specific and open-ended. It places the discretion of copyright regulation in cloud computing in the hands of the legislators. As stated earlier, the analysis of UCC within the context of this study is confined to user-copied content and user-derived content. Despite each of these categories of UCC not being a discrete subject matter, their inherent characteristics provide a foundation for contemplating a copyright approach that addresses each UCC category in a broader context.

The primary focus of user-copied content within the confines of this study is the “uploading” that takes place: the transmission of a digital copy of the copyrighted work to another storage space. Chapter 4 of this study will specifically address and present arguments on the issues associated with user-copied content. In order to understand the extent to which copyright fails to adequately find application to user-copied content there will be an in-depth evaluation of the nature of user-copied content alongside the WCT provisions that find application thereto. Subsequently, the study will address the legitimacy of personal use as a means to provide users with mechanism whereby user-copied content can be justified as fair dealing or fair use. Given that personal use is not a fair dealing or fair use exception that has received much attention over the years, the study will contemplate its application in cloud computing as a supported methodology. It is contended that “copy” ownership of a copyrighted work and copyright exhaustion are part and parcel of a holistic personal use approach under copyright law. Accordingly, Chapter 4 will analyse the scholarly arguments, case law and legal developments that provide insight on the regulation of user-copied content on a personal use basis for South African copyright law development.

The cloud and its functionality serve to foster creativity and stimulate innovation: UCC attests to this. However, questions arise concerning the copyright attached to many of the works accessible to users from which they “create” new content. The South African Copyright Act²³ does not specifically provide for derivative works *per se*, but addresses such works under the auspices of “adaptation”²⁴ or

²³ 98 of 1978.

²⁴ Section 1(1) of Act 98 of 1978 defines ‘adaptation’ according to the nature of the copyrighted work. In the case of literary works ‘adaptation’ includes the conversion of the work from one form to another, the translation of the work or the conveying of the work wholly or mainly by means of pictures. T. Pistorius: 185. With respect to musical works ‘adaptation’ includes any arrangement or transcription of the work if

“reproduction”²⁵ and associated “fair dealing” considerations. Copyright law in the U.S. makes specific provision for derivative works, the essential requirement therefore being that it needs to be “transformative,” but the application of the use has largely been undefined. It is, however, submitted that the contemplation of a transformative use approach to user-derived content may help establish what the effects of copyright law on non-professional and new sources of creativity are and need to be, and whether copyright law needs to be re-examined to allow the coexistence of market and non-market creations and distributions of content and thereby spurring on further innovation.²⁶

Chapter 5 of this study will address the development of copyright law for the regulation of user-derived content “created” from existing UCC. While user-derived content may generally rely on fair dealing to a certain extent, many derivative works generated by users to which commercial or publication value is attached go beyond the general scope of fair use.²⁷ The discussion in Chapter 5 will analyse the notion of “transformative use” to establish whether and when a derived work amounts to fair use. It is important to note that the transformative use requirement for the application of fair use to derivative works and the transformative requirement for defining and identifying the copyright for a derivative work in itself varies. Accordingly, subsequently to evaluating the standard of “transformativity,” Chapter 5 will evaluate the overlap between transformative fair use and transformative derivative works to establish whether and to what extent the two applications for transformative use is mutually exclusive.

such arrangement or transcription has an original creative character. T. Pistorius: 185. An adaptation of artistic work refers to a transformation of the work in such a manner that the original or substantial features thereof remain recognisable. T. Pistorius: 185. As far as cinematograph films are concerned there is no specific provision made for the adaptation thereof, but it is submitted that any conversion of any form will suffice for adaptation thereof. T. Pistorius: 185.

²⁵ The protection a copyright holder enjoys as far as the reproduction of the work is concerned is very extensive in that the work may not be reproduced in any manner or form. T. Pistorius: 184. With respect to literary and musical works a ‘reproduction’ includes reproduction in the form of a record or cinematograph film. T. Pistorius:184. ‘Reproduction’ also includes a reproduction made from a reproduction of a particular work. T. Pistorius: 184.

²⁶ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 46.

²⁷ E. Lee: 1461.

Under the current South African law approach infringing work may be eligible for copyright protection if it satisfies the originality requirement.²⁸ In the *Haupt*²⁹ case it was held that “if a work is eligible for copyright, an improvement or refinement of that work would similarly be eligible for copyright, even if the improved work involved an infringement of copyright in the original work, if it satisfies the requirement of originality.”³⁰ Creativity is not a requirement for originality under South African law.³¹ Accordingly, the test for originality under South African law is as follows: “Save where specifically provided for otherwise, a work is considered to be original if it has not been copied from an existing source and its production required a substantial (or not trivial) degree of skill, judgement or labour.”³² User-derived content is primarily created by using circumvention technology which allow for the editing, copying, pasting and remixing parts of or the entire original work altogether.

Moreover, given the fact that derivative works in the cloud are derived mainly from previously created content it is arguable that innovative creation in terms of the traditional narratives for originality can be said to not take place at all, especially if one considers the working definition for UCC as articulated by the Organization for Economic Co-operation and Development (OECD) in its 2007 report.³³ For work to qualify as UCC it is required that “a certain amount of creative effort was put into creating the work or adapting the work to construct a new one.”³⁴ Thus, the test for originality under South African law cannot find application to user-derived content. It is therefore submitted that South African copyright law needs to be developed to accommodate the requirement for “some creative effort” to determine whether content generated in the cloud amounts to UCC for the purpose of copyright application.

²⁸ Section 2(3) of the Copyright Act 98 of 1978.

²⁹ *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA) 470 D-F.

³⁰ T. Pistorius: 162.

³¹ T. Pistorius: 162.

³² T. Pistorius: 162.

³³ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

³⁴ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

The discussion on the issue of transformative derivative work thus necessitates the contemplation of the “originality” standard user-derived content ought to adhere to for the copyright recognition. The investigation will accordingly scrutinise the application of the “originality” standards, along with the notions of “authorship” and “creativity,” for copyright recognition in the U.K. and the U.S., and will inspect new judicial developments that may aid the application of an originality standard that better suites the versatility of the cloud and its creation capabilities. In order to afford insight into the development of South African law, Chapter 5 will explore the latest legislative undertakings that aim to create and apply fair dealing exceptions to accommodate user-derived content.

As stated previously, the purpose of this study is to evaluate the ineffective regulation by traditional copyright law of the various issues which arise with respect to the cloud and the content generated therein, and to investigate the legal developments which have and must be effected to make copyright law more adaptable thereto. The investigation into the purpose of this study will not, however, be complete without a discussion that contemplates the adjudication issues that arise with respect to the recognition and enforcement of judicial decisions when the distributive nature of the cloud is considered.

Chapter 6 navigates the complexities associated with the assertion, recognition and enforcement of jurisdiction by courts over copyright matters that arise from cloud computing. The discussion evaluates the scope afforded South African courts to recognise and enforce foreign judgements by the Enforcement of Foreign Civil Judgments Act 32 of 1988. Chapter 6 analyses the approaches of various jurisdictions to the establishment of a “real and substantial connection” which affords a court the authority to adjudicate over cloud computing matters. Moreover, Chapter 6 deliberates the most recent legislative initiatives and practical mechanisms that aim to provide insight to the recognition and enforcement of foreign judgments in digital intellectual property matters. Consequently, Chapter 6 addresses the need for South African legislators to contemplate the regulation of copyright matters in cloud computing in a manner that acknowledges its undefinable, unrestricted nature across territorial boundaries.

The South African government signed the WTC in 1977 but has not yet ratified it.³⁵ To date, South Africa has only very basic copyright laws which are not currently aligned with international best practice.³⁶ South African copyright legislation has not been updated to provide for key digital copyright issues, and the enforcement of online copyright is generally poor.³⁷ It is also of notable importance that the current Copyright Act makes no reference to any work created in, acquired from or processed via the Internet. The only provision concerning the data that is transmitted electronically is contained in the Electronic Communications and Transactions Act 25 of 2002, and these provisions acknowledge the legitimacy of transmitting electronic data for contractual and commercial purposes. Copyright in the virtual realm is not currently provided for, or even contemplated in any South African legislation.

South African policy makers have been reluctant to implement the provisions of the WTC into its copyright law despite pressure from the U.S. because they are of the opinion that it must prove beneficial for them to do so and they must be able to retain the current exceptions.³⁸ The study therefore aims to investigate the insufficiency of current South African copyright law to adequately regulate the conduct of users who can acquire, remix, upload, derive and share vast amounts of copyrighted works via the Internet. The purpose of this study is to analyse legislative and theoretical developments in copyright law for cloud application in order to propose the implementation of international best practice for the regulation of UCC within a South African context.

Copyright law has not changed, but its target and purpose has.³⁹ The enormity of regulating copyright in the context of the Internet and the content generated therein seems overwhelming, and drastic international initiatives have been undertaken to

³⁵ <http://cloudscorecard.bsa.org/2013/assets/PDFs/country_reports/Country_Report_South_Africa.pdf>. Retrieved 22 May 2013.

³⁶ A method or technique that has consistently shown results superior to those achieved with other means, and that is used as a benchmark. <<http://www.businessdictionary.com/definition/best-practice.html#ixzz2Wr8JWFhW>>. Retrieved 21 June 2013.

³⁷ <http://cloudscorecard.bsa.org/2013/assets/PDFs/country_reports/Country_Report_South_Africa.pdf>. Retrieved 22 May 2013.

³⁸ This assertion is in line with the recommendation of the Commission on Intellectual Property Rights that developing countries ought not to be pressured into accepting higher intellectual property standards without a serious and objective assessment of the economic and developmental impact. T. Pistorius:154.

³⁹ D. Gervais: 848.

provide a universal address for the regulation of UCC. South African copyright law is lagging behind. The progression of the Internet has brought about tremendous advantages for South African commerce, and there is a need for South African policy makers to start considering implementing international initiatives for copyright regulation in cloud computing. If South Africa wishes to maintain a strong intellectual property rights regime policy makers need to realise that the traditional copyright regime is inadequate for the regulation of copyright in cloud computing and the UCC generated therein.

CHAPTER 2

THE CLOUD, THE CONTENT AND COPYRIGHT

Everyone is using the cloud, whether they know it or not. Casual users use cloud computing to stay connected to their friends e.g. on Facebook, and to maintain a persistent presence on the Internet,¹ e.g. through Twitter.² More ambitious users utilise the cloud to remix, adapt or create mash-ups³ of existing content as a way to express themselves about particular social, cultural, economic or political matters, or in an effort to convey their interpretation of content as a fan. The cloud encompasses several uses, all of which influence the regulation thereof. Most importantly, and for the purposes of this study, the cloud affords users opportunities to transform, create and share content because it offers new modes of expression for creativity.⁴

“More and more software companies are developing Web 2.0 applications to enable users to create content of their own. Already web developers have begun talking about the next phase of Internet - “Web 3.0” - in which the Internet essentially takes over traditionally desktop-based applications (such as word processing, spread sheets and PowerPoint) and converts them into web-based applications that are greatly enhanced by access to unbelievable amounts of information stored in the so-called “clouds,” huge data centres that serve computers through the Internet. As Nicholas Carr discusses the shift in to “cloud computing” - where software applications and data storage come not in the personal computer, but through the Internet connected to powerful databases - has the potential to transform fundamentally how we communicate. Control over media “shifts...from institutions to individuals.”⁵

¹ D.J. Gervais and D.J. Hyndman: 59.

² Twitter is a free social network microblogging service that allows its registered members to broadcast short posts called “tweets”. WhatIs.com.<<http://whatIs.techtarget.com/definition/Twitter>>.Retrieved 19 January 2014.Twitter members can broadcast tweets and follow other users' tweets by way of various platforms and devices. WhatIs.com. <<http://whatIs.techtarget.com/definition/Twitter>>.Retrieved 19 January 2014.Tweets and replies to tweets can be sent by cell phone text message, desktop client or by posting at the Twitter.com website. WhatIs.com.<<http://whatIs.techtarget.com/definition/Twitter>>.Retrieved 19 January 2014.

³ The term “mash-up” originated in the music industry; the process entails the integration of complementary elements from two or more sources and which is used to describe the on-going shift towards more a more interactive and participatory Web (Web 2.0) with more user-defined content and services. WhatIs.com. <<http://whatIs.techtarget.com/definition/mash-up>>.Retrieved 19 January 2014.

⁴ D.J. Gervais and D.J. Hyndman: 59.

⁵ T.M. Woods: 1161.

The sky is the limit in the cloud, but it raises certain issues with respect to the copyright attached to the data accessible in the cloud and the works derived therefrom. In effect copyright serves not only to protect the rights of the copyright holder, but it also serves to instigate innovation in a broader social context. It is submitted that there is little understanding of the interaction between the cloud, its content and copyright law and the purpose it serves to realise the rationale of copyright law in a modern society. In order to understand the various aspects of the problem addressed in this study we need to look at each of the components thereof individually.

2.1 THE CLOUD

From a technical perspective, “cloud” is a term that refers to the means to host hardware in an external data centre (sometimes called an infrastructure as a service), utility computing (packages computing resources to use as a utility in an always-on, metered and elastically scalable manner), platform services (middleware as a service) and application hosting (software or application as a service).⁶ A cloud is accessible from anywhere, and at any time: a user merely requires a functioning Internet connection. There are a myriad of ways to use the cloud for productive interaction. Google Docs accommodates the sharing of documents; multiple people can edit a document or a spread sheet.⁷ In 2010 iTunes streamed⁸ over 10 billion songs to users over the Internet from its online store – its “cloud”.⁹ Before the advent of cloud computing, the Internet served merely to transmit processed data between two or more computers.¹⁰ Now, a user stores or accesses data from an external computer - a computer the user does not own, cannot control and is unable to locate.¹¹

⁶ T.B. Winans and J.S. Brown: 1-2. It is obvious that, in reality, nothing takes place in some abstract “cloud” above us, but refers to the means by which computers and communication facilities operate to accommodate the utilisation by users of the Internet, its content and its serves. M.J. Ficsor: 2.

⁷ D.J. Gervais and D.J. Hyndman: 59.

⁸ Streaming services allow users to purchase games that are tied to an online account; they can access their account and games from any device without using a CD or other hardware media. D.J. Gervais and D.J. Hyndman: 59.

⁹ D.J. Gervais and D.J. Hyndman: 59.

¹⁰ D.J. Gervais and D.J. Hyndman: 57.

¹¹ D.J. Gervais and D.J. Hyndman: 57.

Beyond a relationship to the Internet and Internet technologies a widely accepted industry definition for cloud computing does not currently exist.¹² The National Institute of Standards and Technology (NIST)¹³ attempted to define and describe the term “cloud computing” accordingly, that:

“Cloud computing is a model for enabling convenient, on-demand network access to a shared pool of configuration computing resources (e.g. networks, servers, storage, applications and services) that can rapidly provisioned and released with minimal management effort or service provider interaction. This cloud model promotes availability and is composed of five essential characteristics, three service models and four deployment models.”¹⁴

The term “cloud computing” thus describes a global technical infrastructure whereby the user of a computer can access and use software and data located outside of the user’s personal computer or other digital device.¹⁵ A cloud user links to these external devices by way of an Internet connection while having no knowledge of the nature, or whereabouts of the server hosting the cloud.¹⁶ For example, a Yahoo account is accessible from anywhere in the world as long there is an Internet connection and the user has the correct access codes. The cloud thus effectively fosters the engagement in and utilisation of peer-to-peer networking, inexpensive digital devices, open source software, easy editing tools and reasonably affordable bandwidth.¹⁷ NIST admits that the proposed definition, and the terms therein, are subject to change as the model evolves.¹⁸ It is submitted that the NIST definition of

¹² T.B. Winans and J.S. Brown: 1-1.

¹³ The National Institute of Standards and Technology is a non-regulatory agency of the United States of America’s Department of Commerce founded in 1901. NIST.<http://www.nist.gov/public_affairs/general_information.cfm#>. Retrieved 7 December 2013. NIST’s mission is to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards and technology in ways that enhances economic security and improves quality of life. NIST.<http://www.nist.gov/public_affairs/general_information.cfm#>. Retrieved 7 December 2013.

¹⁴ NIST Definition of Cloud Computing. <<http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>>. Retrieved 18 May 2013: 2.

¹⁵ D.J. Gervais and D.J. Hyndman: 56. Clouds have containers which refer to a visualised image containing technology and application stacks. T.B. Winans and J.S. Brown: 1-14. A container may hold other kinds of containers, but a cloud container is impermeable. T.B. Winans and J.S. Brown: 1-14. This implies that a cloud does not directly manage container contents, and the cloud contents do not participate in cloud or container management. T.B. Winans and J.S. Brown: 1-14.

¹⁶ M.J. Ficsor: 4-8. D.J. Gervais and D.J. Hyndman: 56.

¹⁷ M.W.S. Wong: 1081.

¹⁸ D.J. Gervais and D.J. Hyndman: 60.

cloud computing is probably the most accurate description of the cloud currently available. Admittedly, the scope is rather broad, but this can be attributed to the very nature of the cloud itself.

Despite the ambiguity surrounding concept of a cloud, cloud computing represents a different way to architect and remotely manage computing resources.¹⁹ The reason *d'être* of cloud computing, and the associated automation of processes it presents, is the need to address the growing complexity of IT systems.²⁰

“As systems become more interconnected and diverse, architects are less able to anticipate and design interactions among components, leaving such issues to be dealt with at runtime. Soon systems will become too massive and complex for even the most skilled. And there will be no way to make timely, decisive responses to the rapid stream of changing and conflicting demands.”²¹

Globalisation, economic crises, technological innovation and numerous other factors are making it imperative for businesses to evolve away from current core capabilities toward new ones.²² It is submitted that the rise in the popularity of the cloud is due to the increase in download and upload speeds from and to the Internet.²³ Another contribution to the growth of cloud computing is the expansion of the number and type of digital devices capable of connecting to the Internet.²⁴ The ultimate purpose of the cloud is to link all computers and devices to virtually an infinite array of content and ways to access, process and add to that content, be it for informative or entertainment purposes.²⁵

¹⁹ T.B. Winans and J.S. Brown: 2.

²⁰ T.B. Winans and J.S. Brown: 1-10.

²¹ T.B. Winans and J.S. Brown: 1-10.

²² T.B. Winans and J.S. Brown: 2-1.

²³ D.J. Gervais and D.J. Hyndman: 57. The global transition to broadband drastically altered the environment in which users could create, post and download content. Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 13.

²⁴ D.J. Gervais and D.J. Hyndman: 58.

²⁵ D.J. Gervais and D.J. Hyndman: 65.

Web 3.0 offers a vast array of opportunities to users wishing to distribute content, as well as those who seek to use content.²⁶ “Hundreds of millions of people are downloading, altering, mixing, uploading and/or making available audio, video and text content on personal web pages, social sites or using peer-to-peer technology to allow others to access content using their computers or devices.”²⁷ By its very nature, the cloud is designed to accommodate social interaction and cultural participation. Cloud content can be manipulated, mashed-up or remixed to form new creations which add to the very cloud from which it came, where it resides and is available for further manipulation.²⁸ Where a user was once restricted to passive association with content accessible via the Internet, the user can now actively participate in the creation of such content.

2.2 USER-CREATED CONTENT (UCC)

At this point it is important to understand what is meant by “user-created content” within the context of this study. The term is commonly used to refer to the various expressions of creativity and participation produced by users during their engagement on the Internet. The OECD recently presented a report to the Working Party on Information Economy (WPIE) which contained a working definition for UCC. UCC is defined as: “content made publicly available²⁹ over the Internet which reflects a certain amount of creativity,³⁰ and which is created outside of professional³¹ routines and practices.”³² The elements in the definition lay down a

²⁶ T.M. Woods: 1161.

²⁷ D.J. Gervais and D.J. Hyndman: 65.

²⁸ D.J. Gervais and D.J. Hyndman: 66.

²⁹ The work is published in some context, be it on a publicly accessible website or on a social networking site accessible by a select group. The reference to “publication” in this definition also serves to exclude emails and bilateral instant messaging. Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

³⁰ A certain, indeterminable, amount of creative effort was expended to create work or adapt existing work to construct new work altogether: the user must add his or her own value to the work. Mere copying will not constitute “creativity” and therefore will not be recognized as UCC. Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

³¹ UCC predominantly produced outside of an institutional or commercial context by “amateurs”. Generally, there is no expectation of profit or remuneration; instead motivator for UCC include connecting to peers, achieving a level of fame, notoriety, prestige and the desire to express oneself. Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

spectrum for the identification of UCC, but they are hard to define and are based on criteria that are likely to evolve.³³

Currently, UCC can generally be distinguished along two axes; firstly, on the basis of the type of content, and secondly on the basis of its distribution platform.³⁴ While this distinction may prove useful to some extent, from a copyright perspective the distinction is unsatisfactory.³⁵ Firstly, the distinctions between the types of UCC and their respective platforms are not crystalline.³⁶ Secondly, copyright has tried to be technologically neutral, and has therefore not drawn distinctions between the categories of content.³⁷ Copyright law only recognizes discrete forms of expression; it does not distinguish between the various categories thereof.

The current definition for UCC provides us with taxonomy for UCC types and their respective hosting platforms, but these are submitted to require contemplation too extensive for this study. Use will be made of Professor Gervais' taxonomy for UCC. Accordingly, UCC is classified as user-authored content, user-derived content, user-copied content and peer-to-peer sharing.³⁸ Each category gives rise to its own set of copyright issues but the issues concerning user-derived content, i.e. derivative works, and user-copied content, i.e. content uploaded on the Internet, will be the focus of this study. Certain issues associated with peer-to-peer sharing may however overlap with issues accompanying user-copied and user-derived content. Despite the focus of this study on user-copied and user-derived content, it is important to realise that the distinctive groups for UCC are not always crystalline and often encompass considerations associated with other UCC.

A distinctive feature of UCC is that it is often a collaborative effort which forms part of a larger social network, and it is generally directly created and posted for or onto

³² Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

³³ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

³⁴ D. Gervais: 857.

³⁵ D. Gervais: 857.

³⁶ D. Gervais: 857.

³⁷ D. Gervais: 857.

³⁸ D. Gervais: 858-860.

UCC platforms, i.e. YouTube, Facebook etc. with the use of devices, software, UCC platforms and an Internet access provider.³⁹ The accessibility of software tools which enables users to edit and create audio and video without professional knowledge is considered to be a significant driving force for the creation of UCC.⁴⁰ The format for UCC is thus infinite, and there is currently no set method to determine the social, cultural and economic impacts of UCC.⁴¹

The creation of UCC is often perceived as a social phenomenon with social implications:⁴² implications that affect the application of copyright to UCC. The rise of UCC produces new opportunities for how information, knowledge and culture is made and exchanged.⁴³ The cultural impacts of this social phenomenon seem far-reaching, and creativity at different levels are affected by new and different ways for creating and diffusing content that foster new interactions between creators, users and consumers.⁴⁴ UCC also presents users with the opportunity to further important free speech and free press goals.⁴⁵ The opportunity to freely express oneself is constitutionally enshrined in South African law. Section 16 of the Constitution of the Republic of South Africa provides that “everyone has the right to freedom of expression...” Given the fact that UCC is premised on the participation by the public in social, economic, cultural and political it is arguable that UCC amounts to expression that may be subject to constitutional recognition and protection. It is important to note that Section 16(1) protects free expression, taking it beyond the confines of the right to free speech as provided for by the United States First

³⁹ E. Lee: 1502. The majority of UCC is undertaken without the expectation of remuneration or profit, but is primarily motivated by factors that include connecting with peers, acquiring a certain level of fame, notoriety or prestige and self-expression. Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 4.

⁴⁰ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 13.

⁴¹ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

⁴² Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 35.

⁴³ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 35.

⁴⁴ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 36.

⁴⁵ E. Lee: 1499.

Amendment: the Constitutional Court held that Section 16(1) “expressly protects the freedom of expression in a manner that does not warrant a narrow reading.”⁴⁶

Expression clearly includes any conduct that warrants communication, but the nature and extent of the conduct to realise such expression will determine the extent to which it can rely on protection in terms of Section 16(1).⁴⁷ Accordingly, Currie and de Waal submit that the closer an expression comes to an action, the less likely it would amount to expression subject to protection.⁴⁸ Thus, the conduct by users to create UCC – the copying, remixing, adapting of existing works – would be more easily subjected to limitation. The purpose of this study is not to contemplate the protection that ought to be afforded to UCC as a right to freedom of expression: it is to address the balance between recognising the impact UCC has towards fostering a “semiotic democracy”⁴⁹ whereby there is a decentralisation of the power to re-create social artefacts,⁵⁰ and the need for developing copyright law to create conditions in which UCC can flourish whilst a robust copyright regime is maintained. Thus, while it is important to realise that Section 16 of the Constitution may indeed be relevant when contemplating the recognition of UCC in terms of South African law, UCC must first be understood within the context of its origin – the dualistic nature of copyright law.

2.3 COPYRIGHT LAW: A CONTEMPORARY ANALYSIS

Broadly speaking, copyright generally describes the exclusive right in relation to work embodying intellectual content to do or to authorize others to do certain acts in relation to that work, the acts of which represent, in the case of each type of work,

⁴⁶ I. Currie and J. de Waal: 362. The term “expression” refers to any act in terms of which a person attempts to express some emotion, belief, grievance or opinion. I. Currie and J. de Waal: 363.

⁴⁷ I. Currie and J. de Waal: 363.

⁴⁸ I. Currie and J. de Waal: 363.

⁴⁹ The process whereby individuals collectively alter society by changing the meaning of cultural signs. The term was coined by media studies professor John Fiske in his 1987 book, *Television Culture*. <<http://fkhan3.wordpress.com/2011/07/09/5th-post/>>. Retrieved 21 June 2013. In that book, Fiske noted that television treats its viewers as members of semiotic democracy capable of assigning their own meaning to images they see on the screen. <<http://fkhan3.wordpress.com/2011/07/09/5th-post/>>. Retrieved 21 June 2013. In this interpretation, semiotic democracy is defined as engaging with, altering, and re-shaping cultural products. <<http://fkhan3.wordpress.com/2011/07/09/5th-post/>>. Retrieved 21 June 2013.

⁵⁰ M.W.S. Wong: 1080.

the manners in which that work can be exploited for personal gain or profit.⁵¹ The right to control the use of a work in all the manners in which it can be exploited for personal gain or profits is an essential right under the law of copyright, and that law does not achieve its objective unless such essential right is granted in full.⁵² Dean submits that this is the function and purpose of copyright law.⁵³

Copyright does not, however, exist naturally; it is a construct of society which exists to restrict the flow of expression and is a creature of statute.⁵⁴ Copyright is a relatively modern legal concept that ascended with the invention of the printing press in the fifteenth century.⁵⁵ Copyright protection on an international scale began in the middle nineteenth century and was affected by way of bilateral treaties between jurisdictions.⁵⁶ The justification of copyright law in modern society stems from four arguments, namely that of natural-justice,⁵⁷ economic,⁵⁸ cultural⁵⁹ and social⁶⁰ arguments.⁶¹ A primary goal of copyright law is proposed to ensure public access to, enjoyment and preservation of works.⁶²

Copyright law creates a subjective right, and has certain intrinsic characteristics. Firstly, the rights conferred by copyright law are territorial in nature. Accordingly, the legal principles of the territory within which the copyright applies will find application with respect to the regulation and adjudication thereof.⁶³ Secondly, copyright is

51 O.H. Dean: 1.

52 O.H. Dean: 1.

53 O.H. Dean: 1.

54 N. Suzor: 61. O.H. Dean: 49.

55 The classical world did not explicitly recognised copyright, but early Greek and Roman authors were of the opinion that authorship be recognised and protected from being passed-of as the work of another. T. Pistorius: 143.

56 WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cq5.pdf#tlt>>. Retrieved 10 May 2013: 262.

57 Authors, as in the case of any other worker, are entitled to the fruits of his or her labour. T. Pistorius: 144.

58 The principle of just labour according to which authors ought to be remunerated for the exploitation of their work. T. Pistorius: 144.

59 The author's work contributes to culture and therefore rewarding creativity is the interest of the public given that creative works enhances national culture. T. Pistorius: 144.

60 A wide dissemination of copyrighted works advances society leading to greater social cohesion. T. Pistorius: 144.

61 T. Pistorius: 144.

62 A. Perzanowski and J. Schultz: 2078. P.N. Leval: 2.

63 T. Pistorius: 145.

considered to be a negative right;⁶⁴ the right not to have the right holder's creativity and the work derived therefrom infringed upon. Thirdly, copyright consists of both moral⁶⁵ and economic rights.⁶⁶ Fourthly, copyright protects the material expression of an idea rather than the idea itself.⁶⁷ Copyright thus only arises once the work is materially embodied, but there is no monopolisation of the idea expressed.⁶⁸ Lastly, copyright is an exclusive right that exists for a specified period and is subject to certain limitations and exceptions.⁶⁹ The purpose of copyright law is therefore to protect against the copying of the physical material itself, and not to protect against the use of the idea underlying such a materialised expression.

The need for a uniform copyright system was recognized with the formulation and adoption of the Berne Convention for the Protection of Literary and Artistic Works on 9 September, 1886.⁷⁰ The Berne Convention has since undergone several revisions⁷¹ in order to make provision for the rapid technological advances that would affect the application of copyright law, to address the needs of newly independent developing countries and to introduce administrative and structural changes.⁷² South African copyright law is closely affiliated with English copyright law, and early copyright law in South Africa was directly based on the British Copyright Act of 1911.⁷³ The South African Copyright Act 98 of 1978 was adopted in 1979 in accordance with the provisions contained in the Berne Convention, and has subsequently been amended several times. The purpose for the enactment and

⁶⁴ O.H. Dean: 33. H. T. Pistorius: 145.

⁶⁵ Moral rights refer to the author's identification with the work, i.e. the expressive style the author utilises to create the work, the experiences the author draws from or the intention underlining the purpose of the work.

⁶⁶ T. Pistorius: 146.

⁶⁷ O.H. Dean: 24. T. Pistorius: 146.

⁶⁸ G.J. Ebersohn: 165-166. K. Hariani and A. Hariani: 506. Copyright is intended to protect form and not function or fact. K. Hariani and A. Hariani: 506. H. Klopper et al: 146.

⁶⁹ T. Pistorius: 147.

⁷⁰ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cq5.pdf#tlt>>. Retrieved 10 May 2013: 262.

⁷¹ The first revision of the Berne Convention took place in Berlin in 1908, followed by the revisions in Rome in 1928, in Brussels in 1948, in Stockholm in 1967 and the last revision took place in Paris in 1979. WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cq5.pdf#tlt>>. Retrieved 10 May 2013: 262.

⁷² WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cq5.pdf#tlt>>. Retrieved 10 May 2013: 262.

⁷³ In 1916 South Africa adopted the British Copyright Act of 1911, and extensively incorporated the British Copyright Act of 1956 into the South African Copyright Act of 1956. T. Pistorius: 149.

amendments of the Copyright Act⁷⁴ was to make it possible for South Africa to adhere to and employ the substantive provisions⁷⁵ of the Paris text.⁷⁶

The substantial technological advancements seen in the 1970s and the 1980 brought about formation and enactment of more copyright orientated regulations within the international framework.⁷⁷ Subsequent to the Berne Convention was the enactment of the Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS) under the auspices of the General Agreement on Tariffs and Trade (GATT)⁷⁸ in 1995, and was designed to align member countries' intellectual property laws to realise maximum and uniform copyright protection of high-tech works such as computer programmes and databases within the international intellectual property framework.⁷⁹ The TRIPS Agreement is based on the principles of national treatment endorsed by the Berne Convention,⁸⁰ and it requires all signatories thereto to comply with Articles 1 to 21 of the Berne Convention.⁸¹ The TRIPS Agreement explicitly provides that copyright protection is extended "to expressions and not ideas, procedures, methods of operation or mathematical concepts as such."⁸² This provision thus serves to secure the provision contained in Article 2(1) of the Berne Convention which clearly specifies what qualifies as an "expression" for the purpose of copyright recognition and protection.

⁷⁴ 98 of 1978.

⁷⁵ The Berne Convention is based of four fundament principles - *jure conventionis* – which make up the substantive clauses thereof. T. Pistorius: 151. Firstly, the national treatment principle requires of each signatory State to extend the same protection to foreign authors as it does to works by its own domestic authors. T. Pistorius: 151. Secondly, the principle of automatic protection afforded to copyrightable works irrespective of their registration therefor or not, provided that the requirements for copyright protection are met. T. Pistorius: 151. Thirdly, there is independence of protection in terms of which the enjoyment and enforcement of copyright protection does not depend on the existence of protection within the country of origin. T. Pistorius: 151. Lastly, the principle of reservations according to which a signatory State may make reservations with respect to newly introduced rights. T. Pistorius: 151.

⁷⁶ T. Pistorius: 152.

⁷⁷ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 269

⁷⁸ The General Agreement on Tariffs and Trade, Geneva, July 1986.

⁷⁹ T. Pistorius: 153.

⁸⁰ T. Pistorius: 153.

⁸¹ Article 9(1).

⁸² Article 9(2).

In 1996 WIPO enacted the WCT in order to intensify the regulation of matters not adequately addressed in the TRIPS Agreement.⁸³ The purpose of the WCT was to move away from the strategy of “guided development”⁸⁴ by establishing new international norms to provide guidance to governments on how to respond to the copyright challenges presented by new technologies.⁸⁵ The objective of the WCT was the clarification of existing copyright norms and the creation of new norms as a response to the problems raised by digital technology, particularly by the Internet.⁸⁶ The “digital agenda” of the WCT addressed issues pertaining to the rights applicable to the storage and transmission of works in digital systems,⁸⁷ the limitations on and exceptions to rights in the digital environment,⁸⁸ technological measures of protection⁸⁹ and rights management information.⁹⁰ These provisions, and their application to the problem addressed in this study, will be discussed in greater detail during the contemplation of the copyright issues associated with the specific UCC focused on in this study.

Traditionally, copyright is primarily concerned with encouraging the production of literary and artistic works for public benefit the public by expanding the available body of new expression.⁹¹ The legal and economic views of copyright law are that an author will only decide to create a work when the author is assured that the expected market revenue from sale of the work exceeds the cost of his expression.⁹² It is, however, submitted that the incentive and reward that motivates the author is not

⁸³ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 269.

⁸⁴ The term “guided development” refers to the international community’s practice of utilising study and discussion rather than trying to establish new international norms. WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 269. Use was made of recommendations, guiding principles and model provisions that were generally based on the interpretation of existing international norms, i.e. the Berne Convention. WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 269.

⁸⁵ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 269.

⁸⁶ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 271.

⁸⁷ Articles 6-8.

⁸⁸ Article 10.

⁸⁹ Article 11.

⁹⁰ Article 12.

⁹¹ H.B. Holland: 12. A. Ng: 872.K.Pham and S. Mkhitarian: 1. G. D’Agostino: 327.

⁹² A. Ng: 858.

intended to benefit the author alone, but it also serves to increase the availability of creative works and thus enhances the public's welfare.⁹³ Copyright serves several important functions towards supporting informational works.⁹⁴ As a matter of public interest copyright law serves to reinforce and shape social norms and expectations in the context of a broader society.⁹⁵ The dualistic nature of copyright thus entails establishing a standard for identifying and protecting materialised literary and artistic works from unauthorised use thereof while ensuring that these works are available for public who derive social and cultural value therefrom.

There is no doubt that the development of information and communication technologies has had a significant impact on the manner in which literary and artistic works are created and used.⁹⁶ The formalistic and traditional view of copyright may deem all derived UCC as copyright infringement, even if they are non-commercial.⁹⁷ This view is submitted to be simplistic and misguided, especially if the interests of the broader public are taken into account. In traditional copyright law, even in a commercial context, some borrowing of content subject to copyright protection is allowed.⁹⁸ The manner in which copyright law is formulated and enforced helps shape the social context in which creative works are made and distributed.⁹⁹ The social context is critically important to the creative enterprise and to the copyright industries.¹⁰⁰

Professor Gervais alleges that the inefficiency of copyright to respond to current social norms underpin the very existence of UCC.¹⁰¹ The formalist understanding of copyright law ignores the reality of the cloud and UCC in modern society.¹⁰² Terry

⁹³ A. Ng: 858.

⁹⁴ D. Mendis: EJCL. <<http://www.ejcl.org/75/art75-8.html>>. Retrieved 7 December 2013: 5. R.T. Nimmer: 831.

⁹⁵ R.T. Nimmer: 831.

⁹⁶ A. Ng: 879. "The arrival of the digital age ushers globally-connected information superhighways into the universe of human flourishing, mainstreaming and electrifying information as the lifeblood of any given knowledge-based society." H: Sun: 329.

⁹⁷ E. Lee: 1509.

⁹⁸ K.Pham and S. Mkhitarian: 2. E. Lee: 1509.

⁹⁹ R.T. Nimmer: 832.

¹⁰⁰ R.T. Nimmer: 832.

¹⁰¹ D. Gervais: 855.

¹⁰² E. Lee: 1499.

McBride, CEO of Nettwerk Music, recently summarised the role of copyright in cloud computing:

“Clearly, the future is not the on-going debate on control and ownership of copyrights, with the big stick approach of suing fans. Music, along with all the other forms of rich media, is going into the clouds where it will be pulled down from servers when and how the consumer wants. The new values reside in what is behind this media data; the meta data. The quality and increase in value of this meta data will have a profound effect on the future. Digital maids will be cleaning up your media locker, moving files to where they belong and propagating your custom and peer based playlists. Digital valets will be pulling down media from these cloud servers and prepping it for the consumer’s consumption. Songs will not only be just music, but will contain data that will allow foreign lyric translations, edited versions, sheet music, and instruction on how to play the song and so on. Future economic models will be based on monetizing the behaviour of the consumer by adding true value.”¹⁰³

Copying and redistribution is easy in the cloud, and many people seem to regard unauthorised copying as socially acceptable.¹⁰⁴ Despite explaining certain instances of copyright in cloud computing sufficiently, particularly those that are litigated, it cannot be said to adequately address factual scenarios that never get resolved in court.¹⁰⁵ It is submitted that with the increased access to all forms of content on the web, and with the applications available to remix, alter and derive such content will aggressively contribute to creations that muddles the relevance and application of copyright law as we know it. The legal dynamics of the copyright system will need to change if it is to effectively regulate both the cloud and the content generated therein.¹⁰⁶

More modern legal and economic theories make the argument that private property rights in creative work are necessary for the preservation and maintenance of the value of the work.¹⁰⁷ Allowing copyright owners to control the manner in which users

¹⁰³ T.M. Woods: 1161.

¹⁰⁴ R.T. Nimmer: 833.

¹⁰⁵ E. Lee: 1460.

¹⁰⁶ A. Ng: 872.

¹⁰⁷ A. Ng: 874.

utilise copyrighted works on the Internet hinders cultural participation and access to knowledge, and it threatens the right to freedom of express – potentially limiting creativity.¹⁰⁸ However, adopting unlimited rights permit users to use copyrighted works as they wish will offend the basic copyright bargain between creators and society, as well as ignore exiting international treaties.¹⁰⁹ This contention is particularly relevant in the case of UCC that becomes commercially valuable.¹¹⁰ The public will overuse works that are free for all to use without the restraint of private rights.¹¹¹ The question that needs to be asked is what image of social acceptability should the law support?¹¹²

In the digital world property rights may need to not exclude society, instead there needs to be a management of creative resources.¹¹³ There has thus arisen a need to maintain the rights of authors and creators of creative works while ensuring that the public's need for access to these works is met.¹¹⁴ This study argues that a strong intellectual property regime must be maintained despite the technological developments that muddles the regulation thereof. Such a regime can only be maintained if the traditional copyright law is developed to find application in the cloud and the content generated therein. It is submitted that courts and legislators ought not to lose sight of the individual author's rights under copyright law in contemplation of regulating the cloud: the law should support a culture of presumptive respect for content creator's property.¹¹⁵

2.4 WHY IS COPYRIGHT LAW STRUGGLING WITH UCC?

Traditional copyright law is struggling with UCC for various reasons. Firstly, the sheer masses of content generated by users across the globe at all hours of the day give rise to an enormous task of regulating an exponentially increasing activity. In the

¹⁰⁸ H. Sun: 316. T.M. Woods: 1150.

¹⁰⁹ T.M. Woods: 1150.

¹¹⁰ T.M. Woods: 1150.

¹¹¹ A. Ng: 874.

¹¹² T.M. Woods: 1150.

¹¹³ A. Ng: 861.

¹¹⁴ A. Ng: 880. By nature copyright law is about establishing a balance; the Berne Convention has been described as granting rights to authors which are merely a small part of a much broader economic and social picture. A. Nicholson: 391.

¹¹⁵ R.T. Nimmer: 834. A. Ng: 880.

digital world real world information is converted to a binary numeric form of ones and zeros to from easily transferable chunks of data capable of transmission over communication networks.¹¹⁶ Works of authorship have become more readily adaptable and its content less certifiable for its authenticity and accuracy, because there may be modification and dissemination of a single work by many users.¹¹⁷ In the traditional sense the popular and ordinary meaning of “author” is that of the maker or creator of a literary, musical or artistic work.¹¹⁸ In all other works the “author” is defined with reference to persons who have a financial interest in the end result.¹¹⁹ In the digital context, authorship is characterised by a culture that is eager to explore the possibility of creating new works from original works of authorship using available technology.¹²⁰ On all accounts, it has never been easier for anyone to “create” new works using existing creations, and “amateur art”¹²¹ is on the rise.¹²²

Secondly, copyright is struggling to cope with the UCC as a result of the uncertainty surrounding its nature.¹²³ The reason therefore is due to the fact that copyright law was originally designed to address identifiable threats such as commercial privacy, passing-off and forgery.¹²⁴ While these threats subsist in the virtual realm too, the majority of the works accessed from and processed to a cloud is of non-commercial value, and user conduct is predominantly participatory in nature. It must be remembered that copyright law was originally designed for routine individual use: the exceptions and limitations contained in copyright legislation, the South African Copyright Act 98 of 1978 included, was written with professional authors and artists in mind.¹²⁵

At the heart of copyright jurisprudence lies the idea that when authors are encouraged to produce original, authentic works of authorship, the availability of

¹¹⁶ A. Ng: 864.

¹¹⁷ A. Ng: 864. M.J. Madison: 822.

¹¹⁸ T. Pistorius: 171.

¹¹⁹ T. Pistorius: 171.

¹²⁰ A. Ng: 864.

¹²¹ Creativity produced by all kinds of people for all kinds of reasons, via copies and otherwise. M.J. Madison: 821.

¹²² M.J. Madison: 821.

¹²³ D. Gervais: 845.

¹²⁴ D. Gervais: 845.

¹²⁵ D. Gervais: 851.

diverse forms of literary and artistic works for society's use in the creation of new works to promote the progress of the sciences and useful arts increases social welfare.¹²⁶ In the cloud it often happens that there are numerous users that contribute to a single work, or a single user puts together a piece of work that is derived from the input of various other users. Cloud computing has brought about a shift from one-to-many to many-to-many; a shift that has destabilised the precepts of the current copyright regime.¹²⁷ UCC does not "fit" into the traditional copyright framework.

Lastly, copyright law ordinarily attempts to examine copyright infringement within a single snapshot in time – the moment of unauthorised use of a copyrighted work.¹²⁸ This static approach to copyright issues, especially in the cloud, is also a primary source behind the inadequacy of traditional copyright law in the cloud. Firstly, the cloud is not static – not in nature or in function. Secondly, copyright law does not exist in a vacuum.¹²⁹ It operates in a society whose values and desires change from year to year; day to day for that matter. In effect copyright serves not only to protect the rights of the copyright holder, but it also instigates innovation in a broader social context. It must therefore find application in a modern society while recognising both the needs dependant thereon and the needs it obstructs.¹³⁰ It seems that the general question concerning the application of copyright law to UCC is what the effects of copyright law on non-professional and new sources of creativity are, and whether copyright law may need to be re-evaluated to allow the coexistence of market and non-market creation and distribution of content in order to spur on innovation.¹³¹

2.5 CONCLUSION

The initial contention between the rights of the copyright holder and the copy owners was that the granting of rights in literary and artistic works would monopolise the control over creative works to the extent that it restricts the public from access

¹²⁶ A. Ng: 886.

¹²⁷ D. Gervais: 856.

¹²⁸ E. Lee: 1483.

¹²⁹ E. Lee: 1483.

¹³⁰ E. Lee: 1483.

¹³¹ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 46.

thereto.¹³² With the coming of the digital era there arises a conflict between the new digital technologies which provide incentive for the free flow of ideas, knowledge and information and the fundamental design of copyright law which serves to limit the unauthorised flow of copyrighted works.¹³³ As society has greater access to and use of creative material in novel ways through new communication and digital technologies there is a need to rethink the fundamental purposes of the copyright system, evaluate the legal implications of rights expansion and consider if the best response to rights expansion is to abridge rights in literary and artistic works.¹³⁴

It is submitted that the application of copyright in the virtual realm – to the cloud and UCC – has brought about a shift in the dynamic of the relationship between authors and their audience.¹³⁵ Accordingly, the primary worry for copyright with respect to cloud application is not the misuse of rights by authors or copyright owners, but the social disrespect for the process of authorial integrity and authentic works of authorship.¹³⁶ Thus, the focus of copyright for cloud application should be to ensure that authors will have the personal motivation to continue producing new works because the integrity and personality contained in their work is safeguarded.¹³⁷ “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and other arts.¹³⁸ The immediate effect of copyright law is to secure a fair return to an “author’s” creative labour effort, but the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”¹³⁹ Accordingly, the manner in which the purpose of copyright law is realised needs to be within the confines of existing copyright mechanisms. If copyright law is to be addressed for cloud application then the broadening of fair use and fair dealing exemptions may prove to be the best approach to realising the balance between the rights of copyright holders and the interests of users.

¹³² A. Ng: 872.

¹³³ K. Pham and S. Mkhitarian: 7.

¹³⁴ A. Ng: 885.

¹³⁵ J.P. Liu: 1255. A. Ng: 872.

¹³⁶ A. Ng: 872.

¹³⁷ A. Ng: 872.

¹³⁸ A. Ng: 872.

¹³⁹ P. Cimentarov: 16-17.

CHAPTER 3

ALLEVIATING STRICT LIABILITY IN CLOUD COMPUTING

The Internet has generated an upsurge in the amount of material available to users, and has removed many of the barriers for propagating expressive works.¹ The realisation and enforcement of intellectual property rights requires a balance among competing interests, yet, that balance historically favours the interests of the copyright holder.² Accordingly, the digital copyright debate is highly polarised.³ On the one side there is the entertainment industry which takes a moral high ground by noting the wrongfulness of online file sharing and the resulting economic damage.⁴ On the other end of the debate are the industry's opponents – music fans, consumer advocates, civil libertarians, academic commentaries and user communities – who deplore the sacrifices the public has to make to protect the industry's economic interests.⁵

The doctrine of fair dealing and fair use creates certain exceptions that confine the scope of the copyright monopoly in furtherance of its utilitarian objective.⁶ The general purpose of copyright exceptions and limitations is to balance the public's right to access copyright works and the economic rights of copyright owners.⁷ The balance between public and private rights also affects access to learning materials, education and social development.⁸ Yet, *prima facie* infringement attaches strict liability, a doctrine that strongly supports the copyright holder's rights, and it is submitted that no "innocent infringement" will immunise a defendant from liability for copyright infringement.⁹ Despite the position supported in this study - that a strong intellectual property right regime be maintained for the regulation of UCC in the cloud - support for a strong copyright regime does not mean that no other interests should be recognised. The availability of the fair dealing doctrine serves to provide some

1 R.T. Nimmer: 827.
2 R.T. Nimmer: 828.
3 P.K. Yu: 883.
4 P.K. Yu: 884.
5 P.K. Yu: 884.
6 P.N. Leval: 3.
7 T. Pistorius: 211.
8 T. Pistorius: 212.
9 J.D. Lipton: 774.

counter measure to the strict liability approach, but the fair dealing doctrine is generally imprecise with limited application. While courts have managed to contemplate its development for analogue application, the fair dealing doctrine is submitted to fall short in the digital context.

The contemplation of achieving this balance requires the contemplation of some of the most fundamental aspects of copyright law, namely that of copyright infringement and the fair use doctrine, and the current debates surrounding them in order to establish the development, if any, necessary to render these elements accommodative to cloud computing and the UCC generated therein. “One must assess each of the issues that arise in considering a fair use defence in the light of the governing purpose of copyright law.”¹⁰ Therefore, before moving onto contemplating the development of the fair use doctrine to aid the regulation of user-copied content and user-derived content in more specific contexts there must first be an evaluation of the infringement and fair use doctrines currently utilised by copyright law.

3.1 COPYRIGHT INFRINGEMENT: ATTACHMENT OF STRICT LIABILITY

Copyright confers the right to do or to authorise others to do, or prevent others from doing the acts designated in respect of each different type of work subject to copyright protection,¹¹ thus establishing the monopoly of the copyright owner.¹² Article 9(1) of the Berne Convention states that: “Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.” Accordingly, only the holder of the copyright is afforded the rights to adapt, publish, perform, reproduce, broadcast, or cause the work to be transmitted in a diffusion service, unless the copyright holder grants another person, natural or judicial, permission to undertake any one or more of these restricted acts.

¹⁰ P.N. Leval: 3.

¹¹ Sec 6-11B of Act 98 of 1978.

¹² O.H. Dean: 33.

In the event that any person performs any of the restricted acts with respect to the relevant copyrighted work, such a person commits copyright infringement, direct or indirect, depending on the role the offender fulfils. A direct copyright infringement of a work takes place when a person does or causes any other person to do any of the restricted acts without permission from the copyright holder.¹³ In very general terms, direct copyright infringement pertains to the unauthorised copying of a copyrighted work or the exploitation of that work for commercial purposes without a licence.¹⁴ An example of direct infringement in cloud computing includes the downloading or uploading of software and copyrighted data (works), the making available of software for download and the transmission of software files (peer-2-peer sharing).¹⁵ Indirect infringement, on the other hand, takes place when certain acts are done without the authority of the copyright owner in connection with direct infringements of copyright.¹⁶ Examples of indirect copyright infringement include the posting of serial numbers or cracker utilities, creating links to FTP sites¹⁷ where software may be unlawfully obtained or informing others of such sites, aiding others in locating or using unauthorised software or the creation of supporting sites from which information concerning such activities can be obtained.¹⁸

It is essential to appreciate that copyright in a work is only infringed by unauthorised reproduction or adaption if there is copying.¹⁹ Copyright therefore serves to prevent the copying of a work or even of a part of a work, but does not prevent the creation of an identical work without the utilisation of copying.²⁰ The determination of

¹³ O.H. Dean: 37.

¹⁴ O.H. Dean: 37.

¹⁵ SAIL – Software and Information Industry Association: Direct and Indirect Copyright Infringement <http://www.siaa.net/index.php?option=com_docman&task=doc_view&gid=8&Itemid=318>. Retrieved 16 December 2013.

¹⁶ O.H. Dean: 44. There are basically two forms of indirect infringement of copyright, namely unauthorised dealing of infringing copies of a work and allowing infringing public performances of a work to take place. O.H. Dean: 44.

¹⁷ The acronym FTP stands for “File Transfer Protocol” and is used to refer to the common method of transferring files via the Internet from one computer to another. Techterms.com. <<http://www.techterms.com/definition/ftp>>. Retrieved 20 December 2013.

¹⁸ SAIL – Software and Information Industry Association: Direct and Indirect Copyright Infringement <http://www.siaa.net/index.php?option=com_docman&task=doc_view&gid=8&Itemid=318>. Retrieved 16 December 2013.

¹⁹ O.H. Dean: 42. This means that the making of a work which is very similar to or even identical to another work will constitute an infringement of that other work if the creator produced the second work independently and without reference to the other work. O.H. Dean: 42.

²⁰ O.H. Dean: 42.

copyright infringement in the analogue environment is submitted to be much easier than in the digital arena, because the current copyright regime is aimed at identifiable infringers and recognisable infringing acts. Moreover, an infringer's access to copyrighted works in the analogue context is limited. In contrast, UCC is often created by users – “innocent infringers” - who do not have the intention or the understanding that the action amounts to copyright infringement, and who have unlimited access to content from around the world.²¹

The innocent infringement that occurs in the context of UCC can generally be identified in three instances. Firstly, there are instances of “unconscious” copying in which the user's expression is copied from the plaintiff's original work, but the user has, in good faith, forgotten the sources of the work or to reference the work appropriately or was completely unaware that copyright subsisted in the work.²² Not all copyrighted works in the cloud contain copyright notices or license terms and it is therefore often difficult for a user to establish ownership or the terms on which the copyright owner could allow copying without compensation.²³ Secondly, a user may have copied material from a third party in good faith, because he or she believes it to be original material or believes that the third party, be it another user or a content provider such as Amazon, is otherwise authorised to give permission to make a copy.²⁴ Thirdly, a user may deliberately make copies under the mistaken belief that the copied material is in the public domain,²⁵ or that there is another legitimate reason why the copying is not an infringement, i.e. because he or she is using a legitimately acquired copy of the copyrighted material.²⁶ Moreover, cloud users have access to an infinite array of content that is easily remixed and mashed-up with

²¹ The underlying theme of the term “innocent infringers” is the infringement of copyright by a defendant who had no intention to do so. J.D. Lipton: 773.

²² A. Van der Merwe. Brands in the Boardroom 2006. <http://www.dmkisch.com/sites/default/files/published_works/A%20vd%20Merwe%20Copyright%20Trade%20Mark%20Iam%202006.pdf>. Retrieved 7 December 2013: 40. J.D. Lipton: 773.

²³ J.D. Lipton: 777.

²⁴ J.D. Lipton: 773.

²⁵ The public domain, within the context of copyright, is defined specifically to include all literary and artistic works of which the term of protection has expired and is therefore no longer protected by copyright or any other rights. M. Kellerman: 158. Works will also be regarded to be in the public domain if they do not meet the requirements for copyright protection. M. Kellerman: 158.

²⁶ J.D. Lipton: 773.

modern circumventive technologies in the form of devices and services.²⁷ It is, however, contended that innocent infringement is not confined to these instances; the freedom and flexibility afforded to users who utilise cloud technologies an infinite array of mechanisms that allows them to infringe on copyright held in works in the cloud.

Direct copyright infringement, analogue or digital, attaches strict liability; any *prima facie* act by a person that constitutes any of the restricted acts amounts to direct copyright infringement and thereby attaches liability.²⁸ Strict liability, also referred to as absolute liability, denotes the absolute legal responsibility for an injury that can be imposed on the wrongdoer without carelessness or fault on the part of the defendant.²⁹ Knowledge of the infringing nature of an act performed is not a component of direct copyright infringement.³⁰ Section 23(1) of the Copyright Act 98 of 1978 (the South African Copyright Act) provides: "Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorise." Thus, the attachment of strict liability to copyright infringement does not necessitate considering the defendant's state of mind at the time of the conduct.³¹

While the contemplation of direct copyright infringement in the current copyright regime, both in South Africa and numerous other jurisdictions, adheres to the strict liability approach, the doctrine has been subject to much criticism over the years: criticism that is of import when one contemplates the adaptation of copyright law for cloud application.

²⁷ "Circumvention devices" are technologies that are used to remove, disable or circumvent technological protection measures. Smart Copying. <<http://www.smartcopying.edu.au/copyright-guidelines/hot-topics/technological-protection-measures>>. Retrieved 7 December 2013. A "circumvention service" is a service offered by someone to remove, disable or circumvent a technological protection measure. Smart Copying. <<http://www.smartcopying.edu.au/copyright-guidelines/hot-topics/technological-protection-measures>>. Retrieved 7 December 2013.

²⁸ J.D. Lipton: 769.

²⁹ The Free Legal Dictionary by Farlex. <<http://legal-dictionary.thefreedictionary.com/Strict+Liability>>. Retrieved 20 September 2013.

³⁰ O.H. Dean: 44.

³¹ J.D. Lipton: 803.

3.1.1 A proprietary controversy

“Men are fond of power, especially over what they call their own; and all men conspired to make the powers of property as extensive as possible.”³² It is well known that the modern nature of copyright is deemed to be proprietary. There is no definition in the South African Copyright Act for “copyright”,³³ but the act awards the author of a copyrighted work a negative exclusionary right similar to ownership of corporeal objects.³⁴ The South African Copyright Act establishes certain conditions for the recognition of copyright protection. The work must be “eligible” for copyright protection, it must have been created by a “qualified person”, it must be “original” and it must exist in “material form” before copyright attaches thereto.³⁵ Proprietary of the work is also required.³⁶ The proprietary approach to copyright law is well established in various other jurisdictions,³⁷ including Australia,³⁸ the United Kingdom (U.K.),³⁹ Canada⁴⁰ and the U.S.⁴¹

The doctrine of strict liability is a vestige of British law, and is deeply rooted in private law recognition of rights associated with the ownership of private property.⁴² “The nature of intellectual property is best understood through a comparison with other, tangible forms of property.”⁴³ When one considers the broad definition of copyright

³² H. Sun: 267.

³³ The definition for “copyright” contained in Section 1 of the Copyright Act 98 of 1978 merely provides that “copyright” means copyright in terms thereof. The Act accordingly provides for the forms of expression eligible for copyright and establishes the nature of the copyright attached to the various forms of expression. While the Act does not specifically provide that copyright is the property of the author or owner thereof it does ensure that the rights attached to copyright are exclusive to the author or owner thereof.

³⁴ R.M. Shay: 10. An intellectual property right is conceived as representing a certificate of ownership for knowledge that is in many respects analogous to a title for physical property. O.B. Arewa: 511.

³⁵ O.H. Dean: 1-18.

³⁶ T. Pistorius: 161.

³⁷ M. Kellerman: 21.

³⁸ Section 31 of the Australian Copyright Act No. 63 of 1968 as amended.

³⁹ Section 1(1)(a)-(c) of the CPDA grants a statutory property right in original literary, artistic, musical and dramatic works, sound recordings (also referred to as phonograms), films, broadcasts and published editions.

⁴⁰ Section 3 of Copyright Act R.S.C., 1985, c. C-42, current to October 17, 2013.

⁴¹ Article 1 s 8 Clause 8 of the Constitution of the United States of America empowers Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

⁴² D.S. Ciolino, A.R. Christovich and E.A. Donelon: 355

⁴³ W. Alberts http://www.uj.ac.za/EN/Faculties/law/research/Intellectual_Property/Document/De_%20Rebus%20What%20is%20IP.pdf. Retrieved 27 October 2013: 1.

as proposed by Dean, it has been submitted the focus of copyright is placed on the bundle of rights which is connected to the intellectual property, similar to the case of physical property.⁴⁴ This envisions that property is not defined with regard to the object of its materialisation, but the entitlements attached to its use(s).⁴⁵ Bainbridge defines intellectual property with reference to other, tangible forms of property by stating that: “Intellectual property rights are a form of property which can be dealt with just as with any other property and which can be assigned, mortgaged and licensed. Intellectual property is property in a legal sense: it is something which can be owned and dealt with.”⁴⁶

The legal consequences accompanying copyright resemble those of property law because the owner of the copyright is granted a real right akin to the exclusionary rights realised under property law: the right to property is well established to be a universal human right.⁴⁷ Intellectual property rights, like property rights, refers to the relationship the creator has with his or her works, and thus serves to regulate relations among individuals with respect to those works.⁴⁸ Moreover, it has been suggested that the proprietary quality of the rights granted by copyright recognition is also conferred upon the exceptions of copyright because they serve to limit the owner’s right to fully take advantage of his or her property in certain circumstances.⁴⁹ The exceptions can accordingly be classified as limited real rights.⁵⁰

Intellectual property law, however, pertains to rights in intangible, abstract objects. While many property analogies have been used to justify strict liability in copyright law, it is submitted that the extension of strict liability concepts from physical property laws may not suit the realities of copyright law and the objectives it serves to attain, particularly when one considers the democratic values endorsed by the cloud.⁵¹ Critics submit that the copyright-as-property analogy is flawed for a number of

⁴⁴ J.S.Bennet: 391. M. Kellerman: 21.

⁴⁵ M. Kellerman: 21.

⁴⁶ M. Kellerman: 22.

⁴⁷ R.M. Shay: 10. Akin to the consequences under property law “copying” of expression is generally characterised as a non-consensual taking that should not occur unless the copyright owner agrees thereto. L. Tong: 437. O.B. Awera: 545.

⁴⁸ P.A. Drahos: 1. M. Kellerman: 109.

⁴⁹ C.M. Newman: 262. R.M. Shay: 18.

⁵⁰ R.M. Shay: 18.

⁵¹ J.D. Lipton: 775.

reasons.⁵² Firstly, the legal objects protected by each body of law are fundamentally dissimilar, and the limits of the concept of “property” are exceptionally difficult to delineate because it is not a homogenous concept.⁵³ All items, intangible and tangible, can embody various property rights.⁵⁴ However, unlike tangible property, copyrighted works of authorship are “public goods” which are both “non-excludable” and “inexhaustible”.⁵⁵ Intangible works of authorship can be shared extensively without damage to the owners, a fact that is not true in the case of corporeal property.⁵⁶ Tangible property exists in only one place at a time whereas digital copyrighted works have no distinct boundaries and can exist in countless places at a time.⁵⁷ The non-rivalry of copyright implies that the distributed use of copyrighted work is unlikely to result in the tragedy of the commons,⁵⁸ but is more likely to suffer from the tragedy of the anti-commons.⁵⁹

Furthermore, when one contemplates the fact that one of the purposes of copyright is to make works of intellect and creativity available to the public, it is arguable that copyright serves to ensure that the public does derive certain benefits there from. In the case of tangible property however, the purpose of the legal object is to ensure that the owner thereof exclusively derives benefit there from subject only to the limitation that such benefits are contrary to the public interest. Yet, never from the outset of property law does any individual other than the owner have any expectation with respect to that property. The same cannot be said of intellectual property: while the author or owner has certain expectations with respect to his or her work, the goal

⁵² D.S. Ciolino, A.R. Christovich and E.A. Donelon: 362

⁵³ L. Tong: 437. D.S. Ciolino, A.R. Christovich and E.A. Donelon: 371.

⁵⁴ J.M. Moringeillo: 168.

⁵⁵ P.K. Yu: 892. D.S. Ciolino, A.R. Christovich and E.A. Donelon: 371.

⁵⁶ M. Kellerman: 20. W.J. Gordon: 66-67.

⁵⁷ J.D. Lipton: 777.

⁵⁸ The tragedy of the commons refers to the instance where individuals neglect the well-being of society (or the group) in the pursuit of own personal gain. Investopedia.<<http://www.investopedia.com/terms/t/tragedy-of-the-commons.asp>>. Retrieved 7 December 2013. For example, if neighbouring farmers increase the number of their own sheep living on a mutually used block of land the land will eventually become depleted and not be able to support the sheep – a result which is detrimental to all. Investopedia.<<http://www.investopedia.com/terms/t/tragedy-of-the-commons.asp>>. Retrieved 7 December 2013.

⁵⁹ W.J. Gordon: 67. The tragedy of the anti-commons, in contrast to the tragedy of the commons, refers to the instance when a public resource is overused because there is no one owner to regulate it, or when a resource is underused because it is divided up among a number of owners who may not be willing to agree to cooperate with one another concerning its utilisation. P2P Foundation.<http://p2pfoundation.net/Tragedy_of_the_Anti-Commons>. Retrieved 7 December 2013.

of intellectual property is to benefit the public too and there therefore exists anticipation from the outset of copyright that consumers or users have certain expectations concerning the property. Moreover, the fair use doctrine of copyright law permits judges to decide whether the use of a copyrighted work is socially desirable or not, and the inquiry leaves much scope for fact-finder discretion.⁶⁰ The law therefore delegates less authority to copyright owners than to real property owners.⁶¹ Accordingly, it is submitted that the property rights in works of authorship as acknowledged by copyright law are significantly weaker than rights in tangible property.⁶²

Secondly, the rights granted by the two forms of property according to their associated bodies of law are disparate and divergent.⁶³ The body of law concerning corporeal property refers to the set of legal rules that govern the relationship between an individual and his or her physical property.⁶⁴ Thus, the property law serves to regulate property rights such as ownership and the component rights thereof, i.e. the right to alienate, use or exclude other people from using it.⁶⁵ Copyright law, on the other hand, serves to grant exclusive rights in relation to work embodying intellectual content, and to regulate the acts of which represent, in the case of each type of work, the manners in which that work can be exploited for personal gain or profit.⁶⁶

Thirdly, unlike property law, copyright law suffers from a severe lack of demarcation.⁶⁷ The copyright-as-property analogy is untenable because the immediate problem associated therewith is the imprecise boundaries of the restricted acts if they are considered to be limited real rights.⁶⁸ Unlike tangible property, copyright are subject to extensive limitations, and are thus neither unlimited nor

⁶⁰ D.S. Ciolino, A.R. Christovich and E.A. Donelon: 371.

⁶¹ W.J. Gordon: 68.

⁶² D.S. Ciolino, A.R. Christovich and E.A. Donelon: 371.

⁶³ D.S. Ciolino, A.R. Christovich and E.A. Donelon: 372.

⁶⁴ I. Currie and J. De Waal: 537.

⁶⁵ I. Currie and J. De Waal: 537.

⁶⁶ O.H. Dean: 1.

⁶⁷ D.S. Ciolino, A.R. Christovich and E.A. Donelon: 374. Boundaries establishing the limits of property rights provide advance notice when an act will give rise to rights and limitations established by property law, but works of authorship bear no similar delimiting marking, boundaries or other demarcation. D.S. Ciolino, A.R. Christovich and E.A. Donelon: 374.

⁶⁸ R.M. Shay: 18.

perpetual. Copyright's "property right" is thus a set of limited rights of limited duration, and the ultimate goal thereof is for the copyrighted works to enter the public domain.⁶⁹ Furthermore, tangible properties are physically scarce, but intellectual property consists of information – a plentiful commodity.⁷⁰ Moreover, physical intrusions can easily disturb private activities, whereas a copy can be made "a thousand miles from the owner without his ever becoming aware of the wrong."⁷¹ Thus, the making of a copy of protected work in the digital context may not have any impact on the copyright holder's rights in a significant way, and therefore the loss-benefit equation that can generally be assumed in cases of interference with physical property rights will often not find application to copyright infringement in the cloud.⁷²

Due to the treatment of intellectual property analogous to real property there is a tendency to extend the rights to information.⁷³ The sanctity placed upon personal property, and its association with freedom, has unwittingly been applied to information.⁷⁴ There is thus a lot at stake where the idea of corporeal property is extended to include abstract property.⁷⁵ Drahos submits that it is necessary to enquire whether the legal recognition and protection of intellectual property may be explained and justified by utilising general property theories or whether a distinctive theory of intellectual property needs to be developed.⁷⁶ Accordingly, numerous authors, including Dean, have made the argument that intellectual property should be protected under a separate constitutional proprietary clause because intellectual property interests require a different kind of protection than tangible property interests.⁷⁷

⁶⁹ D.S. Ciolino, A.R. Christovich and E.A. Donelon: 372-373.

⁷⁰ M. Kellerman: 114.

⁷¹ W.J. Gordon: 68. A. Ng: 860.

⁷² J.D. Lipton: 777.

⁷³ N. Suzor: 62.

⁷⁴ N. Suzor: 62.

⁷⁵ M. Kellerman: 110.

⁷⁶ P.A. Drahos: 1.

⁷⁷ M. Kellerman: 11.

However, in the *First Certification* case⁷⁸ the Constitutional Court responded to the contention that Section 25 of the Constitution, the property clause, fails to recognise the right to intellectual property.⁷⁹ The Constitutional Court explicitly rejected the claim that the Constitution could not be adopted because it does not guarantee a right to intellectual property.⁸⁰

“A further objection was lodged was that the ... [text of the 1996 Constitution] fails to recognise a right to intellectual property. Once again the objection was based on the proposition that the right advocated is a ‘universally accepted fundamental right, freedom and civil liberty’. Although it is true that many international conventions recognise a right to intellectual property, it is much more rarely recognised in regional conventions protecting human rights is also true that some of the more recent constitutions, particularly in Eastern Europe, do not contain express provisions protecting intellectual property, but this is probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted. In the circumstances, the objection cannot be sustained. (citation omitted).”⁸¹

Accordingly, the court interpreted this tendency to mean that the inclusion of a specific right to intellectual property in a separate constitutional clause is not a universally accepted norm.⁸² To date there has been no formulation of a general principle by the Constitutional Court to indicate whether or not any or all intangibles should be recognised as property under the auspices of Section 25 of the Constitution.⁸³ However, Currie and De Waal submit that “property” for the sake of constitutional interpretations ought to be seen as the resources that generally constitute a person’s wealth, and are accordingly recognised and protected by law.⁸⁴ Such resources are legally protected by private law rights – real rights in the case of

⁷⁸ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 10 BCLR 1253 (CC) (6 September 1996).

⁷⁹ M. Kellerman: 10.

⁸⁰ L. Tong: 438-439. A. Rens: 28.

⁸¹ A. Rens: 28.

⁸² M. Kellerman: 14.

⁸³ R.M. Shay: 134.

⁸⁴ I. Currie and J. De Waal: 539.

physical resources, contractual rights in the case of performances and intellectual property rights in the case of intellectual property.⁸⁵

An important qualification of the expansive interpretation of property that has been advocated here is that for the right to constitute property it must be a vested right.⁸⁶ Accordingly, the right must be more than merely an expectation and must have accrued to the claimant according to the relevant rules of common law or statute.⁸⁷ “Since these rights are creatures of statute and established in accordance with a special statutory regime, the requirement is usually that the right should be established and vested according to the applicable statutory prescriptions before it will be recognised and protected under the constitutional property clause.”⁸⁸ The general rule is therefore that an intellectual property right will be recognised and protected under the property clause provided that the requirements for its recognition and protection in the specified works are met.⁸⁹ Compliance with the requirements for copyright recognition does indeed create such a vested right with respect to the works that qualify therefore.

Currently, there is no determinable consensus among authors and critics whether copyright should be viewed as property in the corporeal sense, but the assertion that intellectual property is also subject to the protection afforded to tangible property is well-established and supported extensively by most intellectual property scholars.⁹⁰ The current position is that the constitutional property clause is wide enough to protect rights and interests that should be protected according to international human rights standards.⁹¹

Due to the fact that copyright has been accepted to constitute property in the tangible sense it is submitted that the proprietary supposition establishes the

⁸⁵ I. Currie and J. De Waal: 539.

⁸⁶ I. Currie and J. De Waal: 540. Copyright is not absolute; it is a right that is confined by a subtle structure of limits and limitations. P.B. Hugenholtz and M.R.F. Senftleben: 6.

⁸⁷ I. Currie and J. De Waal: 540.

⁸⁸ M. Kellerman: 93.

⁸⁹ M. Kellerman: 93.

⁹⁰ C. Greiger: 538. J.D. Lipton: 775.

⁹¹ M. Kellerman: 203. It is asserted that Article 27(2) of the *Universal Declaration of Human Rights* and Article 15 of the *International Covenant on Economic, Social and Cultural Rights* prove that the protection of the right to hold intellectual property rights is internationally accepted. M. Kellerman: 265.

foundation upon which strict liability in copyright infringement arises. In the cloud, however, most cases of innocent infringement associated with UCC involve defendants who had no means of knowing about the copyright infringement: many copyright infringers are small-scale creators with little or no knowledge of the intricacies of copyright law, and who have no interest in exploiting their creations for commercial purposes.⁹²

3.1.2 Chilling effects on downstream creativity

The strict liability in copyright law that arises from its proprietary nature has been criticised for chilling expression and innovation, and it is therefore alleged to be contradictory to the utilitarian goals of copyright law.⁹³ It must be remembered that the rationale for granting exclusionary rights over intellectual property is based on the utilitarian objective of encouraging socially beneficial activities.⁹⁴ Thus, with respect to copyright law, the utilitarian approach predicts that without guaranteed protection of rights there would be no incentive to create works.⁹⁵ The rationale therefore revolves around providing works for the users of intellectual products, not rewarding the creators: the economic incentive is merely a means to serve the public.⁹⁶ Copyright is intended to foster creativity, but it is submitted that a strict liability approach can chill downstream creativity because users would refrain from producing innovative expressions for fear of attaching liability and the accompanying “bullying” that occurs.⁹⁷

⁹² J.D. Lipton: 779.

⁹³ W. T. Gallagher: 455. D.S. Ciolino, A.R. Christovich and E.A. Donelon: 410. J.D. Lipton: 782. The prolific increase in the commodification and privatisation of intellectual products has raised concerns about the effect thereof on the public’s access to knowledge, information and technology. L. Tong: 441. The over-expansion of intellectual property rights over the past two decades is contended to harm competition, chill free speech and diminish the public domain as increasingly broad areas of social life fall within the scope of strong intellectual property rights protection. W. T. Gallagher: 455.

⁹⁴ R.M. Shay: 13.

⁹⁵ R.M. Shay: 13.

⁹⁶ R.M. Shay: 13.

⁹⁷ One of the most important features of the IP disputing landscape is that it takes place primarily outside of the formal legal system, and enforcement of copyright is generally initiated with a letter of demand which tends to be forceful and aggressive in assertion of the copyright-holder’s rights, irrespective of the admitted weakness thereof. W. T. Gallagher: 481-485. A very aggressive demand letter serves to coerce a target to capitulate and to cease infringing activity immediately, a result termed as a “slam dunk.” W. T. Gallagher: 485. Copyright lawyers and their clients sometimes enforce admittedly weak copyright claims precisely because it can be an effective strategy with few downsides. W. T. Gallagher: 496. Copyright enforcement outside of judicial forums tends to amount to “bullying” of the infringer in a

Copyright law was originally designed for routine individual use, a fact attested to by the exceptions and limitations attached to copyright recognition and enforcement.⁹⁸ Unfortunately it is not that simple anymore. The cloud computing has brought about a shift from one-to-many to many-to-many; a shift that has destabilised the current copyright regime, and various accounts of copyright infringement are not taken into consideration by the law.⁹⁹ Concerns about the chilling effect of strict liability are of particular significance in cloud computing because so many people participate in the online “cut and paste” culture.¹⁰⁰

The cloud, access thereto and its operations require huge investments, investments predominantly derived from the private sectors.¹⁰¹ Accordingly, Internet service providers, server farms and companies, including Google and other search engines, will lead practitioners and policy makers to actionable contents with greater ease than when targets are millions of individual computers.¹⁰² The ease with which service provider can locate and monitor the conduct of users places them in a position to target innocent infringers who have no understanding of copyright law and the questionable nature of the conduct they perceive to be legitimate.

Online models of distribution i.e. the cloud, generally involve copying as a matter of necessity, and are therefore not really comparable with analogue distribution models.¹⁰³ Moreover, it is also not always easy to establish definitively which party is responsible for unauthorised copying in systems within which copying is largely automated.¹⁰⁴ It is therefore often difficult to distinguish between direct and indirect infringement, a distinction that is important because each requires a different evidentiary approach.¹⁰⁵ Furthermore, the cloud allows users to establish a virtual identity. Lipton asserts that the punishment of innocent copying on the Internet amounts to punishment of virtual existence: “Strict punishment makes no sense in a

manner that aims to subvert any other infringer from doing the same – the effect of which chills any further downstream innovation.

⁹⁸ D. Gervais: 851.

⁹⁹ D. Gervais: 856.

¹⁰⁰ J.D. Lipton: 783.

¹⁰¹ D.J. Gervais and D.J. Hyndman: 67.

¹⁰² D.J. Gervais and D.J. Hyndman: 67.

¹⁰³ J.D. Lipton: 797.

¹⁰⁴ J.D. Lipton: 786.

¹⁰⁵ J.D. Lipton: 790.

world where copying is the architecture of being.”¹⁰⁶ Therefore, the social context of virtual identity is vitally important to both creative enterprises and to copyright industries if balance is to be struck between the expectations of users and the interests of copyright holders in the cloud.¹⁰⁷

“The tension between a law designed for real space and the ontology of cyberspace must be addressed. If the Internet is to draw widespread participation, it requires fairness for the unwary. If the Internet is to fuel the vehicle of commerce, it requires assurances for good-faith purchasers. If the Internet is to breed a marketplace of ideas, it requires breathing space for its speakers. The Internet’s great potential for commercial and information exchange may be realized only if innocent actors are not dissuaded from participating.”¹⁰⁸

Current legal interpretation maintains that standard copyright rules and its exceptions are a necessary condition for creativity.¹⁰⁹ However, it has been submitted that strict liability is neither justified nor necessary in copyright law, particularly if one bears in mind the flawed historical, conceptual and economic misconception.¹¹⁰ Irrespectively, given the fact that copyright is considered akin to tangible property and that this presupposition is well embedded in South African law, it is hardly likely that the necessary alleviation from strict liability for copyright infringement will arise from the arduous debate concerning its proprietary acknowledgement. It is worth noting that some commentators have pointed out that corporeal property systems have become more accommodating of innocent infringers than copyright law.¹¹¹ Some alleviation is necessary if copyright is to be adapted for cloud application. However, given the strong proprietary foundation upon which copyright law is established it is submitted that such alleviation will therefore have to arise from extending and supporting fair dealing and fair use doctrines.

¹⁰⁶ J.D. Lipton: 796.

¹⁰⁷ W. T. Gallagher: 462. R.T. Nimmer: 832. The law and society approach to the study of intellectual property is deemed to be particularly important because it is an area of law that remains greatly understudied and under-theorized from a societal perspective. W. T. Gallagher: 462.

¹⁰⁸ J.D. Lipton: 800.

¹⁰⁹ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 46.

¹¹⁰ D.S. Ciolino, A.R. Christovich and E.A. Donelon: 418.

¹¹¹ J.D. Lipton: 775.

3.2 FAIR USE/FAIR DEALING

Exceptions to copyright infringement have become an increasingly important legal vehicle to address the competing interests between copyright holders and cloud users – a matter that is exacerbated by the constant evolution of technologies.¹¹² Copyright law makes provision for a number of “fair dealing or fair use” exceptions from copyright infringement, the consideration of which leads to the supposition that these exemptions are instances which are considered to be in the public interest that the copyright owner should not have a monopoly in the performance of specifically restricted acts in relation to his or her work.¹¹³ While the American Copyright Act refers to “fair use” and the South African Copyright Act refers to “fair dealing” it is submitted that for the present purposes of analysing copyright and its application to the cloud the two terms are synonymous and will thus be used interchangeably.¹¹⁴

The fair dealing and fair use doctrines were developed at common law as an equitable defence to copyright infringement, allowing for uses that – notwithstanding the copyright owner’s right to exclude others therefrom – would fulfil a socially beneficial purpose.¹¹⁵ These doctrines were intended to delineate the acceptable ways in which new works may use existing ones.¹¹⁶ The doctrines are therefore intended to function as a flexible rule of reason that caters for changing circumstances.¹¹⁷ In accordance with the provisions in the Berne Convention,¹¹⁸

¹¹² P. Chapdelaine: 1.

¹¹³ O.H. Dean: 51. Sections 12 to 19B of the Copyright Act 98 of 1978 curtail the copyright holder’s monopoly on the exploitation of the copyrighted work under certain circumstances in terms of which users are permitted to make copies of the work without the copyright holder’s permission. T. Pistorius: 212-213. The primary requirement for fair dealing/fair use is that the work be used fairly to fulfil a particular purpose. T. Pistorius: 212-213. Instances of fair dealing pertain to the copyrighted work being used for research, private study, personal or private use and for criticism, review and reporting of current events.

¹¹⁴ O.H. Dean: 52. Fair use models have been implemented in countries such as the U.S., Israel and the Philippines, whereas in the alternative, a more restrictive fair dealing model is commonly employed in Commonwealth countries such as the U.K, Canada and Australia. M. Geist: 157-158.

¹¹⁵ A. Perzanowski and J. Schultz: 2086. A. Katz: 101. Fair use began as an equitable defence implying that considerations such as good faith or fairness should help consumers defend their personal use against accusations of infringement. A. Perzanowski and J. Schultz: 2086.

¹¹⁶ O.B. Arewa: 496.

¹¹⁷ J.D. Lipton: 774.

¹¹⁸ Article 9(2) of the Berne Convention sets out the three-step test that exempting legislative provisions must conform to: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict

legislators in South Africa and numerous other jurisdictions have enacted various fair dealing exceptions. Fair dealing finds application when a substantial part of a copyrighted work is used in a way that seemingly conflicts with the exclusive rights in that work.¹¹⁹ If less than a substantial part is reproduced then there is no infringement and the availability of an exemption is irrelevant.¹²⁰ However, despite the availability of fair use as a defence, it is submitted that a user who downloads or make copies of original works from the internet will not be excused from liability, unless he or she can establish the defence during litigation.¹²¹ Thus, fair use/fair dealing is not automatically considered if there is *prima facie* infringement, it must be raised and proven by the defendant.

There are many ways to draft copyright exceptions and limitations: (1) as open-ended provisions, a method commonly used in common law countries; (2) as a catalogue of allowed exempted uses, a method typically used by civil law countries, and; (3) as a combination of both.¹²² The open-ended provisions allow judges to react in a more flexible way to new situations, but the results are less predictable and therefore the successful application of the doctrine is uncertain.¹²³ With a catalogue of exempted uses the legislation is more rigid, but there is greater legal security.¹²⁴ The approach in other OECD countries such Australia, the European Union (E.U.), Korea and Japan utilises a set of closed purpose-specific exceptions to exclusive rights.¹²⁵ Despite the various approaches to formulating fair dealing exceptions the doctrine generally provides courts with a broadly determinable spectrum of instances in which it would find application if raised as a defence. Yet, the scope of fair dealing or fair use exceptions, however broad or narrow, is directed at identifiable infringers and ascertainable infringing acts.

with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

¹¹⁹ H. Sun: 284. R.M. Shay: 1. Members of the public are permitted to use copyrighted works for certain predetermined purposes which constitute an exhaustive list. R.M. Shay: 1.

¹²⁰ O.H. Dean: 51. A.W. Dnes: 2.

¹²¹ J.D. Lipton: 774.

¹²² C. Geiger: 519.

¹²³ C. Geiger: 519.

¹²⁴ C. Geiger: 519.

¹²⁵ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 46.

National approaches to the determination of exceptions and limitations vary, but it is customary in common law countries to allow for particular types of limitations on the various exclusive rights, i.e. fair use and fair dealing exceptions.¹²⁶ Fair use is traditionally defined as a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.¹²⁷ Despite the enactment of these exemptions the doctrine it is not a precise notion, and the relevance and application thereof to a particular matter depends on the courts discretion.¹²⁸ “Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. . . . Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.”¹²⁹

By design, fair dealing is an indeterminate concept that allows flexibility in its application.¹³⁰ The doctrine is vague because no one knows what the conceptual of definitive nature of fair use is or what it is intended to be.¹³¹ Professor Barton Beebe notes that, “we continue to lack any systematic, comprehensive account of our fair use case law.”¹³² Moreover, what “fair” exactly means is uncertain and there is no precise definition or test to determine whether a user’s use of copyrighted expression in a way the law deems to be fair.¹³³ Thus, fair use has earned a reputation for leading to unpredictable and inconsistent outcomes that offer potential defendants little guidance.¹³⁴

¹²⁶ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content.<<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 46. The Berne Convention and TRIPS Agreement permit exceptions for fair use of copyrighted works, but the availability and scope of the exceptions remain subject to national law for the most part. K. Pham and S. Mkhitaraya: 3.

¹²⁷ K. Pham and S. Mkhitaraya: 2. The fair use doctrine functions as an equitable rule of reason, so each case must be decided on its own facts so that courts can balance the interests of each party. J.M. Nolan: 549.

¹²⁸ R.M. Shay: 1. Over one hundred years of judicial development and commentary on the nature of the fair use doctrine has not produced any spectrum of a consistent and clear-cut definition of the doctrine. H. Sun: 283.

¹²⁹ J.M. Nolan: 559.

¹³⁰ N. Snow: 1786. A. Ng: 870.

¹³¹ C. Bohannan: 687.

¹³² C. Bohannan: 687.

¹³³ N. Snow: 1786. A. Katz: 127.

¹³⁴ A. Perzanowski and J. Schultz: 2092.

The notion of fair use and its application is presently the subject of much industry and academic debate, and there have been many commercial and legislative initiatives.¹³⁵ It is well recognised that users of copyright work have a valid interest in being able to use the work without the authorisation of the copyright owner in certain circumstances.¹³⁶ It must be appreciated that the exemptions are all predicated on the assumption that, in principle, an act of infringement has been committed and that this act is then excused by the exemption.¹³⁷ The fair use defence is intended to limit the scope of copyright and help ensure that copyright does not stifle creativity.¹³⁸ In order for fair dealing to find application, the conduct must potentially amount to infringement. Copyright infringement cases typically involve some evaluation of the degree of similarity between two works using tests of substantial similarity.¹³⁹ Once a plaintiff proves ownership of a copyrighted work, this evaluation of similarity becomes a predominant inquiry in determining infringement.¹⁴⁰

The balance established by the exceptions and limitations in copyright law thus implies only limited borrowing, and it often involves using the borrowed material to build new works or for purely personal non-commercial use.¹⁴¹ Fair use involves an evaluation of the copying of an earlier work for various reasons some of which are held to further the goals of copyright and others of which are not.¹⁴² A person will not be subject to the strict liability that arises when there is *prima facie* copyright infringement if he or she can prove that unauthorised use of the copyrighted work amounted to fair use thereof. In effect, fair use serves to divert the strict liability that attaches to copyright infringement. Yet, the application of fair dealing is meant to

¹³⁵ M. Geist: 157. The Guidelines for Fair Dealing in the Electronic Environment.<<http://www.ukoln.ac.uk/services/elib/papers/pa/fair/>>. Retrieved 26 October 2013: 10.

¹³⁶ T. Pistorius: 211. To expect a user to acquire the permission of the copyright owner every time they want to make use of the work would seriously impede scientific study, private study and the effective teaching at schools and universities. T. Pistorius: 211.

¹³⁷ O.H. Dean: 51. H. Sun: 309.

¹³⁸ O.B. Arewa: 484.

¹³⁹ O.B. Arewa: 484. The assessment of the similarity between the works typically considers evidence of whether the allegedly infringing defendant had access to the work that the defendant may have copied, the extent to which the two works are similar and the extent to which any copying constitutes an unlawful appropriation. O.B. Arewa: 484.

¹⁴⁰ O.B. Arewa: 484.

¹⁴¹ R.T. Nimmer: 834.

¹⁴² M.D. Murray: 17.

determine whether the use of a portion of the copyrighted work is justifiable.¹⁴³ Moreover, the reproduction of the entire copyrighted work is *prima facie* direct copyright infringement, and proving fair use in such an instance will prove to be more difficult.

Copyright law has always necessitated a balancing between author's rights and reserving some uses and some content for use by others, but we need to appreciate clearly what we are balancing and where the balance is being made.¹⁴⁴ This is of particular import if there is to be an alleviation of the strict liability that attaches to copyright infringement in the digital context. When one considers the fact that the doctrine of fair use was originally developed to allow society to benefit from utilising copyrighted work without being subjected to the legal repercussions, and that the cloud fosters social and cultural participation by giving users access to an unlimited array of copyrighted material, it is necessary to consider the alleviation of strict liability that attaches to copyright infringement by users in the cloud.

Accordingly, the scope of fair use and the spectrum of situations in which it may find application needs clarification for the sake of cloud application, especially when there is consideration of the distribution and creation capacity of the cloud. Therefore, our consideration of the extension and support of fair dealing for cloud application necessitates an inquiry into current contentions and recent developments in the fair dealing and fair use approaches of various jurisdictions, namely Australia, Canada, the UK and the U.S. alongside the fair dealing approach in South Africa.

3.2.1 Fair dealing in the UK

In the U.K. the "fair dealing" provisions contained in Sections 28A to 31 of the Copyright Design and Patent Act (CDPA) of 1988 of the U.K. (the U.K. CDPA) specifies a list of situations where "dealing" with a protected work is permitted.¹⁴⁵ The

¹⁴³ Fair use is an affirmative defence: the defendant must prove that the allegedly infringing work is not harmful to the plaintiff. J.M. Nolan: 562.

¹⁴⁴ L.R. Patterson: 18. R.T. Nimmer: 834-835. H.B. Abrams: 3.

¹⁴⁵ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 46. The actions with respect

provisions for fair dealing in the U.K. are, however, widely characterised as restrictive because it features an exhaustive list of defined exceptions.¹⁴⁶ It is alleged that the UK fair use doctrine contains too many obstacles that undermine its operation: its purposes are too rigid and have been interpreted restrictively.¹⁴⁷ To prove that use does amount to fair dealing a defendant must prove that (1) the dealing falls into an enumerated category, (2) the dealing must be fair, and (3) and that there is sufficient acknowledgement in appropriate instances.¹⁴⁸ The general test for copyright infringement under section 16(3) of the U.K. CDPA requires taking the work “as a whole or any substantial part of it.”¹⁴⁹ Increasingly the courts have found the meaning of “substantial part” in the independent skill and labour of the original author, not in the use to which a work is put.¹⁵⁰

The fair dealing provisions of the U.K. do not shed light on the issue of supporting fair use in cloud computing, but the judiciary has developed a very effective test to contemplate the fairness of any use alleged to be fair dealing. The main test for fairness was established in the case of *Hubbard v. Vosper*,¹⁵¹ and it represents the first major judicial attempt to define the concept of “fairness” when contemplating fair use.¹⁵² The court *in casu* stated that:

“It is impossible to define what is ‘fair dealing’. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be fair. But,

to copyrighted works provided for in the U.K. CDPA are described as “permitted acts” and the relevant sections are nearly 60 in number. K. Pham and S. Mkhitarian: 4.

¹⁴⁶ M. Geist: 165. A.W. Dnes: 2. G. D’Agostino: 314.

¹⁴⁷ G. D’Agostino: 337.

¹⁴⁸ G. D’Agostino: 338.

¹⁴⁹ D. Mendis and M. Kretschmer: 3.

¹⁵⁰ D. Mendis and M. Kretschmer: 3.

¹⁵¹ *Hubbard v. Vosper* (1971), [1972] 1 All E.R. 1023, [1972] 2 W.L.R. 389 (C.A.).

¹⁵² G. D’Agostino: 341.

short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.”¹⁵³

Accordingly, a court must therefore weigh the extent and proportion of the work used in relation to the original work and uses made. An entire work may thus be fair dealing if the overall impression is that the work does not rival the purposes of the original work.¹⁵⁴ The Human Rights Act 1998¹⁵⁵ provides that courts need to be flexible and considerations of public interest are paramount.¹⁵⁶ While not expressly delineated in the U.K. CDPA, several factors emerge from the case law which are, for the most part, consistent with Canadian jurisprudence. The factors that a court must accordingly consider are: (1) the nature of the work, (2) the manner in which the work was obtained, (3) the amount of work taken, (4) the use(s) made, (5) the commercial use derived from that use(s), (6) the motive for the dealing, (7) the consequences of the dealing, and (8) the purpose achieved by different means.¹⁵⁷

The 2006 Gowers Review of Intellectual Property (the Gowers Review) critically analysed the functionality of the intellectual property system applicable in the U.K. in its entirety. The Review made a number of recommendations for the improvement of the framework for innovation in terms of patents, trademarks and copyright.¹⁵⁸ The Review particularly called for greater balance and flexibility of IP rights to allow individuals, businesses and institutions to use information and ideas in ways consistent with the digital age.¹⁵⁹ “The IP system must enable greater economic productivity whilst ensuring equity for all those who use IP. In order to achieve this, the instruments of the system must be balanced, coherent and flexible, and the

¹⁵³ G. D’Agostino: 342.

¹⁵⁴ K. Pham and S. Mkhitarian: 4.

¹⁵⁵ (U.K.), 1998, c. 42.

¹⁵⁶ G. D’Agostino: 342.

¹⁵⁷ G. D’Agostino: 342.

¹⁵⁸ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_7_55.pdf>. Retrieved 22 August: 119.

¹⁵⁹ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_7_55.pdf>. Retrieved 22 August: 119.

operation of those instruments must be effectively administered.”¹⁶⁰ The Review has made no recommendation that fair dealing be amended, but it did recommend adding several new exceptions in order to cater for new technological advances.¹⁶¹

3.2.2 Fair dealing in Australia

Australia’s fair dealing is deeply rooted in the Commonwealth fair dealing approach, and its application is uniquely similar to the approach utilised in the U.K. The Copyright Act 63 of 1968 of Australia (“Australian Copyright Act”) came into operation on 1 May, 1969 and currently regulates copyright law in Australia.¹⁶² Section 31 of the Australian Copyright Act grants exclusive rights to copyright holders to deal with their copyrighted works. In terms of the Australian Copyright Act users are only entitled to limited fair use rights. The enumerated purposes in the Australian fair dealing provisions are research, private study, criticism, parody, satire, reporting news, or a legal practitioner, registered patent attorney or registered trademarks attorney giving professional advice.¹⁶³ No provision is made for personal use rights to copy, transfer and amendment of a work, unless it has specifically been authorised in a licence: it is required of a user to get permission for use of copyrighted material from the holder of that work.¹⁶⁴

Section 40 to 43 of the Australian Copyright Act, however, provides that certain uses will be “fair dealing” if they are for research or study, criticism or review, reporting news or professional advice by a lawyer, patent attorney or trademark attorney. Furthermore, Section 40(2) of the Australian Copyright Act provides that certain factors must be taken into account when deciding whether any of the uses do in fact amount to fair use; namely, (1) the purpose and character of the dealing; (2) the nature of the work or adaptation; (3) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price; (4) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and (5)

¹⁶⁰ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf>. Retrieved 22 August: 119.

¹⁶¹ G. D’Agostino: 338.

¹⁶² R.M. Shay: 88.

¹⁶³ M. Geist: 165.

¹⁶⁴ M. Jackson and A. Shah: 2.

in the case where only part of the work or adaptation is reproduced – the amount and substantiality of the part copied in relation to the whole work or adaptation. The fair use exemptions under Australian copyright law apply to a relatively small group of users in few, specified instances.¹⁶⁵ However, the construction of this provision seems to suggest that the factors for determining the “fairness” of the use should apply to all evaluations of fair dealing.¹⁶⁶ Thus, to qualify as “fair use” a use must fall within the closed purpose-specific exceptions and certain circumstances must be met to determine the “fairness” of the use in question.¹⁶⁷

The Digital Agenda Copyright Amendments to the Australian Copyright Act came into operation on 4 March 2001.¹⁶⁸ The amendments are of significance because it creates the exclusive right to communication to the public which effectively extends copyright protection to materials accessible online and in digital format.¹⁶⁹ The new right of communication to the public exists alongside the other existing rights granted by the Australian Copyright Act, but it serves to aid the regulation of copyrighted materials that is distributed by electronic means or that is included on a website, made available online or included in an email.¹⁷⁰ Section 10(1) of the Australian Copyright Act defines “communicate” as meaning “to make available online or

¹⁶⁵ M. Jackson and A. Shah: 6.

¹⁶⁶ R.M. Shay: 149.

¹⁶⁷ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 46.

¹⁶⁸ M. Jackson and A. Shah: 3.

¹⁶⁹ Davis Collison Cave. Implications of Australia's Digital Agenda Copyright Reforms. <<http://www.davies.com.au/pub/detail/314/implications-of-australia-s-digital-agenda-copyright-reforms>>.

Retrieved 17 December 2013: 1. M. Jackson and A. Shah: 3.

“The new right of communication to the public will replace and extend the existing technology-specific broadcasting right which applies only to ‘wireless’ broadcasts. It will also replace the limited cable diffusion right. The right of communication will encompass the making available of copyright material online, so as to provide protection to material made available through on demand, interactive transmissions. An example of the exercise of this right would be the uploading of copyright material onto a server which was connected to the Internet. The new right will substantially improve protection for many important industries that publish or distribute copyright material on the Internet and will also protect copyright material included in cable pay TV broadcasts. Being a technology neutral right, it will also mean that the development of new technologies such as ‘Internet broadcasting’ will not require repeated technology-specific changes to the Copyright Act.”

Australian Copyright and Fair use – Submissions on Green Bill <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CJwBEBYwQ&url=http%3A%2F%2Fwww.copyright.org.au%2Fadmin%2Fcmsacc1%2F_images%2F1927278782521fdf96c8c6d.pdf&ei=Q-KiUrfdG9KM7Aa4mlHoCA&usq=AFQjCNHnNOvDXs60AB6J0qMJEsjmXWMBhg>. Retrieved 7 December 2013: 11.

¹⁷⁰ M. Jackson and A. Shah: 3.

electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter.”¹⁷¹ One exception to infringement of copyright under these amendments (Sec 43A and 11A) is that of “temporary reproductions” – any temporary copies of works that might be made as a result of transmitting works online or in accessing them due to the “technical process of making or making or receiving a communication.”¹⁷²

The amendments were thus introduced in an attempt to balance the rights of copyright owners and rights of the public to access information freely, or at least for education, research and cultural purposes to be able to access it and make it available to the public electronically.¹⁷³ Accordingly, the new amendments replicate the existing balance between the rights of copyright owners and users and so these fair dealing defences also apply to digital material.¹⁷⁴ For example, Section 103C introduced a fair dealing defence for audio-visual items, such as music, films, sound and television broadcasts.¹⁷⁵

On the 30th of August 2013 the Australian Copyright Council (ACC)¹⁷⁶ submitted a brief submission on the Copyright Legislation Amendment (Fair Go for Fair Use) Bill

¹⁷¹ The creation of a communication right makes it clear that the unauthorised making available of copyright material online infringes copyright. Davis Collison Cave. Implications of Australia's Digital Agenda Copyright Reforms. <<http://www.davies.com.au/pub/detail/314/implications-of-australia-s-digital-agenda-copyright-reforms>>.

Retrieved 17 December 2013: 1.

¹⁷² M. Jackson and A. Shah: 3.

¹⁷³ M. Jackson and A. Shah: 3.

¹⁷⁴ M. Jackson and A. Shah: 3.

¹⁷⁵ M. Jackson and A. Shah: 3.

¹⁷⁶ The Australian Copyright Council is an independent, non-profit organisation founded in 1968 whose purpose is to support copyright in Australia by promoting the benefit of copyright for the common good. Australian Copyright and Fair use – Submissions on Green Bill <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CJwBEBYwQ&url=http%3A%2F%2Fwww.copyright.org.au%2Fadmin%2Fcmsacc1%2F_images%2F1927278782521fdf96c8c6d.pdf&ei=Q-KiUrfdG9KM7Aa4mIH0CA&usq=AFQjCNHnNOvDXs60AB6J0qMJEsjmXWMBhg>. Retrieved 7 December 2013: 7. The Council advocates for the contribution of creators to Australia's culture and economy and the importance of copyright for the common good. Australian Copyright and Fair use – Submissions on Green Bill <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CJwBEBYwQ&url=http%3A%2F%2Fwww.copyright.org.au%2Fadmin%2Fcmsacc1%2F_images%2F1927278782521fdf96c8c6d.pdf&ei=Q-KiUrfdG9KM7Aa4mIH0CA&usq=AFQjCNHnNOvDXs60AB6J0qMJEsjmXWMBhg>. Retrieved 7 December 2013:7. It works to promote understanding of copyright law and its application, lobby for appropriate law reform and foster collaboration between content creators and consumers. Australian Copyright and Fair use – Submissions on Green Bill

2013 which proposes that Australian legislatures insert a fair use exception on terms identical to the U.S. Copyright Act into the Australian Copyright Act. The brief highlights some of the difficulties that Australian copyright law would face if there is a wholesale adoption of statutory provisions for fair use from the U.S. Copyright Act, addressing among other things terminology in the Act (or lack thereof), judicial interpretation of the provisions

3.2.3 Fair dealing in Canada

Under Canadian law the doctrine of fair dealing is statutorily entrenched in Section 29 of the Canadian Copyright Act which provides that: “Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.” Generally, the defendant has to prove that (1) the alleged action of infringement fits into one of the enumerated purposes, (2) that action was fair, and (3) that requirements for acknowledgement are met in the instances it is required.¹⁷⁷ Typically, the enumerated grounds were interpreted as exhaustive because any use that does not fall within the enumerated grounds was considered infringement.¹⁷⁸ It is quite evident that the Canadian Copyright Act closely resembles the fair dealing approach provided for in the U.K. CDPA.¹⁷⁹

However, recent developments in Canadian law present a fascinating window into the extension of fair dealing. In 2004 the Supreme Court of Canada in the matter of *CCH Canadian Ltd. v. Law Society of Upper Canada*¹⁸⁰ held that Canadian law must recognise a “user right” to carry on exceptions generally and fair dealing in particular, thus raising the level of a general fair use principle.¹⁸¹ During its evaluation of the

http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CJwBEBYwQ&url=http%3A%2F%2Fwww.copyright.org.au%2Fadmin%2Fcmsacc1%2F_images%2F1927278782521fdf96c8c6d.pdf&ei=Q-KiUrfdG9KM7Aa4mlHoCA&usq=AFQjCNHnNOvDXs60AB6J0qMJEsjmXWMBhg. Retrieved 7 December 2013:7.

¹⁷⁷ G. D'Agostino: 319.

¹⁷⁸ M. Geist: 166. G. D'Agostino: 319.

¹⁷⁹ Prior to 2002 the leading pronouncement on Canadian copyright right law stems from Canada's highest court in the matter of *Bishop v Stevens* [1990] 2 SCR 467, 72 DLR (4th) 385 where McLachlin J suggested that the Canadian Copyright Act was based on UK law. M.Geist: 166.

¹⁸⁰ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

¹⁸¹ R.M. Shay: 19. G. D'Agostino: 315. M. Geist: 158.

enumerated grounds¹⁸² for fair dealing the Court asserted that the contemplation of the purpose of the dealing “should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”¹⁸³ When the court recognised that rewarding the creator was an important part of Canada’s “dualistic” copyright objectives, it implied that such reward does not promote the public interest in the same way as protecting user rights.¹⁸⁴ For the court, the chief method of promoting the public interest was to protect user rights, or at the very least not champion owner’s rights above others.¹⁸⁵ Accordingly, many Canadian copyright right scholars have argued that a flexible statutory provision in which the list of enumerated purposes is provided for would be more illustrative instead of exhaustive, and accordingly be more consistent with the Court’s vision of fair dealing as a user’s right.¹⁸⁶

This characterisation obviously does not mean that the rights are real rights, but that they ought to be seen as public entitlements granted by legislation that form an integral part in the balance of copyright if they are to be considered rights.¹⁸⁷ However, caution has been raised that the term “right” not be used lightly.¹⁸⁸ In a strictly Hohfeldian sense, a “right” is understood to correlate to a “duty”.¹⁸⁹ Hohfeld complained about the fact the term “rights” is used indiscriminately to cover what in a given case may be a privilege, a power or an immunity rather than a “right” in the strict sense of the work.¹⁹⁰ Instead, the expectations of users with respect to copyrighted works ought to be addressed more akin to a “privilege” because fair use does not establish any special legal status for users who rely thereon; it provides a type of “no-right”.¹⁹¹ Whether fair use exceptions to copyright infringement qualify as

¹⁸² The court analysed the fair dealing doctrinal approaches in the U.S. endorsing the factors that may more or less be relevant in future fair dealing cases. G. D’Agostino: 320. The Court articulated and applied six factors in deciding the case, namely: (1) the purpose (and commercial nature) of the dealing, (2) the character of the dealing, (3) the amount of the dealing, (4) alternatives to the dealing, (5) the nature of the work, and (6) the effect of the dealing on the work. M. Geist: 169. G. D’Agostino: 320.

¹⁸³ M. Geist: 169. G. D’Agostino: 320.

¹⁸⁴ G. D’Agostino: 327. P. Chapdelaine: 27.

¹⁸⁵ G. D’Agostino: 327.

¹⁸⁶ M. Geist: 158.

¹⁸⁷ R.M. Shay: 19.

¹⁸⁸ M.W.S. Wong: 1093.

¹⁸⁹ P. Chapdelaine: 27. M.W.S. Wong: 1093.

¹⁹⁰ H. Sun: 317. M.W.S. Wong: 1093.

¹⁹¹ M.W.S. Wong: 1093.

rights or privileges depends on their nature and function,¹⁹² and will accordingly have to be contemplated within the context of the democratic values they served to endorse.

The analysis by the court in *CCH* of the six factors for contemplating fair dealing revealed the court's pro-user orientation.¹⁹³ Subsequent to the *CCH* case's ruling the Canadian Supreme Court in the matters of *Alberta (Education)*¹⁹⁴ and *Bell*¹⁹⁵ firmly entrenched the six-factor analysis as the test for determining whether a particular use or dealing is fair, and provided guidance on the application of the test.¹⁹⁶ Consequent to the confirmation that fair dealing in Canadian copyright amounts to user rights Bill C-11 was introduced to expand the purposes of fair dealing.¹⁹⁷ Canadian copyright law, particularly with respect to fair dealing, may have laid the foundation for the substantiation of the fair use defence to constitute a user right, and thereby absolve the Canadian fair dealing doctrine of its restrictive nature. The Canadian Copyright Modernization Act¹⁹⁸ was enacted on 7 November, 2012 with the objective of striking "the right balance between the needs of creators and users".¹⁹⁹ Canada may remain a fair dealing country from a strict statutory perspective, but its approach points the way to a hybrid fair dealing/fair use model in which the two-stage analysis of fair dealing purpose (stage one) and fairness analysis (stage two) bears close resemblance to an open-ended fair use system.²⁰⁰

3.2.4 Fair dealing in the U.S.

Copyright law in the U.S. descends from origins in the common law as well as the Copyright Clause of the Constitution.²⁰¹ Against the other fair dealing approaches the fair use doctrine of the U.S. is hailed to be the most flexible and ideal model for

¹⁹² P. Chapdelaine: 31.

¹⁹³ G. D'Agostino: 324.

¹⁹³ *Alberta (Education) v Canadian Copyright Licensing Agency* 2012 SCC 37, [2012] 2 SCR 345.

¹⁹⁴ *Society of Composers, Authors and Music Publishers of Canada v Bell Canada et al.*, 2012 SCC 36 [2012] 2 SCR 326.

¹⁹⁵ M. Geist: 172.

¹⁹⁶ M. Geist: 180. Bill C-11 added education, parody, satire and non-commercial user-generated content to the current list of exemptions contained in Section 29 of the Canadian Copyright Act. M. Geist: 180.

¹⁹⁷ Copyright Modernization Act S.C. 2012, c. 20., Assented to 2012-06-29.

¹⁹⁸ P.A. Bain: 1.

¹⁹⁹ M. Geist: 180.

²⁰⁰ A.W. Dnes: 17.

copyright law.²⁰² Despite the uncertainty created by the flexibility of the U.S. fair use provisions the approach is nonetheless often regarded as wide ranging and flexible with possible advantages for innovation.²⁰³ Accordingly, in U.S. copyright law a use is permitted if it is determined to be “fair use” as that term is defined by U.S. statutes and case law.²⁰⁴ Section 107 of the U.S. Copyright Act has been described as a “broad, largely judicially created doctrine that defies a simple definition or description.... Reduced to its most basic definition, the fair use exception permits what would otherwise be an infringing use of a work because allowing the use will result in a greater public benefit than denying it.”²⁰⁵ Section 107 of the U.S. Copyright Act provides an open list of permissible purposes, as opposed to the provisions in the U.K., Canadian and Australian legislation, and associated case law has generally seen similar uses exonerated under the fair use doctrine.²⁰⁶ Section 107 of the U.S. Copyright Act states that:

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

²⁰¹ G. D’Agostino: 344. Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_7_55.pdf>. Retrieved 22 August: 62.

²⁰² A.W. Dnes: 7. M. Geist: 161.

²⁰³ J.M. Nolan: 547. Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 46.

²⁰⁴ H. Sun: 285. J.T. Pilch: 472.

²⁰⁵ G. D’Agostino: 345.

²⁰⁶ G. D’Agostino: 345.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”²⁰⁷

The decision of whether a particular use is fair mandates the consideration of the four statutorily entrenched factors, but the open-ended construction of the fair use provision allow U.S. courts to find a work “fair” (non-infringing) in instances that falls outside any specifically delineated defence.²⁰⁸ Firstly, when a court evaluates the purpose and character of the use it must therefore consider whether the use is commercial or whether it should be deemed transformative.²⁰⁹ It is important to note that good faith has been noted as a sub-factor; commercial use is no longer presumptive when evaluating the alleged infringing work.²¹⁰ Secondly, upon its evaluation of the nature of the copyrighted work the court must determine whether the work is factual or fictional, whether it is published or unpublished and whether there is substantial creativity that tends to favour the copyright holder (presumed also to be the author.)²¹¹ When analysing the amount and sustainability of the portion in relation to the copyrighted work as a whole the court uses a sliding scale – the more a dealing goes beyond a *de minimis* the more likely it goes against fair use.²¹²

It is important to note that a U.S. court, when evaluating this factor, focuses on what and not how much is used – quality over quantity of the taking is crucial.²¹³ In the matter of *Harper & Row Publishers*²¹⁴ it was held that the last factor is esteemed to be the most important in the application of fair use to an alleged infringing work.²¹⁵ This is deemed to be necessary if the use of the copyrighted work becomes

²⁰⁷ The construction of Section 107 of the U.S. Copyright Act is contended to serve a dualistic purpose. H. Sun: 284. On the one end it serves to itemise the relevant factors gleaned from prior judicial experiences on fair use issues. H. Sun: 284. Accordingly, it is submitted that the codification of the fair use considerations was never intended to change, restrict or enlarge the doctrine in any way. H. Sun: 284. On the other end the wording in the codification makes it flexible and broad enough to confer upon the courts discretion to adapt the doctrine to particular situations on a case-by-case basis: it was thus designed to work in tandem with the judiciary so as to accommodate new technological innovations. H. Sun: 284.

²⁰⁸ G.W. Austin: 612. G. D’Agostino: 345. J.M. Nolan: 544. M. Geist: 161.

²⁰⁹ H. Sun: 285. G. D’Agostino: 345.

²¹⁰ G. D’Agostino: 345.

²¹¹ G. D’Agostino: 347.

²¹² G. D’Agostino: 347.

²¹³ H. Sun: 288. G. D’Agostino: 347-348.

²¹⁴ *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539.

²¹⁵ J.M. Nolan: 549. G. D’Agostino: 348. H.B. Holland: 6.

widespread and undermines the author's potential market,²¹⁶ particularly given the fact that the primary objective of copyright law is to provide authors with the incentive to continue being innovative. Accordingly, *Harper & Row* holds that the fourth factor inquiry "must take account not only of harm to the original but also of harm to the market for derivative works."²¹⁷

In subsequent years U.S. courts have regularly updated the application of the fair use doctrine to reflect the changes brought on by technological development and innovative practices.²¹⁸ In the matter of *Sony Corp. of America v Universal City Studios, Inc.*,²¹⁹ the Supreme Court held that the then-new practice of "time-shifting" television shows to watch them later was fair use.²²⁰ Accordingly, this broader approach to copyright exceptions has opened up a commercial space for other to create value.²²¹ "The existence of a general fair use exception that can adapt to new technical environments may explain why the search engines first developed in the U.S. where users were able to rely on flexible copyright exceptions and not in the UK where such uses would have been considered infringement."²²² However, it has recently been asserted that, despite the flexibility afforded by Section 107 of the U.S. Copyright Act, the favoured uses listed therein - criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research – needs to be updated to include users that are entirely new and that has gained importance since the advent of the digital age: incidental uses, non-consumptive uses and personal, non-commercial uses.²²³

²¹⁶ G. D'Agostino: 348.

²¹⁷ H. Sun: 290.

²¹⁸ J.M. Urban: 7.

²¹⁹ *Sony Corp. of America v Universal City Studios, Inc.*, 464 U.S. 417 (1984).

²²⁰ J.M. Urban: 7.

²²¹ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 62.

²²² Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 62. In the cases of *Perfect 10, Inc. v Amazon.com, Inc.*, 508 F.3d (9th Cir. 2007) and *Kelly v Arriba Soft Corp.*, 336 F.3d (9th Cir. 2003) the Appeal Courts found that search engines were making fair use of copyrighted images by providing thumbnail versions in their search results. J.M. Urban: 7.

²²³ J.M. Urban: 10.

3.2.5 Fair use in South Africa

In South Africa, Section 12(1) of the Copyright Act 98 of 1978 provides that:

“Copyright shall not be infringed by any fair dealing with a literary or musical work—

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purpose of reporting current events—

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film:

Provided that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work.”

It is quite evident that the fair dealing provision in the South African Copyright Act largely corresponds with those contained in the U.K. CPDA, the Canadian Copyright Act and the Australian Copyright Act.²²⁴ It is clear that the immediate aim of the fair-dealing requirements serve to confine the use of the work to only those purposes provided for in Section 12 of the South African Copyright Act.²²⁵ Case law in South Africa shows that courts generally draw a distinction between the allegedly infringing act and the fairness of the act.²²⁶ Thus, a court will first determine whether the actions of the defendant objectively to ascertain whether the conduct can properly be categorised as one of the acts of fair dealing.²²⁷ It is submitted that using a work for a purpose other than those that are statutorily embodied cannot be justified, regardless of the fairness of the use.²²⁸

After the court establishes whether that the act falls within the scope of one of the fair dealing exceptions then the fairness of the act will be evaluated.²²⁹ When

²²⁴ R.M. Shay: 141.

²²⁵ T. Pistorius: 213.

²²⁶ R.M. Shay: 149.

²²⁷ R.M. Shay: 149. It is therefore ascertainable that the requirement that the work be used fairly to fulfil a particular purpose should be taken to mean that use of the work may involve copying a substantial part of the work. T. Pistorius: 213.

²²⁸ R.M. Shay: 1.

²²⁹ R.M. Shay: 149

evaluating the “fairness” of the act alleged to be fair dealing it has to be determined against the objective standard of whether a “fair minded and honest person would have dealt with the copyright work in the manner in which the defendant did for the purpose in question.”²³⁰ At least a substantial part of the original work must have been copied, and it is submitted that the term “substantial” in South African context is interpreted to relate to both the quantity and the quality of the work, however, greater emphasis is placed on the latter consideration than on the former.²³¹

A very important factor in the fair dealing analysis in South African copyright law is the extent to which the use of the copyright work competes with the copyright owner’s exploitation of the work.²³² Another important factor that has surfaced is the amount of work that has been used, and the extent of the use.²³³ Other relevant factors include the motives of the user (including the actual purpose of the use and whether the averred attempt at fair dealing is merely a simulation) and whether the reproduction of the work unreasonably prejudices the legitimate interests of the copyright owner. The factors will be of varying importance depending on which instance of fair dealing is relevant and the facts of the particular case.²³⁴

It has been asserted that fair dealing for the purpose of South African copyright law does not constitute a right, but serves only as a defence, i.e. an act of infringement has been committed which is then exempted.²³⁵ However, the canons of construction of fair dealing provisions in general seem to favour the contention that fair dealing is in fact a right, not merely a defence.²³⁶ The court’s conclusion in the Canadian *CCH* case asserts this contention, and it is recommended that South African courts may benefit from contemplating the approach used in the *CCH* case.

Unlike the Australian Copyright Act and the U.S. Copyright Act, the South African Copyright Act does not set out any factors that a court may take into account to determine the “fairness” of the act. The factors set out in the Australian Copyright Act

²³⁰ R.M. Shay: 73.
²³¹ O.H. Dean: 1-37.
²³² R.M. Shay: 124.
²³³ R.M. Shay: 124.
²³⁴ R.M. Shay: 124.
²³⁵ T. Pistorius: 211.
²³⁶ T. Pistorius: 211.

were included in the South African Intellectual Property Laws Amendment Bill²³⁷ that was published for comment in 2010, but the Bill has since been abandoned.²³⁸ Moreover, South African courts have not had the opportunity to consider the interpretation or application of any of the enacted fair dealing exceptions and have not considered the question of the fairness of a user's conduct.²³⁹ However, Dean asserts that the U.S. fair use approach is both logical and reasonable and should accordingly be followed by South African courts in contemplation of copyright matters.²⁴⁰

3.2.6 Developing fair dealing for cloud application

The application of the fair use doctrine in an analogue context is subject to greater precedent, but its application in the cloud is subject to much uncertainty. The WCT makes provision for the contemplation of limitations and exceptions in the digital environment. An agreed statement was adopted which reads, "It is understood that the provisions of Article 10 [of the Treaty] permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention." Similarly, these provisions should permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.²⁴¹ It is also understood that Article 10(2) [of the Treaty] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.²⁴²

Yet, the adaption of the traditional copyright regime to be more applicable to UCC is no easy matter, because it involves changes either to long-held perceptions about author's rights and the role of limitations and exceptions or changes to application,

²³⁷ South African Intellectual Property Laws Amendment Bill in GG 33055 of 2010-03-29.

²³⁸ R.M. Shay: 149.

²³⁹ R.M. Shay: 124.

²⁴⁰ O.H. Dean: 52.

²⁴¹ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cq5.pdf#tlt>>. Retrieved 10 May 2013: 272.

²⁴² WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cq5.pdf#tlt>>. Retrieved 10 May 2013: 272.

interpretation and practice regarding basic doctrine.²⁴³ “Electronic communications and the Internet bring about new situations with which copyright law must deal. It is necessary to adapt or extend classical copyright concepts so as to cater for these new situations which have arisen in the electronic age.”²⁴⁴

“Even if traditional copyright doctrines may not apply comfortably in cyberspace, we could work to install their functional equivalents. The challenge though remains the same: how to enhance public welfare with some balance between the interests of copyright owners and those of users. Striking this balance has never been easy from a theoretical or political standpoint. But the struggle to do so must continue because its goal is a social imperative and work the fight.”²⁴⁵

The Open Review Report of the South African Copyright Act (The Open Review) examined the current exceptions and limitations in the Act and found that the current exceptions and limitations are outdated in many respects.²⁴⁶ “Current copyright exceptions and limitations do not sufficiently take into account new technologies.”²⁴⁷ It has been submitted that South African courts must take heed of the manner in which the concept of fairness is applied in these foreign jurisdictions, given the similarity of the respective statutes.²⁴⁸ The factors comprising fairness as determined by the courts in Australia, Canada and the U.K therefore bear reiterating when contemplating the development of South African fair dealing exceptions for cloud application.

Despite the various approaches to fair dealing and fair use in various jurisdictions, the fact remains that fair dealing is intended to be a flexible mechanism, and therefore can, and ought to be interpreted more broadly in digital contexts.²⁴⁹ The need to apply fair use more flexibly has recently been addressed in various

²⁴³ M.W.S Wong: 1139.

²⁴⁴ O.H. Dean: 41.

²⁴⁵ R.T. Nimmer: 835.

²⁴⁶ A. Rens: 20.

²⁴⁷ A. Rens: 20.

²⁴⁸ R.M. Shay: 124.

²⁴⁹ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 62.

instances by courts throughout Europe. In the matter of *Dior v Evora*²⁵⁰ the Dutch court was unimpressed by the maxim that exceptions be interpreted narrowly and accordingly held that there must be room to draw the borderlines of copyright outside the existing system of exceptions on the basis of the need to balance the interests similar to the rationale underlying the existing exception.²⁵¹ In this particular matter involving the reproduction of copyrighted perfume bottles in advertisements by a retailer to offer the sale of parallel-imported goods the court found that none of the existing exceptions could find application and it was therefore accepted that there was room to move outside the existing exception.²⁵² Some Dutch commentators subsequently assert that this judgement has opened the door to an American-style fair use defence, inspiring the Dutch Copyright Committee to propose the adoption of an open, fair-use type provision into its copyright legislation to, subject to the three-step provision contained in the Berne Convention, allow for a variety of unspecified unauthorised uses.²⁵³

3.3 DIGITAL RIGHTS MANAGEMENT

The difficulties encountered in applying copyright to the cloud and UCC stems in part from the quantity of online use, and from the complexities of copyright enforcement on such a scale.²⁵⁴ The consideration of copyright protection and enforcement in the cloud thus requires the contemplation of one basic question: can the government control the flow of material on the Internet?²⁵⁵

Much of the tensions between the enforcement of private property rights and the free, unrestrained distribution of information on the Internet are caused by anti-circumvention devices utilised by copyright owners to prevent infringing use of their works.²⁵⁶ Holders of intellectual property rights increasingly protect their work (their property) by means of technological systems such as anti-copy devices, access

²⁵⁰ *Dior v Evora*, Dutch Supreme Court (*Hoge Raad*) 20 October 1995, [1996] *Nederlandse Jurisprudentie* 682.

²⁵¹ P.B. Hugenholtz and M.R.F. Senftleben: 10.

²⁵² P.B. Hugenholtz and M.R.F. Senftleben: 10.

²⁵³ P.B. Hugenholtz and M.R.F. Senftleben: 10.

²⁵⁴ D. Gervais: 870.

²⁵⁵ D.J. Gervais and D.J. Hyndman: 62.

²⁵⁶ M. Kellerman: 66.

control, electronic envelopes, proprietary viewer software, encryption, passwords, watermarks, fingerprinting, metering and monitoring of usage and remuneration systems.²⁵⁷ These systems are all directed at managing digital rights. Digital rights management (DRM) refers to “a collection of systems used to protect the copyrights of electronic media.”²⁵⁸ DRM systems typically utilise technology protection measures (TPM) to restrict the actions of users in their utilisation of copyrighted works, and to ensure that proprietors of copyrighted content are compensated.²⁵⁹ DRM systems therefore enable copyright owners and creators, through the DRM manager, to enforce their copyright in respect of digital material in a way that has not been previously possible.²⁶⁰

The implementation of DRM systems and TPMs are obliged by the WCT which specifically requires Contracting Parties to adequately provide for technological measures of protection²⁶¹ and the implementation of rights management information²⁶² with respect to digitised copyrighted works. Article 11 states that:

“Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restricts acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

The obligation created in Article 11 of the WCT functions on the premise that it must “restrict acts which were not authorised by the authors concerned or permitted by law.”²⁶³ Accordingly, technological measures that fall outside the scope of mandatory protection to the extent that they restrict acts that are authorised by the copyright holders and permitted by law.²⁶⁴ The position is taken that Article 11 functions as a guarantee that the delicate balance of copyright law not be disturbed

²⁵⁷ M. Kellerman: 67-68.

²⁵⁸ Techterms.com. <<http://www.techterms.com/definition/drm>>. Retrieved 20 December 2013.

²⁵⁹ P. Chapdelaine: 2. G.J. Ebersohn: 31.

²⁶⁰ M. Jackson and A. Shah: 1.

²⁶¹ Article 11.

²⁶² Article 12.

²⁶³ T. Rieber-Mohn: 3.

²⁶⁴ T. Rieber-Mohn: 3.

based on the premise that the criterion “permitted by law” refers to the acts that are permitted by copyright exceptions and limitations.²⁶⁵

Article 12(1)(ii) of the WCT provides that:

“Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing,... that it will induce, enable, facilitate or conceal an infringement or any right covered by this Treaty or the Berne Convention: to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.”

Article 12(2) of the WCT provides that the term “rights management information” means “information that identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.” Accordingly, no rights in respect of digital uses of works, particularly uses on the Internet, may be applied efficiently without the support or technological measures of protection and rights management information necessary to license and monitor uses.²⁶⁶ Article 14 of the WCT provides that, “Contracting Parties undertake to adopt, in accordance with their legal system, the measures necessary to ensure the application of this Treaty.”²⁶⁷

DRMs maintain an on-going restraining relationship with the users through technical means.²⁶⁸ These systems enable copyright holders to notify potential downstream users of their rights in a relatively easy manner.²⁶⁹ The employment of content management information systems helps copyright holders identify their ownership of their work and the terms on which they are prepared to licence their work for

²⁶⁵ T. Rieber-Mohn: 3.

²⁶⁶ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 273.

²⁶⁷ Article 14(1) is a mutatis mutandis version of Section 36(1) of the Berne Convention.

²⁶⁸ M. Jackson and A. Shah: 7.

²⁶⁹ J.D. Lipton: 809.

downstream use.²⁷⁰ Besides providing copyright holders with a means to protect their works on in the digital arena, it is submitted that utilising DRM systems also have the potential to mitigate strict liability for copyright infringement in the cloud.²⁷¹ Lipton is of the opinion that the development of an administrative mechanism through which an agency might excuse certain classes of activities of innocent infringement will serve to mitigate strict liability in the cloud.²⁷² A procedure that contemplates such administration has been adopted in the Digital Millennium Copyright Act of the U.S. (U.S. DMCA)²⁷³ which empowers the Librarian of Congress to exempt particular classes of digital copyrighted works from infringement.²⁷⁴

Lipton submits that utilising approaches similar to those envisioned in the U.S. DMCA may incorporate relatively clear guidelines into the system concerning the kinds of uses and UCC that should not constitute copyright infringement.²⁷⁵ Moreover, such administrative systems may serve aid the formulation and application of fair use in the cloud concerning works that do not fall within the designated classes of exempted digital uses. The exemption process set forth in the U.S. DMCA contemplates that the act may interfere with fair use, or any other lawful use, to the point that an exemption should be granted.²⁷⁶ It is thus submitted that the future viability of fair dealing in cloud computing would be enhanced if administrative and technical methods for ensuring that copyright was not breached were both promoted and applied.²⁷⁷

It is submitted that DRM systems have the potential to legally provide users with many rights that they have assumed to be theirs anyway if these systems were no so dead set on protecting only the interests on the copyright holders.²⁷⁸ DRMs regulating digital content may serve to grant both fair dealing and personal use rights

²⁷⁰ J.D. Lipton: 809.

²⁷¹ J.D. Lipton: 801.

²⁷² J.D. Lipton: 805.

²⁷³ Digital Millennium Copyright Act 17 U.S.C., (2006).

²⁷⁴ 17 U.S.C. § 1201(a) (1)(C) (2006).

²⁷⁵ J.D. Lipton: 805. Such systems would help avoid numerous cases of innocent infringement because it prove more difficult for infringers to argue that they did not know of a copyright holder's rights, or that they thought the work was in the public domain. J.D. Lipton: 809.

²⁷⁶ R. Tushnet: 941.

²⁷⁷ The Guidelines for Fair Dealing in the Electronic Environment. <<http://www.ukoln.ac.uk/services/elib/papers/pa/fair/>>. Retrieved 26 October 2013: 8.

²⁷⁸ M. Jackson and A. Shah: 7.

to users if legislators were to give effect to their utilisation in such a manner.²⁷⁹ There are, thus, valid concerns that right-holders are in a position to prohibit any type of use or to seek for payment for any use of their works with DRMs.²⁸⁰ Access to content and copies have been restricted by the use of digital right management measures and licenses with restriction conditions, alternative business models.²⁸¹ Those restriction measures pose new challenges for the traditional beneficiaries of fair use doctrine.²⁸²

3.4 CONCLUSION

It is undeniable that creative reuse and the modification of pre-existing works are highly valued by today's society,²⁸³ particularly so because of the emphasis placed on recognising and supporting a democratic culture. Such a culture serves to ensure the "everyone", not only the political, economic, social or cultural elites, has equal opportunity to play a part in the creation of culture, and in the development of the ideas, the meanings that constitute them and the communities and sub-communities to which they belong.²⁸⁴ The cloud fosters such a democratic culture, and UCC is the manifestation of democratic values such a culture sustains.

A society in which a substantial majority believe that there is no value in protecting or respecting informational property rights will not support or sustain an effective copyright regime, or ultimately, effective copyright-based industries.²⁸⁵ A society in which a substantial majority see no harm in routinely copying and widely distributing the work of another discards a basic premise of copyright law.²⁸⁶ In a world in which copying and redistribution is easy and many people seem to regard unauthorised copying as socially acceptable what image of social acceptability, the question should be asked should the law then support.²⁸⁷ However, maintaining a copyright

²⁷⁹ M. Jackson and A. Shah: 7.

²⁸⁰ K. Pham and S. Mkhitaraya: 10.

²⁸¹ K. Pham and S. Mkhitaraya: 7.

²⁸² K. Pham and S. Mkhitaraya: 7.

²⁸³ P.K. Yu: 896.

²⁸⁴ P.K. Yu: 896.

²⁸⁵ R.T. Nimmer: 832.

²⁸⁶ R.T. Nimmer: 832.

²⁸⁷ R.T. Nimmer: 833.

regime that excludes the interests of the public it is supposed to benefit also circumvents the purpose of copyright law – to provide an environment which sustains and encourage innovation for the sake of cultural and social development.

The nature of UCC, particularly its facilitative participatory aspects, and its centrality to free/remix culture in our digital era has simulated the resurfacing of persistent and simmering public welfare issues with particular urgency.²⁸⁸ The merging of the positive social welfare characteristics of UCC with the goals of semiotic democracy has created the opportunity for policymakers, legislators and judges to reconsider the traditional framing of copyright as a broadening bundle of exclusive rights set against a narrow list of exceptions.²⁸⁹ Knowledge is a public good and access to knowledge is a human right,²⁹⁰ there must be a balancing regulation between the competing interests of copyrights holders and user by providing exceptions and limitations from an authors' rights perspective.²⁹¹ The fair dealing doctrine is therefore “a key part of the social bargain at the heart of copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture ... and is [now] more important today than ever before.”²⁹²

Every exception is intended to provide a greater social benefit than the loss it is contended to cause the individual copyright owner.²⁹³ Moreover, fair dealing exceptions address the significant economic and social policy issues that arise from the attachment of strict liability when copyright infringement arises. “Fair use” of copyright can create economic value without damaging the interests of copyright owners.²⁹⁴ To this end, the international copyright framework may need to recognise the feasible doctrines like fair use and its fair dealing cousins ought not to be

²⁸⁸ M.W.S Wong: 1137.

²⁸⁹ M.W.S Wong: 1138.

²⁹⁰ Article 27(1) of the *Universal Declaration of Human Rights* provides the basis for the right for access to knowledge by stating that: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”

²⁹¹ K. Pham and S. Mkhitarian: 5.

²⁹² G. D'Agostino: 313.

²⁹³ R.M. Shay: 145.

²⁹⁴ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 62.

narrowly viewed as specific exceptions, but rather as user rights as this would encourage a more liberal and adaptable interpretation of fair use and similar doctrines.²⁹⁵

As previously states, UCC can be categorised according to a workable taxonomy: four distinct categories of UCC each encompassing a very broad range of content identifiable by way of the inherent characteristics of each category. For the purpose of accommodating fair use in cloud computing it may thus be more practical to craft more general infringement defences for each UCC category rather than utilising sector-specific approaches that fail to contemplate the wide range of UCC.²⁹⁶ The two categories of UCC that are the focus of this study therefore require that there be an in depth analysis of each on the merits of its own copyright issues and recommended regulatory development.

²⁹⁵ M.W.S Wong: 1138.

²⁹⁶ J.D. Lipton: 802.

CHAPTER 4

DEVELOPING A PERSONAL USE METHODOLOGY

The cloud is a repository of content and users will want access to whenever and on whatever device they happen to have available to them at that point in time.¹ The cloud is a formidable distribution vector and the value users derive therefrom is understood in terms of the connection they have to the content they value, where and whenever they need it.² Cloud users will want to experience as many of the cultural products they value as possible, and are therefore very likely to value the cloud intermediaries that grants them access to such products.³ Moreover, the cloud not only serves to give users access to content, but it also allows users to store, make available and distribute content they have in their possession.

Cloud storage is a growing technological trend which gives a user password-protected access to an online storage space.⁴ It has been predicted that “everything digital will be in the Cloud. Almost every bit of human culture, every song, every book, document and movie ever made.”⁵ A private cloud allows a user to upload files to this storage space and may thus serve to store backup copies of content from a hard drive, as additional space to supplement a hard drive or merely to make those files available online from other computers or mobile devices.⁶ Apple’s cloud storage product, iCloud, is designed to work seamlessly with all Apple devices connected to the Internet.⁷ Thus, the biggest advantage iCloud offers a user is its integration with

¹ D. Gervais and D.G. Hyndman: 76.

² D. Gervais and D.G. Hyndman: 76.

³ D. Gervais and D.G. Hyndman: 76.

⁴ S. Crawford. How the Apple iCloud Works. <<http://computer.howstuffworks.com/cloud-computing/icloud.htm>>. Retrieved 3 October 2013.

⁵ Australian Copyright and Fair use – Submissions on Green Bill <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CJwBEBYwCQ&url=http%3A%2F%2Fwww.copyright.org.au%2Fadmin%2Fcms-acc1%2F_images%2F1927278782521fdf96c8c6d.pdf&ei=Q-KiUrfdG9KM7Aa4mIH0CA&usq=AFQjCNHnNOvDXs60AB6J0qMJEsjmXWMBhg>. Retrieved 7 December 2013: 26.

⁶ S. Crawford. How the Apple iCloud Works. <<http://computer.howstuffworks.com/cloud-computing/icloud.htm>>. Retrieved 3 October 2013.

⁷ S. Crawford. How the Apple iCloud Works. <<http://computer.howstuffworks.com/cloud-computing/icloud.htm>>. Retrieved 3 October 2013.

and synchronisation of all Apple software and devices.⁸ Additionally, an iCloud user can expand access thereto to include devices used by other family members too.⁹ The distribution capacity of clouds such as the iCloud is unfathomable and individual Internet end-users have become content providers. Products such as the iCloud foster social and cultural participation and the application of copyright must serve to protect the interests of the copyright holder whilst nurturing an environment in which users can freely create and interpret content.

Yet, the advances in digital copyright technology and the expectations of consumers have outstripped the liberties granted by copyright law.¹⁰ The increase in the deployment of cloud content from the immediate possession of one user to a wide variety of geographical and contextual locations along with amplified efforts to design services that rely heavily on the actions of users have led to the production of technologies that facilitate personal use.¹¹ However, the iCloud and the various other means by which users can access, enjoy and distribute entire works in the cloud have blurred the lines between what constitutes private use and what amounts to public use.¹²

4.1 NATURE AND DYNAMIC OF USER-COPIED CONTENT

User-copied content is ordinarily not a complicated matter with respect to copyright – if the term is only used to refer to the unauthorised downloading which constitutes *prima facie* direct copyright infringement. However, the term is also used to refer to the uploading of content onto the Internet and into a cloud and will thus be used accordingly. User-copied content is content that is taken in its entirety from a source

⁸ S. Crawford. How the Apple iCloud Works. <<http://computer.howstuffworks.com/cloud-computing/icloud.htm>>. Retrieved 3 October 2013.

⁹ S. Crawford. How the Apple iCloud Works. <<http://computer.howstuffworks.com/cloud-computing/icloud.htm>>. Retrieved 3 October 2013.

¹⁰ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 40.

¹¹ A. Perzanowski and J. Schultz: 2072.

¹² A. Perzanowski and J. Schultz: 2072. Historically, personal use was reliably and accurately characterised as “private” or “home” copying – a label that faces genuine definitional shortcomings in an era or mobile networked information. A. Perzanowski and J. Schultz: 2072.

and either stored in private cloud or made available online on a virtual platform.¹³ A good example of this is where consumers copy music from compact discs (CDs) onto their MP3¹⁴ players, which essentially serves as storage device.¹⁵ Moreover, the functionality of the iCloud is an example of how users are able to upload, and in effect copy and distribute, content via an Internet connection in massive quantities. Nevertheless, many people are unaware that the transfer of copyrighted work from one medium to another amounts to the reproduction of that work and thus results in copyright infringement: uploading content onto the Internet without authorisation amounts to direct copyright infringement.¹⁶

A core of copyright law rests in its protection of copyrighted works from copying.¹⁷ Fair use doctrine was originally crafted to address the question of when a second author might be permitted to copy a prior author's work.¹⁸ Therefore, it must be determined what exactly constitutes a "copy" in the digital context. In terms of the South African Copyright Act a "copy" is defined as "a reproduction of a work, and, in the case of a literary, musical or artistic work, a cinematograph film or a computer program, also an adaptation thereof."¹⁹ In relation to a literary, musical or artistic work an "infringing copy" means a copy thereof, and in relation to a sound recording it means a record embodying that recording.²⁰ Generally, "copying" refers to the

¹³ D. Gervais: 870.

¹⁴ The term "MP3" is the abbreviation for MPEG-1 Audio Layer-3, and is used as a trade name for software created by the Motion Picture Experts Group that enables files to be compressed quickly to 10% or less of their original size for storage on disk or hard drive for transfer across the Internet. The Free Dictionary by Falex. <<http://www.thefreedictionary.com/MP3>>. Retrieved 7 December 2013.

¹⁵ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 40. Instead, the conversion and transmission of copyrighted work for personal use is deemed to be copyright infringement. L. Groenewald: 13. In the U.K. the Guidelines set up by the Joint Information Systems Committee and Publishers Association (the Guidelines) provides that it is not fair dealing for an individual to purposefully copy onto disk an entire electronic publication onto disk all of an electronic publication for permanent local electronic storage: permission is required, and licensing may be appropriate. The Guidelines for Fair Dealing in the Electronic Environment. <<http://www.ukoln.ac.uk/services/elib/papers/pa/fair/>>. Retrieved 26 October 2013: 5.

¹⁶ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 40. G.J. Ebersohn: 65. See *Religious Technology Center v Lerma et al* 897 F.Supp.260 (E.D. Va. 1995).

¹⁷ O.B. Arewa: 485.

¹⁸ O.B. Arewa: 487.

¹⁹ Section 1 of Act 98 of 1978.

²⁰ Section 1 of Act 98 of 1978.

infringement of any of the copyright holder's exclusive rights, and is generally evident by showing that the defendant had access to the copyrighted material and that there is substantial similarity between the two works both in idea and in expression.²¹ Furthermore, the "reproduction" of any work includes a secondary reproduction made from a first reproduction of a particular work.²²

Section 13 of the South African Copyright Act²³ provides general exceptions in respect of reproduction of works and states that: "In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright." The term "reproduction" features prominently with respect to the infringement of copyright, and is submitted to take place in any manner or form.²⁴ The term is therefore subject to wide interpretation, and it has been held that the making of a temporary or permanent electronic copy of works amounts to copyright infringement.²⁵

The extensive application of the term "reproduction" is of considerable significance in the electronic age,²⁶ especially with respect to the UCC and the cloud. Virtually all digital processes involve copying in one way or another; it may last a fleeting

²¹ G.J. Ebersohn: 39.

²² W. Alberts: 1. <www.uj.ac.za/EN/Faculties/law/.../copyright%20inf%20-%20edited.docx>. Retrieved 12 October 2012.

²³ Act 98 of 1978.

²⁴ O.H. Dean: 39.

²⁵ *Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd* 399 JOC (T). A similar approach is followed in the U.K. The Guidelines maintain that it is not fair dealing to transmit by computer network the whole of an electronic publication for the purpose of printing a single copy, even if only such interim electronic storage as is required to facilitate the intended printing. The Guidelines for Fair Dealing in the Electronic Environment.<<http://www.ukoln.ac.uk/services/elib/papers/pa/fair/>>. Retrieved 26 October 2013: 6-7. Permission, explicit or under the terms of a licence, would be required to justify the transmission all of an electronic publication. The Guidelines for Fair Dealing in the Electronic Environment.<<http://www.ukoln.ac.uk/services/elib/papers/pa/fair/>>. Retrieved 26 October 2013: 6-7. Moreover, it is not fair dealing to transmit by computer network of the whole of an electronic publication for the purpose of permanent local electronic storage, reading on screen and printing on individual request, irrespective of whether or not re-transmission is involved. The Guidelines for Fair Dealing in the Electronic Environment.<<http://www.ukoln.ac.uk/services/elib/papers/pa/fair/>>. Retrieved 26 October 2013: 6-7.

²⁶ O.H. Dean: 40.

moment, several minutes or much longer depending on various factors.²⁷ During the formulation of the WCT it was agreed to that storage of works in an electronic medium would amount to reproduction of that work.²⁸ This position is contained in Section 17(2) of the U.K. CDPA which states: "Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form. This includes storing the work in any medium by electronic means." Accordingly, it is generally understood that the "storage" of copyright protected work in digital form in an electronic medium constitutes reproduction within the confines of Article 9 of the Berne Convention.²⁹ Given the fact that user-copied content refers to the uploading of the entire work it is evident that the copying of copyright works to an external storage device would amount to the reproduction of such works, as would the transmission of the work to a cloud.

Moreover, the transfer of copyrighted work does not only impede on the exclusive right of the copyright holder to reproduce the work, but also on the copyright holder's right to transmit the work in a diffusion service.³⁰ The South African Copyright Act defines a diffusion services as:

"a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other pater provided by material substance and intended for reception by specific members of the public; and diffusion shall not be deemed to constitute a performance or a broadcast or as causing sounds, images, signs or signals to be seen or heard; and where sounds, images, signs or signals are displayed or emitted by any receiving apparatus to which they are conveyed by diffusion in such manner as to constitute a performance or a causing of sounds, images, signs or signals to be seen or heard in public, this shall be deemed to be effected by the operation of the receiving apparatus."³¹

²⁷ J.D. Lipton: 783-784. L.R. Patterson: 24. K. Pham and S. Mkhitaraya: 7.

²⁸ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 271.

²⁹ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013:271.

³⁰ Section 6-10 of Act 98 of 1978.

³¹ Section 1 of Act 98 of 1978. Section 1 of the Copyright Act 98 of 1978 provides that "Publication shall not include - ...a transmission in a diffusion service."

During the preparatory work on the WCT it was established that the “transmission of works” on the Internet and in similar networks (such as peer-to-peer sharing) should be the object of an exclusive right of authorisation of the author or other copyright owner, with the appropriate exceptions.³² However, there was no agreement concerning the right(s) to which it would find application, but the rights of distribution³³ and communication to the public³⁴ were identified as the two primary rights for consideration.³⁵ It should also be noted that the Berne Convention does not offer full coverage for those rights; the former does not extend to certain categories of works while explicit recognition of the latter covers only one category – cinematographic works.³⁶

Differences in the legal characterisation of digital transmissions were partly due to the fact that such transmissions are of a complex nature, but the most fundamental reason for the inadequate coverage of the two mentioned rights is the difference in national laws concerning their recognition.³⁷ Accordingly, it was decided that the act of digital transmission would be described in a neutral way, free from any specific legal characterisation.³⁸ The WCT applied this “umbrella solution” by extending the applicability of the right of communication to the public to all categories of works.³⁹ Thus, Article 8 of the WCT states that:

³² L.R. Patterson: 24. WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 271.

³³ Article 6 of the WCT.

³⁴ Article 8 of the WCT. The application of the right of distribution is allowed under the concept of “relative freedom of legal qualification” of acts covered by copyright, but the freedom applies only where the minimum obligations prescribed by the international treaties are fulfilled. M.J. Ficsor: 54.

³⁵ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 271.

³⁶ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 271.

³⁷ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 271.

³⁸ An “umbrella solution” was implemented whereby it was decided that the term “transmission” is not to be excessively technical but should convey the interactive nature of digital transmissions. WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 271. Therefore, when considering the legal characterization of the right or rights to which term “transmission” will find application sufficient freedom should be left to the national legislature of each jurisdiction, but the characterisation of the term “transmission” should cover the right to communication to the public and distribution thus filling the gaps in the Berne Conventions. WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 271.

³⁹ WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cg5.pdf#tlt>>. Retrieved 10 May 2013: 272.

“Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

Thus, the uploading of UCC gives rise to more complications than mere unauthorised downloading. The uploading of copyrighted work into a cloud is digital distribution, and it may impede on one or more of the author’s exclusive rights and will thus amount to direct copyright infringement unless it is determined to be justifiable as fair use/fair dealing. However, despite the international position and recommendation on the manner in which copyright may be dealt with in a digital context, the WCT does not however provide any insight on any fair use development with respect to the recommended developments concerning distribution and communication to the public. Article 10 of the WCT⁴⁰ only goes so far as to provide that any limitations and exceptions contemplated with respect to the rights provided for in Article 6 and 8 of the WCT must adhere to the specifications for fair dealing development in accordance with Article 9 of the Berne Convention.

Yet, users of copyrighted works in whatever form they may be – print, digital, music, films etc. – hold certain expectations about their rights to use and copy that information and to communicate it to others irrespective of the fact that they have no legal right to do so without the approval of the copyright holder.⁴¹ The cloud is a formidable distribution vector.⁴² The cloud is designed to provide constant access to “everything” in the world that is always online, thus avoiding the need for local

⁴⁰ Article 10 of the WCT provides: “(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

⁴¹ M. Jackson and A. Shah: 1.

⁴² D.J. Gervais and D.J. Hyndman: 76.

copies.⁴³ Value will not be derived from counting but by connecting people, wherever they may be, to content they value.⁴⁴ Each connection adds value, but the current copyright provisions for personal use as a fair use defence fails to recognise such value.⁴⁵ Once again the issue of strict liability in the case of the innocent infringer impedes the legitimate interest of a user who utilises the cloud for his or her own personal benefit.

4.2 PERSONAL USE: A SUPPORTED FAIR USE METHODOLOGY

As the digital age advances we are faced with a situation in which a large number of copyrighted works will be created and stored almost exclusively in digital format.⁴⁶ It has been conceded among various authors that some personal use is lawful, but in the digital arena the implications of such use requires the infringement of the exclusive rights to reproduce, distribute, communicate to the public and create derivative works.⁴⁷ There is, however, a clear awareness at all levels of society and government that private copying and other personal uses of copyrighted material occur frequently and that this activity is increasing.⁴⁸ “Free use” such as home taping and copying of music and films has been impossible to stop and would be uneconomic to police, as would emailing or sharing of digital articles and other documents with friends and associates.⁴⁹ Moreover, it is submitted that a surprising cross-section of parties who utilise the cloud share the perception that many personal uses of copyrighted works are non-infringing.⁵⁰

⁴³ D.J. Gervais and D.J. Hyndman: 74.

⁴⁴ D.J. Gervais and D.J. Hyndman: 76.

⁴⁵ D.J. Gervais and D.J. Hyndman: 76.

⁴⁶ J.T. Pilch: 468.

⁴⁷ D.M. Given. <<http://www.lommen.com/pdf/SXSW-2012/Music-In-the-Cloud-A-Business---Legal-Primer.aspx>>. Retrieved 22 May 2013: 2. A. Perzanowski and J. Schultz: 2068.

⁴⁸ M. Jackson and A. Shah: 6. The law must be cognisant of how people are using copyright material, but such awareness does not automatically follow that all such uses should be legitimated. Australian Copyright and Fair use – Submissions on Green Bill <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CJwBEBYwCQ&url=http%3A%2F%2Fwww.copyright.org.au%2Fadmin%2Fcms-acc1%2F_images%2F1927278782521fdf96c8c6d.pdf&ei=O-KiUrfdG9KM7Aa4mlHoCA&usq=AFOjCNHnNOvDXs60_AB6J0qMJEsjmXWMBhg>. Retrieved 7 December 2013: 24.

⁴⁹ M. Jackson and A. Shah: 3.

⁵⁰ J. Litman: 1971. A. Perzanowski and J. Schultz: 2077.

Amazon's Cloud Drive allows its users to upload gigabytes of media files for storage, retrieval and playback on Amazon's servers without any licenses from the relevant copyright holders.⁵¹ However, personal use may validate Amazon's assertion that the service its Cloud Drive provides is permitted under existing copyright law by explaining that "the functionality of saving MPSs to Cloud Drive is the same as if a customer were to save their music to an external hard drive or even iTunes."⁵² The assumption that it is legal for consumers to save copyrighted music to their personal hard drives seem so intuitive and self-evident that companies such as Amazon rely on this justification for development of technological infrastructure worth millions of dollars.⁵³ The questions that arise are how personal use will find application in the cloud, and what considerations may serve to bolster its validation in an attempt to expand and support fair use in cloud computing?

Section 12(1)(a) of the South African Copyright Act⁵⁴ states: "Copyright shall not be infringed by any fair dealing with a literary or musical work for the purposes of research or private study by, or the personal or private use of, the person using the work". The addition of "personal or private" use to the provision for research or private study fair use exception is aimed at situations comparable to research and private study, but which are disparate from education or the academia.⁵⁵ While it seems that the legislature intended to draw a distinction between personal and private use the difference yet remains unclear.⁵⁶ Litman proposes to define "personal use" as a use that an individual makes for herself, her family, or her close friends.⁵⁷ It is therefore discernible that the exception of private or personal use is confined to instances where a reproduction of a reasonable portion of a work is made for the purposes of using it solely by the reproducer, and not where such reproductions are distributed to other persons.⁵⁸ Shay submits that the exception for personal or private use ought to be viewed as an open extension of the permitted uses that is still

⁵¹ A. Perzanowski and J. Schultz: 2073.

⁵² A. Perzanowski and J. Schultz: 2073.

⁵³ A. Perzanowski and J. Schultz: 2073.

⁵⁴ 98 of 1978.

⁵⁵ R.M. Shay: 116.

⁵⁶ R.M. Shay: 116.

⁵⁷ J. Litman: 1894.

⁵⁸ R.M. Shay: 117.

subject to the same considerations that a court would consider for non-commercial research or private study.⁵⁹

The personal use exception is deemed justifiable in terms of Article 9(2) of the Berne Convention in that it is in line with the three-step test which requires exceptions to be confined to special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the rights of the copyright owner.⁶⁰ The personal and/or private use exceptions are common in national copyright laws world-wide.⁶¹ All twelve Commonwealth of Independent States (CIS) include a provision for personal use as a limitation to the right of reproduction, and reproduction only.⁶² In many European states, such as Germany and France, as well as in the U.S. a private copying exception exists, but the application of the use is uncertain and without specification beyond the factor entrenched in legislation for the determination of fair use.⁶³ Section 29(24) of the Canadian Copyright Act does contemplate the making of copies for personal use, but only to the extent that they are for back-up purposes: there are strict requirements that must be adhered to in order for back-up copying to qualify as fair dealing. There is currently no general provision in U.K. law for private copying.⁶⁴ Moreover, Article 5(2)(b) of the European Union Information Society Directive (E.U. ISD) provides that the reproduction of copyrighted work for non-commercial private use 'on any medium' is permitted, but the provision does not specify whether a legal source must be used for these privileged acts of private copying.⁶⁵

⁵⁹ R.M. Shay: 117.

⁶⁰ H. Sun: 296. R.M. Shay: 117.

⁶¹ J.T. Pilch: 484.

⁶² J.T. Pilch: 484. The allowance for the reproduction of copyrighted material on a personal use basis in all CIS copyright laws can be done without consent of the author or payment of royalties of a lawfully disclosed work exclusively for personal use or for the personal use of the members of a family. J.T. Pilch: 484.

⁶³ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 62.

⁶⁴ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 62. The lack of a private copying exception in the U.K. makes it illegal, for example, to copy music from a CD that one has purchased onto a computer or MP3 player that one has also legitimately purchased.

⁶⁵ P.B. Hugenholtz and M.R.F. Senftleben: 14.

Until recently, personal use has largely been unutilised and there are therefore very few cases from which to draw, and three competing rationales have thus emerged to address personal use – the narrow interpretation of the copyright holder’s rights, implied licences and fair use.⁶⁶ As a result of its flexibility, fair use is the most common doctrinal approach, and it has some appeal for protecting personal use in the cloud because it reflects a longstanding preference for non-commercial and socially beneficial uses.⁶⁷ However, as the fair use doctrine evolved less and less emphasis was placed on these two indicia, and current fair use is dominated by questions of transformation of the work.⁶⁸ It must be remembered that the goal of transferring a work from one medium to another is rarely the transformation of its content.⁶⁹ Users generally engaged in personal use are not seeking to critique or adapt the copies they own: they wish simply to enjoy them.⁷⁰ A healthy copyright system requires equilibrium between copyright owners’ rights to exploit works and individuals’ liberties to enjoy them.⁷¹ The realm of personal use is where the need for balance between those interests is most acute.⁷² Many personal uses, particularly those associated with UCC and the cloud, are simply beyond the scope of its provision in copyright legislation, even more so in the case of entire copyrighted works being uploaded into a cloud.⁷³

In its current form fair use and fair dealing is a poor tool for assessing the lawfulness of particular personal uses for another reason: it is not realistically available to the people who most need to use it.⁷⁴ If fair use does not resolve the lawfulness of personal use in the cloud there arises a potential danger that some personal uses

⁶⁶ A. Perzanowski and J. Schultz: 2097.

⁶⁷ A. Perzanowski and J. Schultz: 2086-2087.

⁶⁸ T.F. Cotter: 703. S.M. Reilly: 456. A. Perzanowski and J. Schultz: 2087. Transformation tends to focus on the creation of new content out of old, favouring uses like parody, commentary and criticism. A. Perzanowski and J. Schultz: 2088.

⁶⁹ A. Perzanowski and J. Schultz: 2088.

⁷⁰ M.D. Murray: 2. A. Perzanowski and J. Schultz: 2088.

⁷¹ J. Litman: 1918.

⁷² J. Litman: 1918.

⁷³ Advances in digital technology pave the way for ushering in new forms of economic rights aimed at vesting in copyright holders increased control over private copying. H. Sun: 297. A. Perzanowski and J. Schultz: 2083.

⁷⁴ J. Litman: 1902. Traditional fair use and fair dealing is notoriously fact specific and requires an expensive trial on the basis of merits. J. Litman: 1902. Requiring of a person to go to court each time it must be determined whether a personal use is lawful or not will render fair use and fair dealing ineffective as a tool for striking a balance between the interests of the copyright holder and the user. J. Litman: 1902.

that do not fit the fair use rubric may be deemed legal when they should not be.⁷⁵ However, expecting fair use in its current formulation and contemplation to effectively deal with all personal uses will compound the burden imposed by an already heavy work-load.⁷⁶ When courts decide personal use cases they are left without the benefit of their most familiar and reliable tools and precedent is in short supply.⁷⁷ It is therefore submitted that in order to adequately accommodate fair dealing in cloud computing the doctrine necessitates its supplementation with other legal tools.⁷⁸

4.2.1 Copy “ownership”

The right to make private use of copyrighted material is considered fundamental in several European copyright statutes, and may have a constitutional basis in various other legal systems.⁷⁹ There is a general consensus is that personal use is a healthy component of the copyright ecosystem, because it yields a variety of benefits for consumers, innovators and the copyright system as whole.⁸⁰ More fundamentally, Perzanowski and Schultz submit that personal use comports with our normative and historical understanding of personal property.⁸¹ Owning a copy of a work entitles the owner to make certain uses thereof, despite such use appearing inconsistent with the rights of the copyright holder.⁸² The copyright holder acquires rights only with respect to the exploitation of the materialised expression of his or her intellect whereas the copy owner acquires the right to physically exploit the corporeal object required to access that expression. When statutory rights of copyright holders collide with the personal property rights of consumers, courts are implicitly asked to resolve conflicts between those two competing interests.⁸³

⁷⁵ J. Litman: 1903.

⁷⁶ S.M. Reilly: 470. A. Perzanowski and J. Schultz: 2089.

⁷⁷ J. Litman: 1898. A. Perzanowski and J. Schultz: 2105.

⁷⁸ A. Perzanowski and J. Schultz: 2089.

⁷⁹ D. Gervais: 852.

⁸⁰ J. Litman: 1873. A. Perzanowski and J. Schultz: 2069.

⁸¹ A. Perzanowski and J. Schultz: 2070.

⁸² The legitimate acquisition of copyrighted work by a user renders the work the private property of the user. The user thereby acquires the rights associated with ownership of private property – the right to use, annihilate or exploit the property as deemed fit and necessary – subject to the rights of the author of the copyrighted work.

⁸³ A. Perzanowski and J. Schultz: 2017.

The personal use of copyrighted works, especially in the context of the cloud, is submitted to validate the goals of copyright law to increase public access to cultural artefacts, to promote its preservation and endorse the enjoyment thereof.⁸⁴ Access to substantial amounts of cultural content in the cloud and the ways in which that content can be manipulated ought to be perceived as positive development that will lead to an increase in global culture and possibly global economic welfare.⁸⁵ The cloud has the potential to bring about cultural access beyond borders and become a great equaliser.⁸⁶

The incentives flow from the author's ability to control various uses of his or her work for personal benefit.⁸⁷ The author potentially acquires a personal gain, but more importantly, society as a whole benefits from an increased production of creative work.⁸⁸ However, a user who legitimately acquires a copy of the copyrighted work has a legitimate expectation to utilise that copy for his or her personal benefit. Personal use thus serves to strengthen users' expectations that when they buy or legally acquire a copy of protected works they own it, and they are therefore able to use, alienate or dispose of their property as they see fit.⁸⁹ Given the fact that there is general consensus that copyright can be equated to the rights associated with owning corporeal property a conflict of property rights arise when personal use of copyrighted works are asserted. A copyright-holder controls the rights to his/her intellectual property, but the copy owner controls the exclusive rights attached to the particular copy he/she owns.⁹⁰ Personal use may help arbitrate the relationship between the copy-right holder and the copy owner (user) by giving the owner dominion over the copy and the rights-holder control over the copyright.⁹¹

⁸⁴ J. Litman: 1909. A. Perzanowski and J. Schultz: 2069.

⁸⁵ D.J. Gervais and D.J. Hyndman: 64.

⁸⁶ D.J. Gervais and D.J. Hyndman: 64.

⁸⁷ R.T. Nimmer: 836.

⁸⁸ R.T. Nimmer: 836.

⁸⁹ J.M. Urban: 23. A. Perzanowski and J. Schultz: 2079.

⁹⁰ A. Perzanowski and J. Schultz: 2070.

⁹¹ A. Perzanowski and J. Schultz: 2070.

It is not disputed that copyright law is essential for protecting the investments made in artists, performers and designers.⁹² However, if uses such as transferring music from CDs to an MP3 player for personal use are seen to be illegal, it becomes more difficult to justify sanctions against copyright infringement that genuinely cost industry sales, i.e. freely downloading music and films using the Internet.⁹³ This contention stems from the fact that copying from a work that has already been purchased has arguably less impact on the market.⁹⁴ Personal use thus increases economic efficiency by reducing transaction costs which in turn encourages innovation, and it protects consumer anticipations of autonomy and privacy.⁹⁵ Moreover, personal use may help to address copyright law's credibility crisis because it closes the gaps between the rights-holders' interpretation of the law and the public's understanding thereof.⁹⁶

When faced with infringement claims arising out of personal use of protected works a number of courts have turned almost reflexively to copy ownership in their attempt to separate infringement from lawful use. In fair use, however, courts have little reason to concentrate on copy ownership.⁹⁷ The reason therefore is submitted to arise from the fact that none of the factors for fair use contemplation takes copyright ownership into account.⁹⁸ Yet, it is submitted that a copy owner is in a far better position than a non-owner to convince a court that his or her use is consistent with copyright's incentive structure, and that utilisation of the copyrighted work for his or her personal use and enjoyment amounts to fair use.⁹⁹ It is contended that fair use as a concept should apply only to the copyright owner's use of the copyright; it should not be used

⁹² Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 40.

⁹³ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 40.

⁹⁴ D.M. Given. <<http://www.lommen.com/pdf/SXSW-2012/Music-In-the-Cloud-A-Business---Legal-Pri mer.aspx>>. Retrieved 22 May 2013: 7. It is believed that private copying has almost no adverse effect on the right holder's normal exploitation of copyright. H. Sun: 296.

⁹⁵ A. Perzanowski and J. Schultz: 2070.

⁹⁶ Copyright is facing a crisis of legitimacy because of what many scholars consider to be over-protectionist tendencies, particularly since copyright has become progressively more creator-unfriendly. C. Greiger. A. Perzanowski and J. Schultz: 2070.

⁹⁷ A. Perzanowski and J. Schultz: 2097.

⁹⁸ A. Perzanowski and J. Schultz: 2097.

⁹⁹ A. Perzanowski and J. Schultz: 2111.

to restrict the right of personal use, the individual's use of the work, for his or her personal benefit be it for learning or recreation.¹⁰⁰ If courts resort to contemplating copy ownership then the uses are of a personal or private nature, the purpose of the use is irrelevant to determining whether the conduct is permissible to the extent only that such use does not entail the commercial exploitation of the work or the degradation of its integrity.¹⁰¹

This contention can be seen in the finding of the court in the matter of *Cartoon Network v CSC Holdings, Inc.*¹⁰² in which owners of copyrighted programming brought an action against a cable television company, Cablevision, seeking a declaratory judgment concerning the Defendant's cloud-based remote storage digital video recorder system (RS-DVR) violated their respective copyrights.¹⁰³ The court held that "copies" of programs that were made did not warrant the imposition of strict liability given the fact that these copies were created upon the customer's demand and thereby Cablevision's technology only served to contribute to the reproduction of the programs.¹⁰⁴ Moreover, the court found that when a consumer "plays" his or her copy of the recorded program for his or her own personal enjoyment such conduct does not qualify as a "performance to the public" and therefore did not violate the exclusive right of performance.¹⁰⁵

Furthermore, the court in *Recording Industry Ass 'n of America v. Diamond Multimedia Systems*¹⁰⁶ held that copying for space-shifting purpose is "paradigmatic non-commercial personal use entirely consistent with the purposes of the [Copyright] Act."¹⁰⁷ Format shifting music for personal use from CDs to another media is

¹⁰⁰ L.A. Patterson. <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4147&context=lcp>>. Retrieved 5 December 2013: 18.

¹⁰¹ R.M. Shay: 117.

¹⁰² *Cartoon Network v CSC Holdings, Inc.* 536 F.3d 121 (2d Cir. 2008), cert. denied, 129 U.S. 2890 (2009).

¹⁰³ F.M. Pinguelo and B.W. Muller: 2-3.

¹⁰⁴ F.M. Pinguelo and B.W. Muller: 3.

¹⁰⁵ F.M. Pinguelo and B.W. Muller: 3.

¹⁰⁶ *Recording Industry Association of America v. Diamond Multimedia Systems*, 180 F.3d 1072 (9th Cir. 1999).

¹⁰⁷ H. Sun: 297. In the *Record Industry* case the court held that the copying of digital music recordings to a portable MPS player was non-infringing personal use. J. Litman: 1897.

accordingly considered to be an entirely legitimate activity.¹⁰⁸ The Gowers Review has recommended that private copying and personal use ought to be limited to “format shifting” or “space shifting” – the process whereby digital media is converted from one format to another.¹⁰⁹ The exception would only allow one copy per “format”, but it would also have to recognise that transfer between formats may require intermediate steps (or formats) to be taken.¹¹⁰ This would validate the automatic copying that takes place when transferring content between mediums.

Arguably, copyright ownership serves as a readily identifiable marker for a user who has not disregarded the basic premise of copyright law; it offers a reliable suggestion that the use made by the user of a legitimately owned copy of the work is unlikely to disrupt copyright incentives.¹¹¹ Yet, precisely which uses creates the intolerable harm that would impede copyright incentives remains a difficult question. Moreover, there is considerable disagreement on whether every personal use – even where its purposes is to enable the kinds of benefits sought by semiotic democracy such as personal autonomy – can fall within the scope of fair use.¹¹² Despite the existence of strong institutions in terms of which personal use may be lawful, there is a lack of a cogent and predictable method of solidifying this rule in law.¹¹³

Litman contends that the fair use and fair dealing enquiries are clumsy and unhelpful in determining whether a particular personal use is lawful.¹¹⁴ Accordingly, the value of personal use in the copyright system as a means to facilitate reading, listening, viewing and playing the evaluation of personal use under the fair use test is likely to

¹⁰⁸ G.J. Ebersohn: 65. Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 63.

¹⁰⁹ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 63. Format shifting involves the moving one digital asset from one platform to another by copying a protected digital work and then transferring it to another electronic device and allowing it to be executed on that device. Techopedia: Space Shifting Definition. <<http://www.techopedia.com/definition/970/space-shifting>>. Retrieved 15 November 2013.

¹¹⁰ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 63.

¹¹¹ A. Perzanowski and J. Schultz: 2111.

¹¹² M.W.S Wong: 1096.

¹¹³ A. Perzanowski and J. Schultz: 2143.

¹¹⁴ J. Litman: 1904.

cause missing important distinctions between personal uses that should be encouraged and personal uses that should be prohibited.¹¹⁵ With the progression of the Internet and the cloud uses it provides it is necessary to develop a more sensible way to balance the rights of consumers in their personal property with the necessary incentives that creator need to continue contributing to our cultural economy.¹¹⁶

4.2.2 Copyright exhaustion (first sale doctrine)

Copyright, to some extent, is a statutory exception to the private law system of contract law.¹¹⁷ Copyright exhaustion, or the first sale doctrine as it is referred to in U.S. law, denotes the notion that once the copyright holder parts with a particular copy of a work then his or her power to regulate the use and disposition of that copy is constrained.¹¹⁸ Irrespective of the copyright attached to the work, the owner of a copy of such a work has the right to sell, dispose or use the work as he or she sees fit.¹¹⁹ Accordingly, the copyright exhaustion doctrine seems to make provision for various personal uses.¹²⁰

While the U.S. and the E.U. have differing models of copyright law, the E.U.'s exhaustion doctrine and the U.S.'s first sale doctrine provide similar copyright protection for purchasers of copies of copyrighted software.¹²¹ Section 109 of the U.S. Copyright Act establishes the legal foundation for the first sale doctrine by providing that: "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." The reference to Section 106 of the American Copyright Act addresses the exclusive right of the author to distribute his or her work and therefore Section 109 of the

¹¹⁵ J. Litman: 1904.

¹¹⁶ A. Perzanowski and J. Schultz: 2143.

¹¹⁷ K. Harris: 1752.

¹¹⁸ Andrew Nicholson: 392. P. Cimentarov: 8. A. Perzanowski and J. Schultz: 2075. The first sale doctrine in the U.S. originates from the Supreme Court's finding in the case of *Bobbs-Merrill Co. v Straus* 210 U.S. 339 (1908) where after it was codified in 17 U.S.C. § 109 in 1976. K. Harris: 1749.

¹¹⁹ P. Cimentarov: 8.

¹²⁰ J. Litman: 1896.

¹²¹ Alice J. Won: 398.

American Copyright Act implies that the first sale doctrine, and thereby copyright exhaustion, serves to limit that particular right.¹²²

In the E.U. copyright exhaustion is a judge-made principle and can be found explicitly in a few directives.¹²³ In 1971 European case law adopted the exhaustion doctrine for copyrighted works and placed it in Directive 91/250/EC as of 1991.¹²⁴ The European framework states that once the software right-holder gives his consent and sells or distributes a copy within the E.U. he or she can no longer control or prevent distribution of that copy within the E.U.¹²⁵ Furthermore, the lawful acquirer of that software copy even if he is a second-hand acquirer will have the statutory right to use the program for its intended purpose.¹²⁶

The Open Review considered the issue of parallel import in its evaluation of South Africa's copyright law in context of technological progression.

"Parallel import can be described as the importation of a product, which is subject to intellectual property rights, disposed of with the implied or express authorisation of the intellectual property right holder in the country of export, where the importation is without the authorisation of the particular intellectual property right holder in the country to which the product is imported."¹²⁷

Once copies are made with the authority of the creator, or his or her successor in title, then the specific embodiment of that legitimate copy may be freely traded by the purchaser of the embodiment.¹²⁸ In its current state, the South African Copyright Act¹²⁹ deals with the matter of unauthorised importation as a form of secondary or indirect infringement, and not as a matter of exhaustion.¹³⁰ The basis of the doctrine is that the sale of a work protected by copyright does not present the purchaser with

¹²² A.J. Won: 400. P. Cimentarov: 25. It is evident that the text limits the application of the principle to "lawfully made" made or acquired, thereby ensuring that any illegally obtained copy will grant the copy holder that associated rights of ownership.

¹²³ P. Cimentarov: 34.

¹²⁴ Alice J. Won: 390.

¹²⁵ Alice J. Won: 390.

¹²⁶ Alice J. Won: 390.

¹²⁷ A. Rens: 21.

¹²⁸ A. Rens: 21.

¹²⁹ 98 of 1978.

¹³⁰ A. Rens: 22.

any rights in the intellectual property related thereto, but rather extinguishes the copyright holder's claims to constrain the movement of a work embodying that intellectual property after the work or a copy thereof is sold.¹³¹ Copyright exhaustion thus functions on the premise that once a copyright holder consents to placing his or her work on the market, and essentially in the public domain, then such holder has no claim to controlling any further distribution of that particular work.¹³² Without an exhaustion doctrine the copyright holder would perpetually exercise control over the sale, transfer or use of copyrighted work and would accordingly control economic life.¹³³

Copyright exhaustion gives only limited privileges to the owner of a copy, the primary one of which is the privilege to redistribute the particular copy without permission of the copyright owner despite the exclusivity of the right to distribute.¹³⁴ The premise underlying the first sale doctrine is that by obtaining full market value for a copy by an outright sale of the copy, the copyright owner's economic interests in controlling distribution of that copy are fully satisfied, thus effectively extinguishing the copyright owner's economic interest in the distribution of that copy.¹³⁵ Naturally, courts should not equate exhaustion with unrestrained immunity for acts of copying or distribution beyond those that flow naturally from title to a discrete copy.¹³⁶ The doctrine does not give the copy owner the right to make and distribute additional copies of the work, and it only applies to an "owner" of a copy.¹³⁷ Therefore, copyright exhaustion can only find application in the case where a user owns or legitimately acquired a copy of the copyrighted work, and who wishes to transmit a copy of that work to another storage device or cloud for preservation and personal enjoyment. "There is no social value in allowing an end user to post an unauthorised, verbatim copy of a

¹³¹ D. Biagio: 1. <<http://www.spoor.com/home/index.php?ipkArticleID=89>>. Retrieved 21 September 2013

¹³¹ P. Cimentarov: 8. Referred to as the "first sale doctrine" or the "exhaustion of rights" the application of the doctrine entails that the monopoly granted to a creator does not extend to all subsequent sales or transfers of the embodied work. A. Rens: 21.

¹³² Exhaustion of Rights. <http://www.iprsonline.org/unctadictsd/docs/RB_Part1_Nov_1.4_update.pdf>. Retrieved 21 September 2013: 93.

¹³⁴ R.T. Nimmer: 866.

¹³⁵ R.T. Nimmer: 866.

¹³⁶ A.J. Won: 401. A. Perzanowski and J. Schultz: 2115.

¹³⁷ A.J. Won: 404. R.T. Nimmer: 868.

song for widespread copying by other.”¹³⁸ Copyright exhaustion thus places copy ownership at the centre of the digital personal use debate.¹³⁹

Copyright exhaustion plays an enormously important part in determining the manner in which intellectual property rules affect the movement of goods and services in international trade.¹⁴⁰ The issue of whether copyright exhaustion ought to find application in the case of digitally transmitted goods has, thus, been the subject of some debate.¹⁴¹ Kupferschmid submits that the balance between the interests of users and those of copyright holders which has been established throughout the history of copyright law would be distorted if copyright exception is finds application in the digital context.¹⁴² Unlike the sale of a CD or textbook, the sale of a digital work does not offer to the purchaser any physical property interest.¹⁴³ The application of copyright exhaustion may result in copyright holders having to compete with their own works, as in the case of parallel imports, but copyright holders would potentially have to deal with more copies than they originally produced.¹⁴⁴

However, the copyright economy is exchanging analogue copies of copyrighted works for digital copies that can be stored on local electronic devices or distant cloud storage facilities – copies that can be reproduced and distributed digitally, often in one single action because reproduction is often essential for distribution in digital contexts.¹⁴⁵

“The emergent business model for the distribution of copyrighted works in the network environment seems to challenge the survival of an “informational commons.” The day may soon be upon us when copyrighted works reside

¹³⁸ R.T. Nimmer: 838.

¹³⁹ Perzanowski and J. Schultz: 2075.

¹⁴⁰ Exhaustion of Rights. <http://www.iprsonline.org/unctadictsd/docs/RB_Part1_Nov_1.4_update.pdf>. Retrieved 21 September 2013: 92. T. Serra: 1776.

¹⁴¹ P. Cimentarov: 44.

¹⁴² P. Cimentarov: 46.

¹⁴³ T. Serra: 1759. When a consumer purchases an album on CD, for instance, he acquires an article of personal property along with all of the prerogatives associated with it; he is the owner of that CD. T. Serra: 1759.

¹⁴⁴ P. Cimentarov: 46. Every digital transmission leads to the creation of a new copy. P. Cimentarov: 46. Digital works maintain their quality level over time, such that “the quality of the first copy of a digitised work is no different than the thousandth copy.” T. Serra: 1785.

¹⁴⁵ A. Perzanowski and J. Schultz: 2115.

primarily in electronic networks.... The trend is that readers, listeners and viewers of copyrighted works are having less and less unencumbered lawful personal use of books, films or music in a technological and legal environment in which uses are easier to trace, and charge for.... In short, technology may make it possible for information proprietors to treat every use as a new instance of “access.” The fear is that such proprietors could maximise profits while continuing to withhold their works from general scrutiny, including fair use.”¹⁴⁶

It is contended that copyright law needs a clear and predictable approach to separating lawful personal use from acts of infringement.¹⁴⁷ Copyright’s leading candidates for such approach – fair use and implied licensing – are doctrines developed to deal with scenarios very different from the consumptive use of mass-produced works sold to the general public, and have accordingly proven insufficient for personal use cases.¹⁴⁸ Copyright exhaustion may thus serve as a useful tool to help distinguish personal use from the acts of infringement undertaken by users who employ the cloud for their own personal use, and thereby supplement fair use doctrines.

Copyright exhaustion serves to ensure the free circulation of goods.¹⁴⁹ Copyright exhaustion allows the author the opportunity to receive satisfactory remuneration with the first sale of the product whereby he or she is able to fully realise the value of his work.¹⁵⁰ Moreover, copyright exhaustion sanctions the “property theory” because it guarantees that the title of the good accompanies the work.¹⁵¹ Another justification for the existence of fair uses is that copyrights must come to an end somewhere: rights should not extend into the regulation of wholly private or non-commercial activities, to over-protect the right holder’s interest.¹⁵² Cimentarov submits that without the first sale doctrine it would be difficult to define the type of ownership the

¹⁴⁶ R.T.Nimmer: 840.

¹⁴⁷ A. Perzanowski and J. Schultz: 2112.

¹⁴⁸ A. Perzanowski and J. Schultz: 2112.

¹⁴⁹ T. Serra: 1776. P. Cimentarov: 19.

¹⁵⁰ P. Cimentarov: 19.

¹⁵¹ P. Cimentarov: 19.

¹⁵² K.Pham and S. Mkhitarian: 2. A. Nicholson: 392. Exceptions should cover common and socially beneficial uses of copyrighted works where formal permission requirements would impose excessively burdensome transaction costs on all parties. K.Pham and S. Mkhitarian: 2.

buyer of a copyrighted work has, and would accordingly be unable to sell the product – one of the most prominent features of owning property.¹⁵³

For those personal uses that flow from a lawfully owned copy, exhaustion offers a robust, balanced and generally predictable legal framework for assessing potential infringement liability.¹⁵⁴ A court presented with a supposed infringement that is defended on the grounds of personal use permitted by exhaustion would need to answer three questions: (1) does the defendant own a copy of the work? (2) is that copy lawfully obtained? (3) is the defendant's use consistent with the common law rights of utility and alienation conferred by virtue of copy ownership in a way that preserves the polemical nature of a single copy?¹⁵⁵

Copyright exhaustion is not an issue contemplated in the Berne Convention, but TRIPS¹⁵⁶ gives member states the freedom to choose the form of exhaustion they choose to implement.¹⁵⁷ Article 6(2) of the WCT deals with the issue of the copyright exhaustion in contemplation of the right of distribution: "Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author." It does not, however, oblige Contracting Parties to choose any national or regional or international exhaustion, or to regulate issue of exhaustion at all for that matter.¹⁵⁸

¹⁵³ P. Cimentarov: 20.

¹⁵⁴ A. Perzanowski and J. Schultz: 2133.

¹⁵⁵ A. Perzanowski and J. Schultz: 2133.

¹⁵⁶ Article 6 of TRIPS provides that: "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights." Accordingly, Article 6 provides that the matter of copyright exhaustion is a matter for each member state to determine under the condition that a member state affords the nationals of member states the same treatment it affords its own nationals.

¹⁵⁷ P. Cimentarov: 11. There is no international requirement that a country should prohibit parallel importation; freedom is expressly reserved. "The TRIPS Agreement prevents the parallel importation of counterfeit or unauthorised infringing goods. The TRIPS Agreement explicitly refrains from regulating the exhaustion of copyright." A. Rens: 21.

¹⁵⁸ M.J. Ficsor: 50. WIPO Intellectual Property Handbook: Policy, Law and Use. <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/cq5.pdf#tlt>>. Retrieved 10 May 2013: 274.

It is clear that the principle of broad right of distribution has gained wide international acceptance.¹⁵⁹ However, there has been no merging of views in respect of the scope to the extent of the right of distribution after the first sale of a copyrighted work, or any other transfer of ownership of a copy thereof.¹⁶⁰ Furthermore, while the enactment of the WCT was intended to respond to the new technological developments in the digital environment, Article 6(1) of the WCT is submitted only to apply to “fixed copies that can be put into circulation as tangible objects.”¹⁶¹ One cannot therefore imply that the provision provides for an immaterial distribution right.¹⁶²

However, the ultimate goal of copyright is to ensure the products of intellect and innovation are available to the public, and therefore rejecting the application of copyright exhaustion to digitally distributed goods would result in the restriction on the circulation of goods, and thus restrict access to the knowledge.¹⁶³ Moreover, it does not seem justifiable to differentiate between a buyer of digital products and a traditional buyer: the distinction is arbitrary given that both buyers have the same goal in mind – to own and manage the work acquired for the exchange of an economic incentive. Accordingly, Article 6(1) WCT does not exclude the possibility for a Contracting Party to apply the right of distribution in a broader scope as what is prescribed, namely also in respect of intangible copies.¹⁶⁴

Copyright exhaustion provides courts with a much-needed doctrinal mechanism for supporting personal uses made by copy owners, but the doctrine is not without its limitations in terms of traditional copyright concepts.¹⁶⁵ Firstly, courts tend to have difficulty making a distinction between sales of copies that trigger copyright exhaustion and licenses to use works that do not confer ownership.¹⁶⁶ Secondly, copyright exhaustion has to contend with the text of copyright legislation, in particular

¹⁵⁹ P. Cimentarov: 24.

¹⁶⁰ P. Cimentarov: 25.

¹⁶¹ P. Cimentarov: 25.

¹⁶² P. Cimentarov: 26.

¹⁶³ P. Cimentarov: 54

¹⁶⁴ M.J. Ficsor: 55.

¹⁶⁵ A. Perzanowski and J. Schultz: 2124.

¹⁶⁶ In order for copyright exhaustion to help clarify the utilisation of personal use courts must have a clear understanding of when a consumer owns a copy. A. Perzanowski and J. Schultz: 2124.

the statutory distinction between works and copies.¹⁶⁷ Thirdly, the scope of the exhaustion rule means that it cannot resolve every personal use dispute.¹⁶⁸ It is, however, important to note that copyright exhaustion only finds application with respect to the distribution of copyrighted works: the exclusive right to reproduce the work is not exhausted after the first sale thereof.¹⁶⁹

Copyright exhaustion thus preserves the interests of copyright owners despite recent changes in the mechanics of distribution of copyrighted works.¹⁷⁰ The application of copyright exhaustion in instances of digital distribution preserves the proper incentives for copyright authors and distributors by limiting its protection to uses of a particular copy that benefits only that particular copy owner.¹⁷¹ Accordingly, in 2009 the European Parliament and Council issued the European Software Directive for the legal protection of computer programs, or Directive 2009/24/EC which gave software owners the exclusive right to control the distribution of software through licenses and to control the software's use or technical reproductions.¹⁷² Article 4(2) provides an exhaustion exception,¹⁷³ and Article 5 relates to a "second hand" software exception¹⁷⁴ for users of software copies.¹⁷⁵

¹⁶⁷ A. Perzanowski and J. Schultz: 2124.

¹⁶⁸ A. Perzanowski and J. Schultz: 2124. Despite the fact the copyright exhaustion is a preferable approach in many personal use disputes it is unable to capture the full range of lawful personal use matters. A. Perzanowski and J. Schultz: 2124.

¹⁶⁹ P. Cimentarov: 18.

¹⁷⁰ T. Serra: 1775. A. Perzanowski and J. Schultz: 2115.

¹⁷¹ T. Serra: 1775. A. Perzanowski and J. Schultz: 2139.

¹⁷² Alice J. Won: 390-391.

¹⁷³ Directive Article 4(2) states that:

"[t]he first sale in the Community of a copy of a program by the right-holder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof."

Article 4(2) is the E.U.'s version of the U.S. first sale doctrine for copyrights: once an owner of a program sells a copy in the E.U., he loses distribution rights (or his rights are "exhausted") to that particular copy sold. Alice J. Won: 391.

¹⁷⁴ Article 5(1) states that:

"[i]n the absence of specific contractual provisions, the acts referred to in points (a) and (b) of Article 4(1) shall not require authorisation by the right-holder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction."

Article 5(1) effectively gives lawful acquirers of a software copy a statutory license right to use the program. Alice J. Won: 392.

¹⁷⁵ Alice J. Won: 390-391

The recognition of copyright exhaustion will thus serve to legitimise personal uses in three ways, namely: it provides a stable doctrinal foundation for the supposition that personal uses made by copyright owners are non-infringing, it helps shield providers of services and devices that facilitate such uses from potential claims of indirect liability and it effectuates the legislature's intent by allowing consumers to circumvent technological locks that impede the otherwise lawful usage of the copies they own.¹⁷⁶ Moreover, copyright exhaustion could play an integral role in mediating the relationship between traditional copyright infringement and the anti-circumvention provisions contained in the WCT.¹⁷⁷ It is, however, asserted that copyright exhaustion should insist on a one-to-one ratio between those copies lawfully acquired or created and those transferred.¹⁷⁸

If widely embraced, it is submitted that copyright exhaustion offers courts a simple, predictable and stable approach to resolving the wide swath of personal use scenarios that involve consumers who lawfully own copies of the works they use.¹⁷⁹ Copyright exhaustion gives courts a categorical, transparent and principled approach for contemplating the property interests of copy owners and the statutory privileges of copyright holders.¹⁸⁰ It is submitted that copyright exhaustion in cloud computing can serve to stabilise and promote lawful uses both for individual users as well as the service providers they depend on while at the same time continuing to provide appropriate incentives for creators.¹⁸¹

The contemplation of copyright exhaustion is submitted to be necessary given the goals copyright is designed to achieve, both in analogue and digital contexts. However, the debate surrounding such contemplation seems to come down to the issue of how copyright exhaustion will be effected in the digital environment. Due to

¹⁷⁶ A. Perzanowski and J. Schultz: 2124.

¹⁷⁷ A. Perzanowski and J. Schultz: 2120. The term "anti-circumvention" refers to laws which prohibit the circumvention of technological barriers for using a digital good in ways the rights holders does not wish it to be used. The Free Dictionary by Farlex.<<http://encyclopedia.thefreedictionary.com/anti-circumvention>>. Retrieved 21 September 2013.The requirement for the implementation of anti-circumvention laws was globalised in 1996 with the creation of the WIPO Copyright Treaty. The Free Dictionary by Farlex.<<http://encyclopedia.thefreedictionary.com/anti-circumvention>>. Retrieved 21 September 2013.

¹⁷⁸ A. Perzanowski and J. Schultz: 2115.

¹⁷⁹ A. Perzanowski and J. Schultz: 2116.

¹⁸⁰ T. Serra: 1781. A. Perzanowski and J. Schultz: 2116.

¹⁸¹ T. Serra: 1781. A. Perzanowski and J. Schultz: 2138. J.M. Moringeillo: 159.

the ease of duplication and distribution, digital works are often offered to consumers pursuant to license agreements, thus extending the use of contract law to control access to and the use of digital copyright works.¹⁸² A copyright license is a synonymous to an undertaking by the copyright owner not to sue the licensee, or his sub-licensee, for infringement and, except in the case of an exclusive licensee, confers no rights against third parties.¹⁸³ Accordingly, the copyright owner remains the owner of the right and merely allows the licensee to exercise a particular right(s).¹⁸⁴ Upon the termination of the license the full rights revert back to the copyright owner.¹⁸⁵

Due to the fact that copyright was originally conceived as a mechanism for creating property rights in intangibles there exists a presumption that voluntary exchange that takes place between authors and users is facilitated by property rights.¹⁸⁶ Accordingly, individuals are free to make virtually any contract with substantial substantive terms over the copyrighted works they choose, whatever effects on fair use or the first sale doctrines.¹⁸⁷ In fact, the massive use of contracts on terms and conditions dictated by suppliers to extend the copyrights beyond those granted by the copyright legislation is a real challenge to fair use doctrine.¹⁸⁸ For example, in *ProCD, Inc. v. Zeidenberg*,¹⁸⁹ the Seventh Circuit stated that shrink-wrap licenses included with software purchases were binding on the consumer, but that these licenses could not pre-empt nor create rights that were equivalent to the exclusive rights under copyright law.¹⁹⁰ Gervais submits that this inability and/or unwillingness to license end-users, along with uncertainties about the scope of fair use, are two of the primary sources of the tension associated with adapting copyright law for cloud

¹⁸² R.T. Nimmer: 854. K. Pham and S. Mkhitaraya: 11-12. T. Serra: 1770.

¹⁸³ J.M. Moringeillo: 177. K. Harris: 1752. O.H. Dean: 84.

¹⁸⁴ O.H. Dean: 84.

¹⁸⁵ O.H. Dean: 84.

¹⁸⁶ K. Pham and S. Mkhitaraya: 11-12.

¹⁸⁷ P. Chapdelaine: 14. R.T. Nimmer: 856. K. Pham and S. Mkhitaraya: 11-12.

¹⁸⁸ K. Pham and S. Mkhitaraya: 11-12. The enforcement of a particular type of contract, the "shrink wrap" license, for software and of pre-determined conditions attached to the commercialisation of other digital works illustrate this threat. K. Pham and S. Mkhitaraya: 11-12.

¹⁸⁹ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452–53 (7th Cir. 1996).

¹⁹⁰ Alice J. Won: 411. T. Serra: 1762. Holding that content licenses may not prohibit further transfer or resale, the court in the matter of *UsedSoft* found that downloading a copy of a copyright holder's software coupled with the execution of a license for its use "form an indivisible whole which . . . must be classified as a sale." T. Serra: 1762.

application.¹⁹¹ In order to contemplate the application of copyright exhaustion for extending support for personal use in the cloud there need to be a navigation of the issues that arise when licensing agreements are utilised.

4.2.3 Navigating personal use and copyright exhaustion around digital licensing agreements

A copyright owner's economic rights are monetised through licensing regimes.¹⁹² Copyrights holders and cloud service providers are increasingly making use of "access contracts" generally incorporated as the "terms of service" assented to by the user.¹⁹³ Enforceable contracts have a more direct legal effect because it creates a right of action independent of copyright law if a licensee fails to comply with the agreements.¹⁹⁴ License agreements are therefore often used to establish use restrictions on copyrighted works that copyright law alone cannot provide,¹⁹⁵ while the use terms contained therein enable an information provider to efficiently differentiate between markets, and therefore desired uses.¹⁹⁶

Current licensing regimes have been seen by some to be unduly burdensome because of the costs involved or the inability to identify and locate the author of the original work.¹⁹⁷ The requirement to obtain *ex ante* permission from the copyright holder for the intended uses through licenses poses substantial costs that could hinder the development of new technologies that benefit consumers and copyright holders alike.¹⁹⁸ In some cases the original author of a work will not be identifiable and cannot be contacted, and hence no legal use of the material can be made.¹⁹⁹ Licenses can be cost prohibitive and often takes months to negotiate, thus

¹⁹¹ D. Gervais: 849.

¹⁹² T.M. Woods: 1146.

¹⁹³ R.T. Nimmer: 856-857. P. Chapdelaine: 17. The fear that copyright no longer provides effective control over the rights of reproduction and distribution has encouraged copyright holders to make use of licensing as a more restrictive alternative. K. Harris: 1756.

¹⁹⁴ R.T. Nimmer: 857.

¹⁹⁵ R.T. Nimmer: 854.

¹⁹⁶ R.T. Nimmer: 858.

¹⁹⁷ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 47

¹⁹⁸ A. Perzanowski and J. Schultz: 2081.

¹⁹⁹ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 47.

essentially halting any innovation that could have taken place.²⁰⁰ The sheer multitude of all rights holders involved in the production of the work sought to be used could prevent comprehensive licensed offerings.²⁰¹ When rights in intangible assets are transferred, however, we cannot visualize the asset and therefore we have difficulty separating the asset from both the property right and the contract transferring it. Digital systems therefore tend to undermine the economic incentives for creative work intended to be established under copyright law.²⁰² Accordingly, numerous commentators have begun looking at how various other doctrines, within and outside the copyright law, may provide remedial approaches for users in instances where licensing contracts and End-User-License-Agreements (EULA)²⁰³ expand the copyright holder's exclusive rights beyond the statute that creates them.²⁰⁴

More importantly, and for the purpose of this study, the widespread use of license agreements attached to copies of works purchased by consumers introduces some unfortunate and unnecessary difficulties into the ownership enquiry.²⁰⁵ Contracts that control the use and copying of informational works are very common today, and opponents of the application of copyright exhaustion to digital distribution allege that license agreements restrict the application of the principle accordingly.²⁰⁶ In their attempt to escape copyright exhaustion of their works on the Internet industries often refuse to qualify purchases as sales, but offers the music, soft-ware or e-books they provide under the auspices licenses which inherently fails to communicate any defined property right.²⁰⁷ Copyrighted works made available under the terms of a license evades the transfer of ownership.

²⁰⁰ A. Perzanowski and J. Schultz: 2081.

²⁰¹ A. Perzanowski and J. Schultz: 2081.

²⁰² R.T. Nimmer: 854.

²⁰³ The End-User-Licence-Agreement presents a standard set of non-negotiable terms which allow the parties to "bargain around" copyright law to afford the copyright holder greater control over his or her intellectual works. K. Harris: 1766-1767.

²⁰⁴ P. Chapdelaine: 17.

²⁰⁵ T. Serra: 1761. A. Perzanowski and J. Schultz: 2016. In a world that increasingly relies on digital files to exchange works of authorship the proliferation of licensed-only works presages a world in which consumers can never truly "own" copies of their favourite works. T. Serra: 1761. Some scholars are of the opinion that these licenses "attempt to give consumers the appearance of ownership, while legally restricting the transfer of title to the physical copy." T. Serra: 1761.

²⁰⁶ R.T. Nimmer: 856. P. Cimentarov: 46.

²⁰⁷ P. Cimentarov: 46. J.M Moringiello: 191. This affirmative defence of copyright exhaustion is not available to works that only provide licences copies thereof; it is triggered by an actual transfer of ownership and only applies to owners of a particular copy. A.J. Won: 401.

In the case of *Vernor v Autodesk Corp*²⁰⁸ the court held that licensee is not the owner of a licensed copy if the license: (1) specifies that the user is granted a licence; (2) significantly restricts the user's ability to transfer software; and (3) imposes notable use restrictions.²⁰⁹ Accordingly, the court held that the defendant did not purchase his second-hand copies from an owner and therefore ownership was not conveyed, therefore the defendant could not invoke the first sale doctrine when reselling the software on eBay.²¹⁰ Copyright owners utilise this assertion as a means of getting out from under the thumb of the first sale doctrine and other exhaustion based doctrines that limit the control of copyright holders over consumer behaviour and secondary markets.²¹¹ In such cases, the consumer can neither sell work since he does not have title thereto, nor sell the license.²¹² In effect, re-sale is foreclosed and fair dealing rights removed by contract.²¹³ The use of licenses that limits the use of a copy purchased by a user is not contended to be entirely unreasonable, but it is submitted that such licenses may impede the much needed alleviation of strict liability for copyright infringement associated with uploading content into a cloud if it is arbitrarily relied upon and enforced by courts.

The question that thus arises is whether contracts can obstruct the rights of a copy holder who legitimately acquired a copy of the protected work? The question of the hierarchy contract law and copyright law was the main issue in *SoftMan Products Company, LLC v. Adobe Systems, Inc.*²¹⁴ The court ruled against licensing as a technique to avoid the outcomes of copyright exhaustion.²¹⁵ The defendant

²⁰⁸ *Vernor v Autodesk Corp.* 621 F.3d at 1103-04. The court *in casu* addressed that copyright issue between the copyright owner and a third party who had obtained copies from the licensee and planned to resell them online. R.T. Nimmer: 869. The court held that a license did not transfer ownership of the copy to the licensee, and therefore the licensee could not convey ownership of his copy to the third party. R.T. Nimmer: 869. Thus, the first sale privilege to re-transfer the copies did not apply to that third party or to the licensee. R.T. Nimmer: 869.

²⁰⁹ R.T. Nimmer: 868.

²¹⁰ A.J. Won: 409.

²¹¹ A. Perzanowski and J. Schultz: 2017. Frequently, the license terms prohibit not only resale but also any subsequent transfer. T. Serra: 1760.

²¹² T. Serra: 1760.

²¹³ M. Jackson and A. Shah: 6. T. Serra: 1760. In all of the DRM terms and conditions studies, fair dealing was excluded either explicitly or implicitly. M. Jackson and A. Shah: 6.

²¹⁴ U.S. District Court for the Central District of California, No. CV 00-04161, 27 August 2001, *SoftMan Products Company, LLC v. Adobe Systems, Inc.*, 171 F.Supp.2d 1075.

²¹⁵ P. Cimentarov: 48.

purchased a software product from Adobe where after he resold it on e-Bay.²¹⁶ However, the EULA to which the user agreed when he made his initial purchase contained restrictions on the further distribution of the software.²¹⁷ When asked to address the question as to whether a copyright owner can in fact restrict the rights of copy owners by statute in that the terms of license agreement regulated the relationship between Adobe and the defendant to the exclusion of the U.S. Copyright Act, the court stated that:

“This assertion is not accurate because copyright law in fact provided certain rights to owners of a particular copy. This grant of rights was independent from any purported grant of rights from Adobe. The Adobe license compelled third-parties to relinquish rights that the third-parties enjoyed under copyright law.”²¹⁸

A second question that arose was is whether the EULA ought to qualify as a license or a sale.²¹⁹ To address this question the court *in casu* enquired into the history of such licenses and determined that they are primarily used to restrict and escape the first sale doctrine and thereby copyright exhaustion.²²⁰ Accordingly, the court concluded that it is not the name of the contract that determines the nature of its application, but the “economic realities of the exchange,” and that such shrink-wrap licenses ought to be re-qualified and considered to be a sale.²²¹ This contention is supported in the finding of the court in *UMG Recordings, Inc. v. Augusto*.²²² In this matter the court had to consider whether the promotional CDs UMG gave various radio programmers constituted a transfer of ownership of those CDs in light of the fact that UMG did not track or police those copies, but gave the recipients the freedom to dispose of those copies.²²³ Despite the language utilised by UMG to state that the CDs were subject to a license, the court made it clear that merely labelling

²¹⁶ P. Cimentarov: 48.

²¹⁷ A.J. Won: 406. P. Cimentarov: 48.

²¹⁸ P. Cimentarov: 48.

²¹⁹ P. Cimentarov: 48. While EULAs permit the copyright holder to place restrictions on the distribution of its products, the EULA's effectiveness depends on whether a license was actually established or whether ownership was transferred. A.J. Won: 406.

²²⁰ P. Cimentarov: 48.

²²¹ A.J. Won: 408. P. Cimentarov: 48. If the transferee pays a single lump sum to have perpetual use of the copy then it is likely amount to conveyance of ownership, but limited use licenses or acquisition by lease, loan, or rental will not constitute transfer of ownership of a copy. A.J. Won: 408.

²²² *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1180 (9th Cir. 2011).

²²³ A.J. Won: 410-411.

copies as a “license” was insufficient to constitute it as such, particularly when there is no indication that there was consensus among the recipients concerning the terms of such a license.²²⁴

The economic reality thus remains central to evaluating the position of personal use and its supporting components alongside the use of licenses in the digital environment. It is evident that courts are reluctant to enforce licencing restrictions if the “licensing” is not sufficiently constructed to constitute a license as such. It is thus submitted that the transfer of digital files under the auspices of licensing agreements would more likely be regarded as sales by courts that rely on the economic reality of the transaction.²²⁵ Hence, the recommended application of digital copyright exhaustion would bolster the much needed balance between copyright holders and users in the cloud.

The recent finding in the case of *UsedSoft GmbH v Oracle International Corp*²²⁶ takes a progressive step towards realising the balance that needs to be struck between EULAs and copyright exhaustion to effectively provide for the personal use exception in the cloud. The court in the *UsedSoft* case held that software licenses that were granted for an unlimited time could be resold because the E.U. complies with the exhaustion doctrine.²²⁷ In terms of video games, *UsedSoft* takes the position that gamers are no longer purchasing permanent licenses, but rather they are purchasing ownership of their copy of the game based on the first sale that occurred in the E.U.²²⁸ Accordingly, once the copyright holder sold a particular copy the copyright holder’s rights in that copy were exhausted, and a purchaser of a copy could resell it without the copyright holder’s authorisation.²²⁹ This effectively negated license agreements that prohibited resale of computer programs, and may possibly even negate EULA in the video game context.²³⁰

²²⁴ A.J. Won: 410-411.

²²⁵ P. Cimentarov: 52.

²²⁶ *C-128/11, UsedSoft GmbH v. Oracle International Corporation*, 2012 E.C.R. I-0000. Judgement of the European Court of Justice (Grand Chamber).

E. Verbraeken: 7. Alice J. Won: 396. Also see Salvador Ferrandis & Partners. <<http://www.sfplegal.com/blog/information-technologies/cjue-judgement-usedsoft-the-exhaustion-of-rights-applies-to-software-licenses>>. Retrieved 7 December 2013: 1.

²²⁸ A. Nicholson: 393. Alice J. Won: 416.

²²⁹ M.J. Ficsor: 52. Andrew Nicholson: 391.

²³⁰ Alice J. Won: 396.

Subsequent to *UsedSoft* commentators began questioning whether the “adventurous” and “progressive” decision of the court had “opened the doors to a second-hand market for iTunes, mobile apps and computer games”.²³¹ However, as a result of the ambiguity of the case its effect on mobile games, cloud computing, freemium games,²³² subscription models, and product keys²³³ is still unknown.²³⁴ Currently, the E.U. Directive and *UsedSoft* case pre-empts EULAs made between the copyright owner and the transferee who has a perpetual license or ownership in a copy of the computer program.²³⁵ The E.U. thus holds a position that both licensees and owners of a particular copy can resell the copies of their tangible or intangible software because the copyright owner exhausted his distribution right after the first “sale” occurred in the E.U.²³⁶

In the U.S., however, whether the user is a licensee or owner will determine whether the first sale doctrine will apply.²³⁷ U.S. copyright law pre-empts state contract law concerning altering rights in copyright; the U.S. gives copyright owners a little more breathing room.²³⁸ Despite its propensity to emphasize the rights conferred by copyright in its assessment of copyright exhaustion the U.S. has made some attempts to make some provision for copyright exhaustion, albeit it as DRM services

²³¹ A. Nicholson: 400. Some even suggested that “the greatest impact will probably be felt at the “retail software level.” A. Nicholson: 400.

²³² The term “freemium” is a combination of the words “free” and “premium” and refers to a business model that works by offering simple and basic services to a user to try at no cost and more advanced or additional features at a premium. INVESTOPEDIA. Definition of “Freemium.” <<http://www.investopedia.com/terms/f/freemium.asp>>. Retrieved 19 December 2013. This practice is commonly utilised by software companies to offer basic software free of charge to allow users to try out subject to certain restrictions. INVESTOPEDIA. Definition of “Freemium.” <<http://www.investopedia.com/terms/f/freemium.asp>>. Retrieved 19 December 2013.

²³³ A “product key” or a “key code” refers to an unusually alphanumeric code of any length required by a software program to ensure installation: unique product keys help software manufacturers ensure that each copy of their software was legally purchased. About.com PC Support. <<http://pcsupport.about.com/od/termsns/g/productkey.htm>>. Retrieved 19 December 2013.

²³⁴ Alice J. Won: 397.

²³⁵ The court in *UsedSoft* justified its holding with compelling policy reasoning; the court feared that proprietors would label transactions as licenses rather than sales “in order to circumvent the rule of exhaustion and divest it of all scope.” T. Serra: 1762.

²³⁶ Alice J. Won: 416. *UsedSoft* saw the ECJ hold that a permitted download of software from a provider’s website coupled with the grant of a perpetual licence was a “sale” and thus exhaustion ought to apply, in turn laying the foundation for a second-hand trade in such software. A. Nicholson: 393.

²³⁷ Alice J. Won: 410

²³⁸ Alice J. Won: 410

instead of as a personal use tool. One such solution that has been proposed is the “forward and delete” proposal by representatives of the U.S. Congress.²³⁹ The idea is to mimic the transfer of property in the digital environment: once the file in contention is transferred to another computer or storage device or cloud then the original file will be deleted thereby preventing the copies created with each transfer and thus no infringement of the reproduction right takes place.²⁴⁰ The proposal has not, however, seen much success because copyright holders maintain that it would prove detrimental to their economic interests, and in view of easily available ways of saving a copy of what is “resold” it is no guarantee that the proposal could be enforceable.²⁴¹

While the U.S. advocates a position of providing economic incentives for copyright owners, it appears that the E.U. endorses a position favouring consumers and the secondary market.²⁴² After *UsedSoft*, with licenses subject to limitations in Europe, pressure may increase for courts in the United States to follow suit.²⁴³ However, recent cases on technology may not take immediate effect in the E.U. or in other countries affected by it, as there may need to be “some kind of legal catalyst to actually spark implementation of the case.”²⁴⁴ Until actual consequences of *UsedSoft* are felt by the U.S. and international software and video game companies through increased profit-loss from the secondary market, the international community may have to wait and see what rights they have internationally with the E.U. and how the U.S. market will be affected.²⁴⁵

4.3 CONCLUSION

Rapid technological changes have altered the way in which media is recorded, stored and played.²⁴⁶“The meaning of private and public changes according to where one stands suggests that this dichotomy is not part of the world, but a way of

²³⁹ P. Cimentarov: 81.

²⁴⁰ P. Cimentarov: 81.

²⁴¹ M.J. Ficsor: 53. P. Cimentarov: 81-82.

²⁴² Alice J. Won: 415.

²⁴³ T. Serra: 1762.

²⁴⁴ Alice J. Won: 397.

²⁴⁵ Alice J. Won: 415.

²⁴⁶ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf>. Retrieved 22 August: 63.

organizing the world. It belongs, we might say, not to geography by to cartography.”²⁴⁷ New technologies are continually making the reproduction and distribution of digital works easier, and focus is shifting to ways of protecting content rather than just controlling distribution.²⁴⁸ The advances in technology, particularly with respect to the Internet and the participation it allows users, necessitates a review of South Africa’s copyright legislation - especially with regard to fair dealing since the application of the doctrine becomes more complicated in the digital environment.²⁴⁹

Today, almost every cloud service provider or consumer electronics manufacturer must consider the legality of personal uses when it designs a new product or service.²⁵⁰ It is maintained that when balances are drawn they should generally favour the author of the original work except as to limited copying for truly personal use, or copying small parts of the original, or as to the ideas of facts expressed in the original, none of which threatens commercial incentives or social perspectives about the value of protecting copyright interests.²⁵¹ Private copying should enable users to copy media on to different technologies for personal use without the attachment of strict liability.²⁵²

Despite the inclusion of the personal use exception in the South African Copyright Act²⁵³ there is no provision for the factors that a court may take into consideration to make use of the exception when contemplating fair use. In the cloud aggregate commercial value is derived from connecting people with content they value individually.²⁵⁴ When consumers have the freedom to innovate with the items they own the innovation is prolific.²⁵⁵ How copyright law is formulated and enforced helps

²⁴⁷ R.A. Campbell: 322.

²⁴⁸ R.A. Campbell: 324.

²⁴⁹ L. Groenewald: 8.

²⁵⁰ A. Perzanowski and J. Schultz: 2081.

²⁵¹ R.T. Nimmer: 836.

²⁵² Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf>. Retrieved 22 August: 63.

²⁵³ Section 12 of Act 98 of 1978.

²⁵⁴ D. Gervais and D.G. Hyndman: 71.

²⁵⁵ A. Perzanowski and J. Schultz: 2082.

shape the social context in which creative works are made and distributed.²⁵⁶“The advances that have been made in digital technology since the Act was passed in 1978 revolutionised how South Africans engage with content, copyright and media.”²⁵⁷

Lawful personal use supports economic efficiency by simplifying the contours of consumer transactions involving the transfer of copies, especially by downstream purchasers.²⁵⁸ Reliable personal use will help minimise the problem of high information costs associated with detailed articulation of permission and restrictions imposed by the rights holder.²⁵⁹It is thus submitted that contemplating the development of personal use as a fair use exemption on a proprietary premise supported by copyright exhaustion may provide valuable insight to addressing the alleviating strict liability attached to copyright infringement associated with uploading and storing copyrighted content in a cloud. In 2012 the Canadian Copyright Modernisation Act²⁶⁰ was enacted to create four new categories of acceptable personal use fair dealing, namely for uses that amount to format shifting,²⁶¹ time-shifting,²⁶² backup copying²⁶³ and user-generated content.²⁶⁴

Moreover, commentators have responded favourably to the *UsedSoft* decision declaring it “sensible” and “progressive” in that it maintained that balance of interests that exhaustion had established offline.²⁶⁵ There is no denying that copyright exhaustion provides a clear rationale to find both cloud storage service providers and users of those systems non-infringing when the files are uploaded for personal use

²⁵⁶ R.T. Nimmer: 832.

²⁵⁷ L. Groenewald: 8.

²⁵⁸ A. Perzanowski and J. Schultz: 2082.

²⁵⁹ A. Perzanowski and J. Schultz: 2082.

²⁶⁰ Copyright Modernization Act S.C. 2012, c. 20. (Assented to 2012-06-29).

²⁶¹ Subject to not circumventing any TPMs to make the intended reproduction Section 29.22 Copyright Modernisation Act establishes a format-shifting exception which allows an individual to reproduce non-infringing copyrighted materials that were legally obtained (but not borrowed or rented) by the individual.
²⁶² Subject to certain limitations Section 29.23 of the Copyright Modernisation Act creates a time-shifting exception which authorises an individual to fix a communication signal or reproduce a work, recording or performance that is being broadcast provided that the fixation or recording is only used for the individual's private purposes.

²⁶³ Section 29.24 Copyright Modernisation Act provides for making copies for the purpose of making back-ups for the sole reason of guarding against the copyrighted material being lost, damaged or otherwise rendered unusable.

²⁶⁴ P.E. Bain: 1.

²⁶⁵ A. Nicholson: 395.

and originate from lawfully purchased copies.²⁶⁶ It is submitted that South African courts would benefit from consulting the developments in judicial precedent and legislation in the E.U. and Canada to aid its development of personal use for cloud application.

The development of well-structured personal use exception for the regulation of user-copied content in cloud computing will help address the inadequacy of copyright law in some aspects. However, the personal use exception does not provided for transformative content produced from a variety of existing copyrighted content. User-copied content is not transformative by nature, but user-derived content is inherently defined by the “transformation” that takes place when original works are remixed, cut and paste into an entirely new production. These transformative works require a different approach, an approach that provides guidance on the application of a fair dealing exception that promotes innovation.

²⁶⁶ A. Perzanowski and J. Schultz: 2139.

CHAPTER 5

THE TRANSFORMATION OF TRANSFORMATIVE USE IN THE CLOUD

All digital media is represented as a string of digits – ones and zeros.¹ Perfect reproductions of existing works can be thus be made instantaneously where after they can then be dissected and put back together, and can thus be seamlessly transformed into new works.² The latest developments in communication technologies serve to reduce the costs of both the creation and distribution of innovative material, thus giving more people the prospect of producing creative expressions.³ New digital technologies make it easier to remix, edit, mash-up, sample and eventually transform electronic media; the changes made to the work merges with the existing expression and therefore the original expression is still maintained throughout the new creation.⁴

Accordingly, copyright infringement may arise whenever a user imposes on the copyright holder's exclusive right to adapt the work, or to create a derivative work, be it for commercial or non-commercial purposes, and such work is based on the fundamental elements of the original work.⁵ The most problematic UCC are “mash-ups” - works that incorporate portions of copyrighted material in the creation of an altogether new material, thus essentially creating a derivative work.⁶ Such derivative works, or mash-ups, are primarily borrowed from copyrighted works without the permission of the copyright holder and generally without acknowledgement of the original author.⁷ In most cases, a substantial reproduction of one or more existing

¹ N. Suzor: 7. Digital transformations are not limited to texts or images, but encumbers numerous formats of expression – often all at once.

² N. Suzor: 7.

³ N. Suzor: 7.

⁴ N. Suzor: 7.

⁵ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>> Retrieved 26 June 2013: 45.

⁶ E. Lee: 1509.

⁷ E. Lee: 1509. Australian Copyright and Fair use – Submissions on Green Bill <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CJwBEBYwCQ&url=http%3A%2F%2Fwww.copyright.org.au%2Fadmin%2Fcms-acc1%2F_images%2F1927278782521fdf96c8c6d.pdf&ei=Q-KiUrfdG9KM7Aa4mlHoCA&usq=AFOjCNHnNOvDXs60_AB6J0qMJEsjmXWMBhg>. Retrieved 7 December 2013: 37.

works is involved.⁸ User-derived content thus uses pre-existing content and either makes substantial alterations or significant additions thereto – often simultaneously to varying degrees.⁹

5.1 THE DERIVATIVE WORKS RIGHT

User-derived content embodies existing material, which may be derived from numerous different works each with a different copyright holder, but may have sufficient originality to constitute new work that qualifies for copyright protection in its own right.¹⁰ However, the unauthorised use or portions of copyrighted material may infringe the holder's exclusive rights of reproduction and adaptation, as well as the right to distribution and communication to the public in the event that the user makes the derivative work available for viewing on a site such as YouTube.¹¹

Copyright law is intended to encourage the creation and dissemination of innovative works and thereby to endorse cultural and economic development.¹² Derivative UCC works highlights a difficult copyright issue – are such derivative works acceptable uses permitted by the respective jurisdiction's exceptions and limitations or does it amount to unlawful infringement of the creator's exclusive rights to adapt the work or create derivative work based thereon?¹³ The issue of user-derived content thus raises questions concerning the "originality" of the work for the purpose of determining whether such works are in fact infringing and is therefore integral to the determination of fair use of the work. Moreover, given the working definition of UCC as envisioned by the OECD¹⁴ it seems quite evident that some degree of creativity is required for work to qualify as UCC, a consideration that may contribute to the determination of whether a user-derived work is infringing or whether it amounts to

⁸ D. Gervais: 869.

⁹ D. Gervais: 869.

¹⁰ O.H. Dean: 43.

¹¹ E. Lee: 1509

¹² Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 44.

¹³ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 44.

¹⁴ User-created content is defined as "content made publicly available over the Internet which reflects a certain amount of creativity and which is created outside of professional routines and practices." Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

fair use, and to whether it would subsequently qualify for copyright protection in its own right.

In the digital environment the question that arises is how to adapt the parameters of certain copyright exceptions and limitations, such as fair use, when citations and compilations are increasingly prevalent and easy.¹⁵ South African copyright law does not provide for the derivative work right, but offers a much stricter adaptation right.¹⁶ However, the extent to which work in the cloud can be transformed goes beyond the restrictive application of the adaption right, and it is submitted that the contemplation of a derivative works right and associated transformative use considerations for South African copyright application in the cloud will aid the regulation of copyright with respect to UCC.

The exclusive right to prepare a derivative work is provided for in the Berne Convention.¹⁷ Corollary thereto, Section 106(2) of the U.S. Copyright Act explicitly confers upon the author the exclusive right to prepare derivative works based upon

¹⁵ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>> Retrieved 26 June 2013: 46.

¹⁶ Section 1(1) of Act 98 of 1978 provides that: "In this Act, unless the context otherwise indicates — "adaptation", in relation to—

- (a) a literary work, includes—
 - (i) in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;
 - (ii) in the case of a dramatic work, a version of the work which it is converted into a non-dramatic work;
 - (iii) a translation of the work; or
 - (iv) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;
- (b) a musical work, includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character;
- (c) an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognizable;
- (d) a computer program includes—
 - (i) a version of the program in a programming language, code or notation different from that of the program; or
 - (ii) a fixation of the program in or on a medium different from the medium of fixation of the program;

[Para. (d) added by s. 1 (a) of Act No. 125 of 1992.]

¹⁷ Article 2(3) of the Berne Convention provides that "translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work."

copyrighted works within which he or she already asserts ownership. According to Section 101 of the U.S. Copyright Act a “derivative work” is:

“a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work.” By its terms, the derivative works right definition does not actually require that the defendant incorporate any copyrightable expression, only that the defendant’s work is “based on an existing copyrighted work.”¹⁸

The conventional explanation for the derivative work right is rooted in the incentive theory, i.e. the ability to control derivatives allows for the maximisation of returns through secondary markets for the work.¹⁹ It is proposed that the purpose of the right to prepare derivative works, or to make adaptations to an existing work in the context of South African law, is to protect markets that an author or artist may wish to exploit him or herself.²⁰ This assessment is not subjective, but focuses on whether the market in question is typical for the type of work concerned.²¹ Thus, the types of creations that can constitute a derivative work are not confined to the specific examples provided for in the Berne Convention or the U.S. Copyright Act, and in light of the progression of the cloud the various forms in which derivative works can be presented has sky-rocketed.²² It is therefore submitted that the derivative works right effects the traditional notions of copyright law three important ways, all of which affects the application of copyright in the cloud.

¹⁸ C. Bohannan: 678.

¹⁹ M.W.S Wong: 1122.

²⁰ D. Gervais: 866. P. Samuelson: 1527. Professor Goldstein has stated that “[d]erivative rights affect the level of investment in copyrighted works by enabling the copyright owner to proportion its investment to the level of expected returns from all markets, not just the market in which the work first appears.” P. Samuelson: 1527.

²¹ D. Gervais: 866.

²² M.W.S Wong: 1112.

Firstly, the derivative work right has an expansive effect on the scope of the reproduction right in copyright law.²³ Copying is not only infringed by misusing or misappropriating the whole of the work but by also by misusing or misappropriating a substantial part of the work.²⁴ One articulation of the standard for infringement of the reproduction right is that infringement occurs when, in comparison with the defendant's allegedly infringing work, is substantially similar to the copyright holder's original work to the "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."²⁵ Therefore, in many instances the question arises whether or not a significant part of the original work that has been used in the derivative work bares sufficient similarity thereto to constitute copyright infringement.²⁶

As long as what is taken has substance in the original work (and it not *de minimus*) or has sufficient quintessence to constitute the embodiment of original intellectual activity in material form then copyright infringement might arise.²⁷ In the instance in which a defendant has changed a copyrighted work and added his or her own expression to the extent that an ordinary observer might perceive that the aesthetic appeal of the resulting work is not the same as that of the original work, then the derivative work may constitute a transformative original work.²⁸ However, the derivative works right essentially disqualifies taking account of such differences by granting the copyright holder the exclusive right to "modify, transform or adapt" the existing copyrighted work.²⁹ As such, the derivative works right lowers the threshold of overall resemblance that can constitute a *prima facie* infringement of the reproduction right.³⁰

²³ P. Samuelson: 1528. C. Bohannan: 680.

²⁴ O.H. Dean: 37. Section 1(2A) of the Copyright Act 98 of 1978 provides that any reference to the doing of an act in relation to a work means a reference to doing that act in relation to "any substantial part of such work." O.H. Dean: 37-38. The concept of "substantial" respect of a part of a work relates primarily to the quality and not the quantity of the work, and therefore the unauthorised copying of a small but essential part(s) of the work may constitute copyright infringement. O.H. Dean: 37-38.

²⁵ C. Bohannan: 680.

²⁶ O.H. Dean: 37-38.

²⁷ O.H. Dean: 38.

²⁸ C. Bohannan: 680.

²⁹ P. Samuelson: 1530-1533. C. Bohannan: 680.

³⁰ C. Bohannan: 680.

Secondly, derivative work right influences the fair use analysis in such a manner that it tends to shrink the scope of fair use protection for transformative derivative works.³¹ As part of traditional common law fair use analysis a court would consider things like whether the defendant's use substantially changed the work or instead merely "superseded" the original, and whether the defendant's use was likely to harm the copyright holder's expected markets.³² However, the problem with the fair dealing analysis is that it may be difficult to determine whether the transformative use of the copyrighted material is fair or infringing, particularly given the fact that the fair dealing analysis is flexible and imprecise and that there is no determinable level of for the determination of transformative use.³³ Cotter submits that the undue focus on "transformative use" unnecessarily distracts judges from the more important question – whether enabling copyright owners to control certain niche markets is consistent with copyright policy and free speech principles.³⁴ Moreover, courts do not always clearly distinguish between infringement of the right to make reproductions and the right to prepare derivative works when applying fair use.³⁵

"Online video hosting services like YouTube are ushering in a new era of free expression online. By providing a home for "user-generated content" (UGC) on the Internet, these services enable creators to reach a global audience without having to depend on traditional intermediaries like television networks and movie studios. The result has been an explosion of creativity by ordinary people, who have enthusiastically embraced the opportunities created by these new technologies to express themselves in a remarkable variety of ways. The life blood of much of this new creativity is fair use, the copyright doctrine that permits unauthorized uses of copyrighted material for transformative purposes."³⁶

Lastly, the derivative works right alters the scope of copyright protection in the traditional sense.³⁷ The fair use doctrine, traditional or modern, cannot adequately protect against the over-breadth in the derivative works right because the derivative

³¹ C. Bohannon: 682.

³² C. Bohannon: 692.

³³ C. Bohannon: 687.

³⁴ T.F. Cotter: 753.

³⁵ D. Gervais: 865.

³⁶ R.T. Nimmer: 841.

³⁷ C. Bohannon: 690.

works right itself creates confusion regarding the scope of fair use.³⁸ Accordingly, the interface between transformative fair use and a transformative derivative works that qualifies for copyright protection is murky at best. It is not certain whether the determination of an alleged infringing derivative work to be transformative fair use would render that work subject to copyright protection in its own right. Given the origin of the derivative work's originality the very elements for copyright recognition, originality and authorship, seem to fall far outside the original purpose for its implementation in the case transformative derivative works.

5.2 TRANSFORMATIVE FAIR USE

“Good artists borrow; great artists steal”.³⁹The determination of fair use in the instance in which a user creates a derivative work is subject to the contemplation of Section 107 of the U.S. Copyright Act; the fair use exception allows “transformative use” the purpose of which is to enable creators to rework material for a new purpose or with a new meaning.⁴⁰The doctrine of transformative use is part of the first fair use factor, which probes the purpose and character of the secondary use.⁴¹There are two distinct but non-exclusive conditions of transformative use.⁴² A secondary user may use the copyrighted work (1) in a different manner by changing its content; or (2) for a different purpose; a secondary user may invoke both or neither of those scenarios.⁴³

A work is deemed to be transformative when it “adds something new, with a further purpose of different character, altering the first with new expression, meaning or message” as opposed to simply reproducing original work.⁴⁴ This includes activities

³⁸ C. Bohannon: 692.

³⁹ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 67.

⁴⁰ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 66.

⁴¹ J.M. Nolan: 544.

⁴² J.M. Nolan: 557.

⁴³ J.M. Nolan: 557.

⁴⁴ S.M. Reilly: 456. Professor Heymann contends that the phrase “adds something new” represents a subtle shift that “seems to encourage courts to focus on whether the second artist has added material to

such as remixing or the creation of parody, where the original work becomes integrated in the new work.⁴⁵ In the matter of *Campbell v. Acuff-Rose Music, Inc.*⁴⁶ the U.S. Supreme Court held that, in evaluating the purpose and character of transformative use, courts should consider the extent to which the use is “transformative” by considering the each challenged passage in the derivative work and not the overall character of the secondary work.⁴⁷ “Transformativeness” is however not a prerequisite for fair use; it is not expressly referenced in the statutorily listed exceptions.⁴⁸ The role of transformative use as a fair use defence is generally acknowledged to have stemmed from Judge Pierre Leval’s influential article in the Harvard Law Review containing the famous formulation that has since been adopted by U.S. courts:

“The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; ... it would merely “supersede the objects” of the original. If, on the other hand, the secondary use adds value to the original – if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”⁴⁹

Judge Leval bemoaned that one of the misunderstandings in fair use precedent was the inapposite weight afforded to commercial uses of a copyrighted work.⁵⁰ Despite directing this argument towards the legal presumption that a secondary use that is commercial in nature is not a fair use, Leval’s argument is relevant because it emphasizes that most of activities provided for under Section 107 of the U.S.

the first work to the exclusion of consideration of whether the artist has re-contextualised the copyrighted work.” J.M. Nolan: 561.

⁴⁵ S.M. Reilly: 456.

⁴⁶ *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

⁴⁷ T.F. Cotter: 702. P.N. Leval: 5. A court must consider the purpose of the original use, the purpose of the secondary use, and then ascertain whether there is a distinction between the two purposes. J.M. Nolan: 544. Further, a court must consider whether a defendant’s secondary use of a copyrighted work adds something new to the original; in other words, whether the defendant transformed the original purpose. J.M. Nolan: 544.

⁴⁸ M.W.S Wong: 1105.

⁴⁹ S.M. Reilly: 456.

⁵⁰ J.M. Nolan: 559

Copyright Act are often commercial in nature.⁵¹ In Leval's opinion the more transformative a secondary use is the less significant the commercial nature of that use will be.⁵²

Leval subsequently opined that the *Campbell* case "revives the transformative-superseding dichotomy as the dominant consideration [in the statutory fair use analysis]."⁵³ Thus, it seems that the fundamental idea of transformative use as a fair use defence is validated in its potential to advance knowledge and enable progress subject to the other factors in the case.⁵⁴ More specifically, transformative use as a fair use defence necessitates that a derivative work does more than "supersede the objects" of the original work in that it also generates new and socially desirable knowledge.⁵⁵ The Court held that the "central purpose" of the fair use analysis was to evaluate whether works are transformative, and endorse transformative works as being "at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."⁵⁶ This principle may be seen in many areas: "a change in purpose and function through comment, criticism, parody, or satire, and change in purpose or function from an expressive or creative use to one of archival, referential, or historical value, or to a new purpose or function of education or research, may be held to be transformative and a fair use of the original work."⁵⁷

Transformative use is accordingly justified for three reasons. Firstly, transformative use is an efficient tool for addressing the infringement associated with the adaptation of works if such adaptation would prove socially beneficial.⁵⁸ Secondly, transformative use promotes the decentralisation of speech and recognises diversity – issues that are qualitatively important for democracy.⁵⁹ The final justification for encouraging transformative use of expressive UCC is based on the recognition that significant parts of our reality are constructed by the media to which we are

51 J.M. Nolan: 559.

52 J.M. Nolan: 559.

53 J.M. Nolan: 552.

54 M.W.S Wong: 1106.

55 M.D. Murray: 6. M.W.S Wong: 1106.

56 M.D. Murray: 15.

57 M.D. Murray: 22.

58 N. Suzor: 9. Using pre-existing works saves time, effort and money because the author is not required to start from nothing.

59 N. Suzor: 14.

continually exposed.⁶⁰ It is quite obvious that there are significant benefits that arise from utilising transformative use to justify transformative derivative works. The transformative use inquiry effectively collaborates with the fundamental objective of the fair use analysis.⁶¹

Professor Anthony Reese’s analysis of relevant fair use cases in U.S. case law does however make a critical point: “the inquiry into whether the use of a work may be transformative from a teleological perspective is distinct from the question of whether copyright was infringed.”⁶² Theoretically, a “transformative use” may infringe upon the reproduction right, the right to make derivative works (or adaptations), or both.⁶³ However, not all derivative works are transformative, and some transformative uses do not involve the creation of a derivative work.⁶⁴ Thus, the concept of transformative use as a fair use defence has proven cognitively challenging for many courts when a particular use does not involve some kind of expressive or innovation driven change.⁶⁵ Accordingly, a clear distinction has never been drawn between infringement of a right to make copies and the right to prepare derivative works when applying fair use.⁶⁶ Reese accordingly concluded that “appellate courts do not view fair use transformativeness as connected with any transformation involved in preparing a derivative work.”⁶⁷ As such, the *Campbell* case emphasis on transformative use has not inappropriately interfered with a copyright owner’s right to control derivative works.⁶⁸

The exact parameters of the derivative works right is uncertain when one considers the corollary adaptation right. The legislative language relating to the fair use equivalent in major common law jurisdictions outside the U.S is somewhat more restricted, and the derivative work right is more limited in terms of what types of creations that are considered derivative works (adaptations) within the scope of that

⁶⁰ N. Suzor: 16.

⁶¹ M.W.S Wong: 1110.

⁶² D. Gervais: 864.

⁶³ D. Gervais: 864.

⁶⁴ D. Gervais: 864.

⁶⁵ A. Perzanowski and J. Schultz: 2088.

⁶⁶ D. Gervais: 864.

⁶⁷ J.M. Nolan: 557.

⁶⁸ J.M. Nolan: 557.

particular right.⁶⁹ The statutory framework that applies to derivative works in the U.K.⁷⁰ addresses the work as adaptations and is structured in a restrictive manner, as does the provisions in the Canadian Copyright Act⁷¹, the Australian Copyright Act⁷² and the South African Copyright Act.⁷³ The right of adaptation is triggered by rendering an adaptation of the original work into a material form, a form that is provided for in restrictive legislations,⁷⁴ at which point all other exclusive rights apply in the same manner as it does to the original work upon which the adaptation was based.⁷⁵ There are substantial differences between the scope of the adaptation right in the U.K. and the corresponding but not identical right under U.S. law to prepare a derivative work.⁷⁶

In relation to their respective definitions of derivative works and adaptations, the U.S. does not limit “derivative works” to specific types of subject matter, whereas the U.K. CDPA specifically defines “adaptations” differently for different media and clearly restricts the type of work that would even be considered an adaptation in the first place.⁷⁷ Accordingly, the U.K.’s adaptation right does not apply to pictorial, graphic or sculptural works, or to audio-visual works or sound recording.⁷⁸ In addition to an open-ended provision of what qualifies as a derivative work U.S. copyright law expressly recognises that a derivative work is copyrightable if the subsequent author made contributions that recast, transformed or adapted the underlying work, provided that the resulting legal protection does not extend to any parts of it the illegitimately used pre-existing content.⁷⁹ In the U.K. statutory framework the legitimate adaptation of a copyrighted work is also recognised to give rise to all of the

⁶⁹ M.W.S Wong: 1131.

⁷⁰ Section 21 of the UK Copyright, Designs and Patent Act 1988

⁷¹ Section 3 of the Canadian Copyright Act R.S.C., 1985, c. C-42.

⁷² Section 10 of the Australian Copyright Act 63 of 1968.

⁷³ M.W.S Wong: 1113.

⁷⁴ Paragraph (a) of Section 1(1) of the South African Copyright Act provides for the conversion, translation and depiction of literary works that qualify as “adaptation.” Paragraph (b) provides that “a musical work includes any arrangement or transcription of the work if such arrangement or transcription has an original creative character.” Paragraph (c) indicates that an adaptation of an artistic work can also take the form of “a transformation of the work in such manner that the original or substantial features thereof remain recognisable.”

⁷⁵ M.W.S Wong: 1113.

⁷⁶ M.W.S Wong: 1113.

⁷⁷ M.W.S Wong: 1114.

⁷⁸ M.W.S Wong: 1113.

⁷⁹ Sec 17 U.S.C. §§ 101, 103(b) (2000).

other exclusive rights attached to the original work from which the adaptation stems.⁸⁰

Currently, given the narrow classes of derivative works in terms of which an author are granted further exclusive rights in the U.K., and the relatively restricted types of works that would qualify as such under Canadian law, it may be that these two jurisdictions have greater flexibility for protecting works based on pre-existing ones, particularly given the generally low standard for originality.⁸¹ While this may be excellent news for creators of UCC insofar as copyright eligibility is concerned, its benefits may be counteracted somewhat by the narrower categories of fair dealing in the U.K. and Canada to the extent that the UCC that uses some portion of a pre-existing work could find itself more vulnerable to infringement risks than under U.S. fair use.⁸²

Despite the strong economic-utilitarian rationale underlying U.S. copyright doctrine it is unclear how the application of the derivative work right to UCC and associated transformative use considerations will affect the freedom and ability of users to use, remix and manipulate original content.⁸³ The existence of any identifiable objective does not guarantee success in claiming fair use in the case of transformative derivative works.⁸⁴ The transformative justification must overcome factors favouring the copyright owner.⁸⁵

In the case of derivative work two or more separate works that have different copyright owners may come into contention.⁸⁶ Depending on the circumstances, doing a restricted act in respect of an article without appropriate authority can infringe the copyright in more than one work.⁸⁷ The authorisation of the reproduction by the copyright owner in respect of one of these works will not necessarily include

⁸⁰ M.W.S Wong: 1114.

⁸¹ M.W.S Wong: 1134.

⁸² M.W.S Wong: 1134.

⁸³ M.W.S Wong: 1134.

⁸⁴ P.N. Leval: 5.

⁸⁵ P.N. Leval: 4.

⁸⁶ O.H. Dean: 43.

⁸⁷ O.H. Dean: 43.

the authorisation of the owners of the copyright in the other works involved.⁸⁸ To simply appraise the overall character of the challenged work tells little about whether the various questions of the original author's writing have a fair use purpose or whether the work merely supersedes work.⁸⁹ The existence of an objective similarity between a substantial part of the copyrighted work and the allegedly infringing work is established by means of an objective test.⁹⁰ Dean submits that a court must regard not only the similarities between the contentious work, as well as its dissimilarities.⁹¹

A further crucial point of contemplation should be whether transformative use compromises the commercial interests of the original author or whether it offends the artistic integrity of the original creator.⁹² Judge Posner's decision in the *Beanie Baby*⁹³ case argued that in determining whether use can be considered "fair use", the courts ought to consider the impact of the new work on the sales of the older work.⁹⁴ Thus, when assessing fair use courts must consider the commercial interests and artistic integrity of the work involved.⁹⁵ Subsequently, the court must establish whether there exists a causal connection between the original work and the infringing work by way of a subjective test.⁹⁶

Thus, while strict liability requires no subjective analysis of the infringing conduct, the analysis of transformative use as a fair use defence raised in the instance does requisite establishing the subjective element pertaining to the user's use of the work. Accordingly, taking existing copyrighted material and placing it in a new context to change the principal purpose and function of the original material is transformative if the use creates a new meaning and new expression with a further purpose and

⁸⁸ O.H. Dean: 44.

⁸⁹ P.N. Leval: 5.

⁹⁰ T. Pistorius: 201.

⁹¹ O.H. Dean: 38.

⁹² Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 68.

⁹³ *Ty, Inc. v Publications International Ltd* 292 F3d 512 (7th Cir. 2002).

⁹⁴ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 68.

⁹⁵ Gowers Review of Intellectual Property, November 2006. <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_75_5.pdf>. Retrieved 22 August: 68.

⁹⁶ T. Pistorius: 201.

different character than the original.⁹⁷ Accordingly, Reese contends that when a secondary user successfully argues that his or her use of the copyrighted work was for a different purpose, then the use will be, or is likely to be, fair.⁹⁸

5.3 IN THE OVERLAP: THE *RDR BOOKS* CASE

The derivative works right complements, to the extent that it overlaps with, the reproductions right, and U.S. courts have thus far failed to differentiate between the two rights when applying transformative use in the fair analysis.⁹⁹ Over time the scope of the reproduction right has expanded to the point where copying even relatively small fragments of expression, or such non-literal elements as plot and characters, can constitute an infringement of the reproduction right.¹⁰⁰ Accordingly, it is submitted that the right to prepare derivative works does not seem to add any significant benefit to the copyright owner's bundle of rights, but the right may confer some additional benefits in certain discrete cases.¹⁰¹ The key to understanding the overlap, and the essential difference between the right to reproduce and the derivative work right lies in the definition of a derivative work as opposed to the definition of reproduction (copies).¹⁰²

The court in the matter of *Warner Bros. Entertainment, Inc. v RDR Books*¹⁰³ stated that such a distinction is "critical to the difference between infringing derivative works and works for fair use, and accordingly illustrated this overlap."¹⁰⁴ The court *in casu* ruled that there was sufficient substantial similarity between the defendants' *Harry Potter* based encyclopaedia and the J.K. Rowling books, both qualitatively and quantitatively for a *prima face* case of copying in terms of Section 106(1) of the U.S. Copyright Act.¹⁰⁵ However, as far as Section 106(2) of the U.S. Copyright Act was

⁹⁷ M.D. Murray: 23.

⁹⁸ J.M. Nolan: 557.

⁹⁹ M.W.S Wong: 1122.

¹⁰⁰ T.F. Cotter: 729.

¹⁰¹ T.F. Cotter: 729.

¹⁰² 17 U.S.C. § 101 (2000).

¹⁰³ *Warner Bros. Entertainment, Inc. v RDR Books* 575 F. Supp 2d 513 (S.D.N.Y. 2008).

¹⁰⁴ M.W.S Wong: 1124. In at least some contexts the right to prepare derivative works appears to cover some unauthorised uses that the reproduction does not reach, and a work's status as either a derivative work or a reproduction can have remedial or other significance. T.F. Cotter: 730.

¹⁰⁵ M.W.S Wong: 1124.

concerned the court stated that, while the companion encyclopaedia contained a substantial amount of the plaintiff's material, the acts of "condensing, synthesising and organising" the material did not merely recast the plaintiff's narrative in a different medium, but gave the plaintiff's copyrighted material another purpose – to guide the reader through the "voluminous" fictional world created Rowling.¹⁰⁶

In all of the cases where transformative use was found to be based on the defendant's transformative purpose the ultimate conclusion was that the use was, or was likely to be, fair.¹⁰⁷ In *Blanch v. Koons*,¹⁰⁸ court found that the purpose of Koon's use - to force a viewer to consider how fashion objects affect people - was sufficiently distinct (i.e., transformative) from Blanch's purpose which was to create a provocative fashion photograph for a commercial advertisement.¹⁰⁹ The *Blanch* case illustrates that even when a secondary user does not rework the expressive content of a copyrighted work the use may still be considered transformative if the court determines that the purpose of the use was distinct from the purpose of how the copyrighted work was originally used.¹¹⁰ In contrast, all of the opinions in which the court determined that the defendant did not have a transformative purpose for the use, or in which the court's determination about transformative purpose was uncertain, the court decided that transformation did not weigh in favour of fair use, irrespective of whether the defendant did or did not alter the content of the plaintiff's work.¹¹¹ In these cases the courts ultimate conclusion was that the use was not, or would not likely, be fair.¹¹² Accordingly, despite the copying that defendant resorted to in order to create the work, the court in *RDR Books* held that the encyclopaedia

¹⁰⁶ M.W.S Wong: 1124.

¹⁰⁷ R. Anthony Reese: 119.

¹⁰⁸ *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006).The issue before the Second Circuit was whether Koon's use of Blanch's photograph in his artwork was fair use. J.M. Nolan: 553.

¹⁰⁹ J.M. Nolan: 553.

¹¹⁰ J.M. Nolan: 553. In *Bill Graham Archives v. Dorling Kindersley Ltd.* 448 F.3d 605 (2d Cir. 2006) the Second Circuit again considered whether a secondary use might be transformative without materially changing the original work. J.M. Nolan: 553. Dorling Kindersley Ltd. ("DK") displayed several of the posters in reduced form ("thumbnail images") and arranged them in chronological order in a biography of the *Grateful Dead*. J.M. Nolan: 553. The court concluded that DK's transformative purpose was distinct from the original purpose in which the images were used. J.M. Nolan: 553. The court went further by finding DK's use minimised the expressive value of the posters because the images in the book were reproduced in reduced size and accompanied by a referencing commentary "to create a collage of text and images on each page of the book.J.M. Nolan: 553.

¹¹¹ R. Anthony Reese: 119-120.

¹¹² R. Anthony Reese: 119-120.

presented the reproduction in a manner that it recast the work in a new medium and put in new format that did not infringe the author's derivative work right.¹¹³

The court could not, however, disregard the fact that the construction of the encyclopaedia relied heavily on the works of JK Rowling, and that without the content provided for by the books the derivative work could not stand on its own originality.¹¹⁴ Accordingly, the court contended that something else is required by Section 106(2) of the U.S. Copyright Act in order to maintain a real and substantive distinction between it and Section 106(1) of the U.S. Copyright Act.¹¹⁵ Judge Patterson stated that: "A work is not derivative... simply because it is "based upon" the pre-existing works. If that were the standard, then parodies and book reviews would fall under the definition, and certainly "ownership" of copyright does not confer a legal right to control public evaluation of copyrighted works."¹¹⁶

With respect to the actual books upon which the encyclopaedia was based, Judge Patterson ruled that the defendants' transformative purpose lay in the intention of preparing a reference work rather than the aesthetic and entertainment purposes for which the plaintiff author originally wrote her novels.¹¹⁷ However, with respect to the plaintiff author's companion volumes that were also used to create the defendants work, Judge Patterson found the purpose of the encyclopaedia in this instance was much less transformative given the fact that the plaintiff's companion volumes also had a reference function.¹¹⁸ Judge Patterson ruled that the defendant's work added a "productive purpose to the original material by synthesising it within a complete reference guide" and was therefore slightly transformative because it served a "productive purpose for a different purpose than the original works."¹¹⁹ Moreover, the court was of the opinion that the defendants' encyclopaedia did not merely

¹¹³ M.W.S Wong: 1124. Judge Patterson ruled that in condensing, rearranging and synthesising the many voluminous elements of the Harry Potter books into a useful reference guide the defendants' encyclopaedia no longer "represent [ed] the original work of authorship and therefore was not an infringing derivative work."¹¹³M.W.S Wong: 1125. Under Judge Posner's approach, derivative works recast, transforms or adapts the original "into another medium, mode, language or revised version while still representing the "original work of authorship." T.F. Cotter: 712.

¹¹⁴ M.W.S Wong: 1124.

¹¹⁵ M.W.S Wong: 1124-1125.

¹¹⁶ T.F. Cotter: 711.

¹¹⁷ M.W.S Wong: 1126.

¹¹⁸ M.W.S Wong: 1126.

¹¹⁹ T.F. Cotter: 711.

repackage the original material, but that the defendants supplemented the work with occasional insights and new meaning to the plaintiff's work.¹²⁰ However, the court went on to note that the transformative nature of the encyclopaedia was not consistent because it ultimately failed to serve its purpose – to provide a complete referencing system.¹²¹ Ultimately, the lack of consistency led to the court's ruling that the overall impression of the encyclopaedia did not constitute transformative fair use of the plaintiff's work.¹²² Accordingly, a use that changes the content or context of the work so as to bring about a purpose or function of the original work prods toward a finding of transformation and a finding of fair use, but a use that makes changes in content or context but still predominantly exploits the creative virtues of the original work in a new mode or medium cannot be said to be fair.¹²³

Wong submits that Judge Patterson's thorough and thoughtful opinion confirms that transformative use does not serve the same purpose in the inquiry to determine transformative fair use and transformative derivative works in the eyes of the U.S. judiciary.¹²⁴ Accordingly, the mere fact that an infringing derivative work is found to be transformatively fair does not automatically render the derivative work eligible for copyright protection.¹²⁵ Secondly, the transformative use required for fair use seems largely focused on the defendant's purpose in using the plaintiff's work, an analysis that is not an entirely surprising fact given the general weight of authority on this point in *Harper v Row*.¹²⁶

Within the specific context of the *RDR Book* case it would appear that Judge Patterson placed substantial emphasis on the amount of material that was copied by the defendant to the extent that – despite the acknowledged public interest in encouraging the creation of reference guides to works of literature – the use (which was likened to “plunder”) could not be considered fair, at least not “without paying the customary price.”¹²⁷ It thus seems that courts are very likely to frown on

¹²⁰ M.W.S Wong: 1127.

¹²¹ M.W.S Wong: 1127.

¹²² M.W.S Wong: 1127.

¹²³ M.D. Murray: 22.

¹²⁴ M.W.S Wong: 1127.

¹²⁵ T.F. Cotter: 712.

¹²⁶ H. Sun: 290. M.W.S Wong: 1127. G. D'Agostino: 348.

¹²⁷ M.W.S Wong: 1129.

commercial uses that are not highly transformative, thus establishing the premise that some works are more deserving of protection than others due to their relation to the goals of copyright law.¹²⁸ Accordingly, transformation of a work cannot be tied to only one factor because an appropriately transformative use of an original work would tip the scales in favour of fair use when all the fair use factors contained in Section 107 are considered together.¹²⁹ This approach would serve well in the context of user-derived content because it would aid the distinction between works that simply amounts to reproduction and works whose purpose and result serves to transform the original work beyond its original intention.

Exactly how far the right to prepare derivative works extends beyond the reproduction right remains something of a mystery, and an exact distinction between the two will remain elusive for the time being. However, with respect to transformative use in respect to user-derived content, both for the purpose of the use and the nature of the resulting changes should be important aspects of the inquiry.¹³⁰ As Heymann explains: “[T]he relevant question should be the degree of transformativeness - the amount of interpretive distance that the defendant’s use of the plaintiff’s work creates.¹³¹ If that distance is significant enough to create a distinct and separate discursive community around the second work, the defendant’s use is more likely to be transformative (and, perhaps, fair).”¹³² The focus is therefore not on the author’s intent but on the reader’s reaction.¹³³

The derivative works right and transformative use doctrine is capable of reasonable interpretations that would reduce over-breadth and vagueness in the scope of copyright protection.¹³⁴ For transformative use to have meaning that avoids interpretations that allow everything to be transformative the inquiry must go

¹²⁸ S.M. Reilly: 459. M.W.S Wong: 1129.

¹²⁹ M.D. Murray: 16. Parody, as it turned out in the Court’s analysis, is a near perfect example of a transformative use with an overwhelmingly positive character that produces a favourable rating on all four of the fair use factors. M.D. Murray: 16.

¹³⁰ M.W.S Wong: 1138.

¹³¹ J.M. Nolan: 562.

¹³² J.M. Nolan: 562.

¹³³ J.M. Nolan: 562.

¹³⁴ C. Bohannon: 696.

further.¹³⁵The adoption of a comprehensive standard for the recognition of transformative use in relation to infringement and copyright eligibility may encourage a more inclusive approach toward UCC and other transformative, socially valuable derivative works.¹³⁶ The development of such a framework requires that courts ensure that the violation of the derivative works right requires not only that the allegedly infringing work be based upon the original work but also that it substantially incorporates the creative expression from that work.¹³⁷

5.4 TRANSFORMATIVE DERIVATIVE WORKS

Given the nature of the derivative work right user-derived content constitutes an infringement of both the reproduction right and the adaptation right of the copyright holder.¹³⁸ U.S. copyright law has consistently considered “transformative use” as part of their fair use enquiry, but it seems at times the courts use the term “transformative use” as a conclusion to justify a result instead of using it as an analytical tool to lead to that result.¹³⁹ Moreover, under the existing U.S. legislative framework a consideration of transformative use is mandated in any determination as to whether a copyrightable derivative work has been created, whereas within a fair use analysis transformative use is not necessarily present in every case.¹⁴⁰

Because U.S. copyright law considers transformative use as relevant both to fair use and the copyright eligibility of derivative works the inevitable question is whether transformative use means the same thing in both these analyses.¹⁴¹ Cotter submits that U.S. courts have stretched the meaning of the word “transformative” to permit uses that promise widespread social benefits, but that is difficult to characterise as transformative in any conventional sense of the term.¹⁴² It is thus submitted that if a broader approach to transformative use is adopted for fair use then it is arguable that a great deal of UCC found to be transformatively fair and it would then also qualify

¹³⁵ J.M. Nolan: 562.

¹³⁶ M.W.S Wong: 1134.

¹³⁷ C. Bohannan: 696.

¹³⁸ D. Gervais: 869.

¹³⁹ T.F. Cotter: M.W.S Wong: 1131.

¹⁴⁰ M.W.S Wong: 1131.

¹⁴¹ M.W.S Wong: 1118.

¹⁴² T.F. Cotter: 704.

for copyright protection if the copyright requirements present during the fair use analysis.¹⁴³

However, the fact that the evolution of fair use in the U.S. relies heavily on the transformative nature of the use raises the question of whether transformative use equals authorship in the derivative works context.¹⁴⁴ The scope of transformative use is subject to much indeterminacy and uncertainty, and reliance thereon could prejudice not just fair use prospects of socially valuable UCC, but it may also complicate its status as copyrightable work.¹⁴⁵ Under the derivative works right in the U.S. an innocent infringer is prevented from asserting copyright in her own creation.¹⁴⁶ However, Section 103 of the U.S. Copyright Act provides that derivative works may be copyrightable, but the provision explicitly provides that any copyright in the derivative work does not extend to any part of it that amounts to the “unlawful” use of the underlying work, such that the copyright in the derivative work subsists only in those portions that represent the deriver’s own contributions.¹⁴⁷

Yet, when one considers the nature of the cloud and the progression in the technologies that allow users to remix content the actual innovation that takes place when user-derived content is formed comes into question. Can cutting and pasting clips to construct a new a work really be considered innovative? How does the originality requirement apply in the context of user-derived content? More importantly, how will the essentials for copyright recognition “fit” into the transformative use inquiry to determine whether a transformative derivative work is copyrightable in the cloud?

¹⁴³ M.W.S Wong: 1120.

¹⁴⁴ M.W.S Wong: 1105.

¹⁴⁵ M.W.S Wong: 1105.

¹⁴⁶ J.D. Lipton: 782.

¹⁴⁷ M.W.S Wong: 1113. Section 103 of the U.S. Copyright Act provides that:

“(a)The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.”

The creation of user-derived content needs to be addressed in two scenarios; the first relating to the need to obtain permission from rights-holders in minimally creative works so as to avoid infringement issues, and second relating to the question of whether and how their own works can attract copyright protection given that they are based on works already subject to copyright protection.¹⁴⁸ If the author derived his or her work from pre-existing works, and failed to attribute the formulation of such work to the original creators thereof, then he or she will be liable for copyright infringement unless it can be determined to be fair use – transformative fair use. If the work is found to be non-infringing then the author of the derived work may be acknowledged as such and the work will qualify for copyright protection if it meets the requirements for copyright protection. However, the fact that a derivative work is found not to be infringing does not automatically qualify the work for copyright recognition, it merely establishes that there are no legal impediments that hinders the recognition of the work if it meets the copyright requirements.

In distinguishing between a transformative fair use and a transformative derivative work the court in *Castle Rock*¹⁴⁹ stated that while derivative works may “transform an original work into a new mode of presentation, such works – unlike works for fair use – take expression for purposes that are not transformative ... [I]f the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for the matter, does not infringe the copyright in the original work.”¹⁵⁰ In summary, the court in *Castle Rock* provided that: (1) transformation of content is not indicative of a transformative purpose and thus fair use, although a more than minimal content transformation can indicate a transformation purpose; and (2) actual transformation of the content rather than the purpose with which the transformation is effected is the key to producing a derivative work, provided that the transformation results in a “new mode of presentation,” even if it is for a non-transformative purpose.¹⁵¹ However, the court failed to clarify whether the transformation required to circumvent the alleged infringement involved in the creation of a derivative work is

¹⁴⁸ M.W.S Wong: 1088.

¹⁴⁹ *Castle Rock Entm't Inc. v Carol Publ'g Group Inc.* 150 F.3d 145 & n.9 (2d Cir.1998).

¹⁵⁰ 150 F.3d 145 & n.9 (2d Cir.1998).

¹⁵¹ M.W.S Wong: 1121.

the same transformation required for a copyright eligible derivative work.¹⁵² There may thus be a greater need to establish a balance between those who create literary and artistic works and those who use the same work to create new ones.¹⁵³

5.4.1 Authorship

Copyright law protects “original works of authorship” that are fixed in a tangible form of expression.¹⁵⁴ The heart and essence of the protection afforded to authors in the author’s rights systems is the author as a human being.¹⁵⁵ “[C]opyright is intended to increase and not to impede the harvest of knowledge.... The rights conferred by copyright are designed to assure contribution to the store of knowledge a fair return for their labours.”¹⁵⁶ Copyright embodies the recognition that creative intellectual activity is vital to the welfare of society.¹⁵⁷ Copyright is a pragmatic measure by which society confers monopoly-exploitation benefits on authors and artists (as it does for inventors) for a limited duration in order to obtain the intellectual and practical enrichment that stems from creative endeavours.¹⁵⁸ The author or creator of work is thus contended to be the cornerstone of copyright law.¹⁵⁹

The Berne Convention leaves it up to the member States to determine the issue of “authorship”.¹⁶⁰ This means that “there are different national interpretations as to what is required for “authorship” and as to who is an “author”.¹⁶¹ The analysis of authorship in UCC begins with the very same inquiry as establishing authorship in any other context – whether, and in which manner national or international copyright laws define authorship.¹⁶² Few judicial decisions address what authorship means,

¹⁵² M.W.S Wong: 1121.

¹⁵³ A. Ng: 872.

¹⁵⁴ J.M. Nolan: 548.

¹⁵⁵ A. Rahmatian: 15.

¹⁵⁶ P.N. Leval: 2.

¹⁵⁷ J. Litman: 1881. P.N. Leval: 3.

¹⁵⁸ P.N. Leval: 3. Establishing a limited monopoly for authors over their work by copyright law serves to promote its constitutional objective of enhancing the public welfare while simultaneously allowing authors “to reap the rewards of their endeavours.” J.M. Nolan: 548.

¹⁵⁹ O.H. Dean: 22.

¹⁶⁰ J.C. Ginsburg: 8.

¹⁶¹ J.C. Ginsburg: 8. The identification of the author can in certain circumstances be very closely interwoven with the recognition of the moment of the coming into being of the work. O.H. Dean: 31.

¹⁶² J.C. Ginsburg: 8.

and even fewer jurisdictions define authorship, but some national laws set forth at least some indications of the kinds of activities that establishes a person as an “author”.¹⁶³ In the U.K. CDPA declares that: “Author, in relation to a work, means the person who creates it.”¹⁶⁴

Narratives of authorship are most perceptible in copyright cases where the author is covertly framed as an autonomous actor described as a genius, a person who has made a unique and individual contribution or as a person who shows originality, capacity or skill beyond what is merely ordinary thus confirming the decision to grant an intellectual property right to such a person.¹⁶⁵ However, the legislation does not define creation, and therefore the definition for an author does not provide us with much direction on the matter. The very same goes for the provisions contained in the South African Copyright Act: Section 1 only defines an “author” in relation to the specific works that qualify for copyright protection in terms of the act.¹⁶⁶

There thus exists a presumption that the person whose name appears on copies of the work as published or created is presumed, unless the contrary is proven, to be the author of the work, or one of such authors, provided the name in question was his true name or the name by which he is commonly known.¹⁶⁷ Professor Jane Ginsburg has deftly summed up the various features that have historically been valued as authorship by copyright law: (1) mind over muscle, (2) mind over machine, (3) originality (although some countries “sweat of the brow” is considered authorship regardless of creativity), (4) the intention to be an author, (5) the absence of a requirement that authorship be consciously intended (although intent can help sort out equities between competing authorial claims), and occasionally (6) economic

¹⁶³ J.C. Ginsburg: 8.

¹⁶⁴ Copyright Designs and Patent Act of 1998 Section 9(1).

¹⁶⁵ O.B. Arewa: 513

¹⁶⁶ See *Biotech Laboratories (Pty) Ltd v Beecham Group Ltd* [2002] 3 All SA 652 (SCA) where it was held that the ordinary and popular meaning of the term “author” refers to the maker or creator of the work and only finds application in the case of literary, musical and artistic works: all other persons are referred to with relation to their financial interest in the work.

¹⁶⁷ O.H. Dean: 79.

control.¹⁶⁸ Thus in essence, authorship is copyright law centres on human subjective judgement and personal autonomy, characteristics that undeniably exist in UCC.¹⁶⁹

Professor Ginsburg asserts that much of the copyright law, irrespective of the jurisdiction, only makes sense once the centrality of the author – the human creator of the work – is recognised.¹⁷⁰ Moreover, it is important to note that any intellectual creativity is in part derivative.¹⁷¹ “There is no such thing as an original thought or invention. Each advance stands on building blocks fashioned by prior thinkers.”¹⁷² Secondly, all important areas of intellectual activity such as science, mathematics, philosophy etc. are overtly referential.¹⁷³ However, rights in cloud computing serve to sustain and not encourage authorship.¹⁷⁴

Copyright law continues to grapple with the persistent presence of that elusive creature the “author” who, despite a long-lived existence, remains without a definition or true role in copyright policy.¹⁷⁵ Judicial language concerning the nature of creational knowledge resources is heavily tinged with narratives of authorship in a manner that is not always entirely consistent with the utilitarian justifications that support intellectual property frameworks.¹⁷⁶ Traditional notions of authorship presented problems in the realm of commercially produced consumer goods, and therefore modern conceptions of authorship have been transformed and subsequently used to secure protection for “modestly aesthetic productions” that have commercial value.¹⁷⁷

Accordingly, copyright law has evolved to embrace the notion of originality as the threshold for copyright protection.¹⁷⁸ However, a substantive issue that directly

¹⁶⁸ J.C. Ginsburg: 5. M.W.S Wong: 1097. The under- or over-inclusiveness of the subjective judgement criterion depends on which of these characteristics national laws credit. J.C. Ginsburg: 5.

¹⁶⁹ M.W.S Wong: 1098.

¹⁷⁰ J.C. Ginsburg: 2.

¹⁷¹ P.N. Leval: 3.

¹⁷² P.N. Leval: 3.

¹⁷³ P.N. Leval: 3. Philosophy, criticism, history and even the natural sciences require the continuous re-examination for yesterday's theses. P.N. Leval: 3.

¹⁷⁴ A. Ng: 866.

¹⁷⁵ O.B. Arewa: 513. M.W.S Wong: 1083

¹⁷⁶ O.B. Arewa: 512.

¹⁷⁷ O.B. Arewa: 514.

¹⁷⁸ M.W.S Wong: 1079.

affects question of transformative use, and therefore the copyright eligibility of transformative derivative works, is the notion of authorship.¹⁷⁹ In the cloud, authors are at “the heart of copyright”, but they are also users since their works build upon the ideas and works of others.¹⁸⁰ References to great artists underscore conceptions of Romantic authorship because it brings readers’ attention to the inspired nature of great art which is seen as a product of genius - the type that intellectual property laws are designed to protect.¹⁸¹ It is therefore arguable that copyright protection, to some extent, ought to extend also to users who in certain circumstances may themselves be considered authors.¹⁸²

Given the fact that copyright law prohibits a person from copying someone else’s work, but not necessarily from drawing from it, copyright law “appreciate[s] that the author is herself a user, and that therefore the rights of users are not so much exceptions to the author’s rights as much as themselves central aspects of copyright law inextricably embedded in authorship.¹⁸³ Authorship in the digital world is characterised by a culture that is fervent to explore the manipulation potential of the technology available to them.¹⁸⁴ At a fraction of the original production costs users of original works may alter and manipulate portions of an original work they choose.¹⁸⁵ Accordingly, it is submitted that authorship in the digital environment is characterised by significantly different qualities than in an analogue form.¹⁸⁶

As the law shifts from authors and publishers to users, and as the orthodox understanding of authorship changes the way people think about property rights in creative works, the purposes authors and users serve will have to adapt in a similar direction.¹⁸⁷ Authorship is itself a mode of use.¹⁸⁸ As such the concept of originality serves to distinguish between permissible and impermissible copying, while the

¹⁷⁹ M.W.S Wong: 1079.

¹⁸⁰ M.W.S Wong: 1097.

¹⁸¹ O.B. Arewa: 514.

¹⁸² M.W.S Wong: 1097.

¹⁸³ M.W.S Wong: 1096.

¹⁸⁴ A. Ng: 864.

¹⁸⁵ A. Ng: 865.

¹⁸⁶ A. Ng: 865.

¹⁸⁷ A. Ng: 860.

¹⁸⁸ M.W.S Wong: 1096.

notion of fair dealing is the means by which a defendant shows that her work is truly his or her own, and not merely a copy of the plaintiff's.¹⁸⁹

The creation of original content by using pre-existing work is nothing new. In fact, as Professor Gervais points out, many Walt Disney productions are based on medieval fairy tales and countless screenplays are adaptations of novels.¹⁹⁰ Reuse is made possible because copyright does not protect the idea on which a work is based; it only protects the physical materialisation of the work. However, in the case of UCC, reuse quite literally amounts using the materialised work or parts thereof to create new work. It is such "reuse" of copyrighted content that creates copyright issues in cloud computing.

It is submitted that technological development and social change is not the root cause of the problems encountered in the copyright system.¹⁹¹ The social, economic and political issues that arise from the changing environment as technology advances, new markets emerge and Internet usage grows may not be the result of expanding rights in literary and artistic works; instead it ought to be perceived as a misunderstanding of the nature of copyright law and the ideals it strives to achieve.¹⁹² "Copyright was not meant to exclude use by individual end-users, and trying to make it fit that job description is unlikely to work, and, from a historical point of view, denatures the underlying policy" which is "to promote progress in the arts and sciences and to spread culture."¹⁹³ Users ought to be able to engage in technology and participate in the creative realm the web provides.¹⁹⁴

Copyright law, for the purpose of cloud application, ought not to be interested in recognising commercial interests in content and creative works, protecting infrastructure that carry those works or enclosing information and knowledge in the narrow sense.¹⁹⁵ The law ought to more interested in ensuring that certain conditions exist to encourage authorship, one of which is the author's individual rights to control

¹⁸⁹ M.W.S Wong: 1096.

¹⁹⁰ D. Gervais: 844.

¹⁹¹ A. Ng: 888.

¹⁹² A. Ng: 888.

¹⁹³ T.M. Woods: 1149.

¹⁹⁴ T.M. Woods: 1149.

¹⁹⁵ A. Ng: 882.

how the public uses his work to preserve authorial integrity.¹⁹⁶ It is submitted that that copyright law for the purpose of cloud computing and UCC must be founded on the premise that the relationship the author has with his or her work must be maintained, and the integrity of the work itself be preserved. It is therefore possible that the moral rights¹⁹⁷ attached to copyrighted work provide a foundation from which to instigate the development a copyright law to render it more applicable to the cloud and the UCC created therein. The contemplation of a copyright regime for cloud application may need to put greater emphasis on the paternity¹⁹⁸ and integrity¹⁹⁹ rights than proprietary rights attached to the copyrighted work involved. The balance that the copyright law will seek to achieve will thus no longer be between incentives and access, but between the integrity of the creation and the responsibility in use of literary and artistic works.²⁰⁰

5.4.2 Creative originality

From a utilitarian perspective, innovation is the superior objective of the copyright system.²⁰¹ Narratives of authorship are founded on the premise that a particular creator deserves ownership rights with respect to a particular configuration of knowledge by virtue of that creator's authorship.²⁰² The economic theory views creators as being motivated primarily by money: people are more likely to create when they can monetise their creation.²⁰³ Therefore narratives of authorship emphasize the genius, contribution, or labour involved in an author's creation of a work.²⁰⁴

The proposition is that creativity is the foundation upon which copyright is founded while the "originality" of the work is of the substantive condition for the subsistence of

¹⁹⁶ A. Ng: 882.

¹⁹⁷ An author's moral rights with regard to his or her work focus on the relationship between the author and the work. T. Pistorius: 191. Moral rights only arise if the work is copyrightable, and it entail the both paternity and integrity rights associated with the work. T. Pistorius: 191.

¹⁹⁸ The right to be identified as the author the workT. Pistorius: 191.

¹⁹⁹ The right to object to derogatory treatment, distortion, mutilation or any other modification that may prejudice his or her honour as the author of the work. T. Pistorius: 191.

²⁰⁰ A. Ng: 872.

²⁰¹ C. Geiger: 525.

²⁰² O.B. Arewa: 512.

²⁰³ D.A. Simon: 313.

²⁰⁴ O.B. Arewa: 512.

copyright in a creative work.²⁰⁵ Creativity is the undisputed “what” of copyright, and thus the scope of copyright has always been associated with an author’s “expression” while the concept of “originality” refers to the individualistic, romanticised underlining of the relationship between and author and his or her work.²⁰⁶ In order for a work to acquire copyright protection it must “originate from the author.”²⁰⁷ The manner in which copyright law uses the concept of a Romantic author to simplify the originality enquiry leads copyright law to on the economic incentive and not on the process.²⁰⁸ It is thus submitted that the “originality” requirement for copyright protection is the “*sine qua non*” of copyright.²⁰⁹ A proper definition for the originality requirement of “own intellectual creation” has not yet been formulated; only approximations of the term have thus far been attempted.²¹⁰ Under the orthodox interpretation of originality for purposes of copyright law, broadly speaking, there are four different families of standards which, ranging from very restrictive to very generous.²¹¹

The idea of the work having originated entirely from the author is, however, problematic when one contemplates the nature of derivative works. For user-derived content originality is an issue because it needs to be determined which standard will apply in determining the copyright eligibility of the work given that they are based on pre-existing works already protected by copyright law.²¹² Moreover, the requirement for “creative effort” in the working definition for UCC implies that a certain amount of creative effort was put into creating the work or adapting existing works to construct

²⁰⁵ M.J. Madison: 819.

²⁰⁶ M.J. Madison: 819. M.W.S. Wong: 1085.

²⁰⁷ Alice J. Won: 399. I. Hoare: 3.

²⁰⁸ D.A. Simon: 322. O.B. Arewa: 512.

²⁰⁹ O.B. Arewa: 484. D.S. Ciolino, A.R. Christovich and E.A. Donelon: 393. K. Hariani and A. Hariani: 492.

²¹⁰ A. Rahmatian: 22. The “originality” requirement is reflected in legislation across borders, and is therefore understood according to judicial interpretation of the concept. K. Hariani and A. Hariani: 497. The traditional English approach has been that all independent expression derived through “skill and labor” is protected by copyright: this approach has been followed in most common law countries. K. Hariani and A. Hariani: 497. The civil law system, on the other hand, has traditionally accepted that to be “original” a work must reflect the “intellectual personality” of the author (i.e., it must involve “intellectual creation”). K. Hariani and A. Hariani: 497.

²¹¹ E.F. Judge and D. Gervais: 377. The European Union’s (EU) personal intellectual creation, the U.S.’s *Feist* minimal degree of creativity, Canada’s *CCH* standard of non-mechanical and non-trivial exercise of skill and judgment and the United Kingdom’s skill and labour standard. E.F. Judge and D. Gervais: 377.

²¹² M.W.S Wong: 1090.

a new one i.e. users must add their own value to the work.²¹³ However, the minimum amount of creative effort is hard to define and will depend on the context of the work alleged to amount to UCC, especially user-derived content.²¹⁴

Traditionally, for the purpose of copyright recognition, the requirement of originality does not necessitate any uniqueness or inventiveness, but it does require the work to be a product of the author's own work and accomplishments.²¹⁵ Until the year 2009, the unanimous opinion of the courts and policy-makers was that copyright in the U.K. deemed a work to be "original" if it was the result of the author's own skill, labour, judgement and effort.²¹⁶ Traditional narratives of authorship have occurred in the midst of judicial language where courts discuss the minimum level of creativity required to qualify as an author.²¹⁷ Yet, while the subject matter for copyright is broadly defined in terms of an author's ingenuity, no true creativity is required to qualify as work that is eligible for copyright.²¹⁸ Accordingly, a work may be considered to be original despite closely resembling other work, and the resemblance is not as a result of direct copying, and would subsequently qualify for copyright protection.

The purpose of copyright law is to reward those who produce new expressions of ideas; this does not mean that copyright should be granted in all circumstances where labour has been involved in the creation of an expression.²¹⁹ In the U.S. the Supreme Court has held that "originality" requirement mandates that a work must be "original" in that it is a product of independent creation, and it must be "creative" in

²¹³ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

²¹⁴ If a user uploads his/her photographs, expresses his/her thoughts in a blog, or the creation of a new music video could be considered UCC. Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

²¹⁵ M. Kellerman: 31.

²¹⁶ I. Hoare: 4. It is generally held that the U.K. utilises two different levels or qualities of originality, one rule for originality for the traditional work under copyright law, i.e. literary, musical, dramatic and artistic works, and the other originality rule for special types of works, i.e. computer programs and databases. A. Rahmatian: 5.

²¹⁷ M.J. Madison: 830.

²¹⁸ O.B. Arewa: 514.

²¹⁹ M.J. Madison: 830.

²²⁰ K. Hariani and A. Hariani: 509-510.

that it reflects a “modicum” or “spark” of “creativity” in order to be copyrightable.²²⁰ However, determining whether a work is of “independent origin” is a deceptively simple task because the work is not required to be novel, and there is a general lack of consensus among U.S. courts as to the specific standard of creativity that will be required for derivative transformative works as evidenced in the well-known cases of *Alfred Bell & Co v. Catalda Fine Arts, Inc.*,²²¹ and *Gracen v Bradford Exchange*.²²² Accordingly, only an expression that is creative is the appropriate subject matter for copyright protection.²²³

South African law’s originality enquiry mimics the originality approach traditionally endorsed under English law.²²⁴ In the case of *Haupt*²²⁵ the court explained the provision as follows: “if a work is eligible for copyright, an improvement or refinement of that work would similarly be eligible for copyright, even if the improved work involved an infringement of copyright in the original work, if it satisfies the requirement of originality the alteration to the original work must be substantial.”²²⁶ Accordingly, the test for originality under South African law is as follows: “Save where specifically provided for otherwise, a work is considered to be original if it has not been copied from an existing source and its production required a substantial (or not trivial) degree of skill, judgement or labour.”²²⁷ Moreover, creativity is not considered as a requirement for originality under South African law.²²⁸

It is evident that South Africa’s originality is coherent with the traditional English law “sweat of the brow” approach.²²⁹ The Supreme Court of Appeal in the matter of

²²¹ K.L. McDaniel and J. Juo: 168. D.S. Ciolino, A.R. Christovich and E.A. Donelon: 393. E.F. Judge and D. Gervais: 376.

²²² *Alfred Bell & Co v. Catalda Fine Arts, Inc.* 191 F.2d 99 (2d Cir. 1951).
Gracen v Bradford Exchange 698 F.2d 300 (7th Cir. 1983). D.S. Ciolino, A.R. Christovich and E.A. Donelon: 393

²²³ K. Hariani and A. Hariani: 509-510.

²²⁴ E.F. Judge and D. Gervais: 394. G.J. Ebersohn: 166. Section 2(3) of the Copyright Act 98 of 1978 provides that a work “shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.”

²²⁵ *Haupt v/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA).

²²⁶ E.F. Judge and D. Gervais: 394. T. Pistorius: 162.

²²⁷ T. Pistorius: 162. Also see also *Appelton v Harnischfeger Corporation* 1995 (2) SA 247 (A).

²²⁸ T. Pistorius: 162.

²²⁹ The “sweat of the brow” provides that if a work is created through the effort of an individual, irrespective of the fact that the work contains only statement of facts or that there was no creative input by author, copyright can be granted to the work. K. Hariani and A. Hariani: 498.

Haupt rejected *Feist's* standard of minimal creativity and applied U.K.'s substantial skill, judgment and labour standard.²³⁰ In its current formulation, the test for originality under South African law does not provide any adequate insight to determining the "originality" of user-derived content, and current provisions to determine originality under South African law fail to encompass UCC for copyright application. Furthermore, the South African originality test seems to disregard the presence of copyright infringement generally involved in creating derivative works to the extent that it turns a blind eye to the invalidity of the work's origin.

The low standard of originality is submitted to tip the balance in favour of the author/creator at the expense of a robust public domain to foster future creative innovation.²³¹ In effect, the application of a low standard of originality to a work that is based on a pre-existing copyrighted work may, ironically run contrary to the aims of semiotic democracy.²³² In light of the positive social outcomes and creativity that UCC is supposed to facilitate, copyright doctrines and policies that obstruct the incentive to create should be avoided.²³³ The irony lies in the fact that the freedom and expressiveness that define UCC would be rendered culturally and socially inept if subjected to such a loose standard of originality, and may accordingly restrict any future re-working, borrowing or reuse of those works.²³⁴ This may reflect an institutional concern about the creation of improper monopolies on commonplace expressions that would curtail other creative works.²³⁵ Accordingly, the originality requirement for derivative works may need to be expanded, or at least clarified, with respect to the factors that a court will consider in determining whether such works are copyrightable in their own right.²³⁶ The question that thus arises is how the insufficiency of South Africa's "originality" standard ought to be addressed for the purpose of determining the copyright eligibility of derivative works, or adaptations as referred to in South African law, in the cloud?

²³⁰ E.F. Judge and D. Gervais: 397.

²³¹ G. D'Agostino: 327.

²³² M.W.S Wong: 1091.

²³³ M.W.S Wong: 1091.

²³⁴ M.W.S Wong: 1091.

²³⁵ K.L. McDaniel and J. Juo: 169.

²³⁶ M.W.S Wong: 1092

The relevant condition for the copyright protection of a derivative work is that it must be a product of material change when compared with the pre-existing work.²³⁷ It is accepted that even a “relatively small alteration or addition qualitatively” may, if it is sufficiently material to the creation of the work, confer originality on a work that stems from pre-existing works.²³⁸ However, there seems to arise some discrepancy between the “sufficient personal labour” necessitated by the originality requirement for copyright and the ease with which a cloud user can cut and paste clips and pieces of virtual data to produce a new work. Accordingly, it is asserted that the traditional criteria for originality alone does not confer originality upon derived works: “there must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work.”²³⁹ While the *de minimus* rule exists to address this question, the *de minimus* standard is traditionally lower in the U.K. than in the U.S because the U.S. originality prerequisite necessitates a certain minimal degree of creativity.²⁴⁰

It has been suggested that one way in which to approach derivative works for the contemplation of copyright protection is to realise that nothing in the world is “truly” original because all creativity ultimately draws from already existing works.²⁴¹ As Leval put it “all intellectual creative activity is in part derivative.”²⁴² Before any creator contributes to culture, he or she takes from that culture, and that is a consideration to be factored into the equation when seeking to balance the right of creators and consumers.²⁴³

“[T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from The foam of the sea. Composers recombine sounds that they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other

²³⁷ A. Rahmatian: 13.

²³⁸ K. Hariani and A. Hariani: 497. A. Rahmatian: 13.

²³⁹ A. Rahmatian: 13.

²⁴⁰ K. Hariani and A. Hariani: 499. A. Rahmatian: 14.

²⁴¹ I. Hoare: 4.

²⁴² Australian Copyright and Fair use – Submissions on Green Bill <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CJwBEBYwCQ&url=http%3A%2F%2Fwww.copyright.org.au%2Fadmin%2Fcms-acc1%2F_images%2F1927278782521fdf96c8c6d.pdf&ei=Q-KiUrfdG9KM7Aa4miHoCA&usq=AFOjCNHnNOvDXs60AB6J0qMJEsjmXWMBhg>. Retrieved 7 December 2013: 38.

²⁴³ L.A. Patterson:18.

playwright's characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming and recombining what is already 'out there' in some other form."²⁴⁴

Every creator or author finds his or her inspiration in different things, and draws from the expressions and the interpretation of events they have encountered in a manner distinct to their personality and disposition.²⁴⁵ Creativity is a constrained process because it takes place as a process; creativity builds off the existing experiences and dispositions.²⁴⁶ The creative person does not "invent" ideas; they arrive in the brain through processes.²⁴⁷ Much of the creative process entails borrowing from many different ideas and expressions, but copyright law focuses only on the copyrighted product at issue in any dispute.²⁴⁸ In the case of *University of London Press Ltd v University Tutorial Press Ltd*²⁴⁹ it was stated that: "The term 'original' does not in this connection mean that the work must be the expression of original or inventive thought, and, in the case of 'literary work', with the expression of thought in print or writing, the originality required relates to the expression of thought."²⁵⁰

It must be remembered that regard for creative and original nature of a work is subjected to the subjective analysis of onlookers.²⁵¹ Theoretically, the concept of originality in author's rights countries does not have the manufacturer of intellectual goods or "property" in mind, but the creative artist.²⁵² However, author's rights countries are faced with the fact that most, particularly most commercially valuable, works have no artistic merit.²⁵³ There is no qualitative requisite for the input of the author of a work seeking copyright protection because such qualitative requirements

²⁴⁴ I. Hoare: 4-5.

²⁴⁵ M.D. Murray: D.A. Simon: 322.

²⁴⁶ D.A. Simon: 295.

²⁴⁷ D.A. Simon: 322.

²⁴⁸ O.B. Asewa: 516. D.A. Simon: 323. "Existing narratives of authorship and utilitarian rationales provide an inexact fit for the contextualised reality of many creation processes." O.B. Asewa: 516.

²⁴⁹ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

²⁵⁰ K. Hariani and A. Hariani: 493. I. Hoare: 2.

²⁵¹ I. Hoare: 7.

²⁵² A. Rahmatian: 18.

²⁵³ A. Rahmatian: 18.

are highly subjective.²⁵⁴ “One person’s high art is another person’s pointless doodle.”²⁵⁵ A work that one judge finds lacking in quality may in fact be a work others, the public or experts, may find to be of high quality, and vice versa.²⁵⁶ Accordingly, the originality required by the law is not that of revolutionary ideas, but of the way that the thought is expressed.²⁵⁷ Ultimately, it is only required that the manner in which an expression is brought across to the audience be new.²⁵⁸

However, in the digital environment nearly anything can be creatively original to the extent that it is transformative.²⁵⁹ Therefore, in the cloud the current idea of creativity, however vague it may be, is incapable of performing the institutional and structural functions that scholars believe copyright should perform – distinguishing which types of UCC ought to be protected and encouraged and which types should or need not be.²⁶⁰ A copyrighted work is more likely to succeed against a fair use defence if the work is deemed to be creative, but a work accused of infringement is also more likely to be acquitted as fair use if it is deemed to be “transformative” – if it is creative.

The law’s emphasis on creativity is premised on the idea that creativity is not merely an individual and social good, but the definitive good of its intangible kinds, the highest and best use to which a human mind may be put.²⁶¹ The “high authorship” standard was established in the *Feist*²⁶² case where it was asserted that originality necessitates a modicum of creativity in the selection and arrangement of information in the compilation.²⁶³ It is in the *Feist* case that the U.S. Supreme Court addressed the degree of creativity required to sustain copyright in a compilation of factual material.²⁶⁴ Despite not promulgating a definition or test for determining creativity,

²⁵⁴ K. Hariani and A. Hariani: 496.

²⁵⁵ I. Hoare: 7.

²⁵⁶ K. Hariani and A. Hariani: 496.

²⁵⁷ I. Hoare: 2.

²⁵⁸ I. Hoare: 3.

²⁵⁹ M.J. Madison: 831.

²⁶⁰ M.J. Madison: 831.

²⁶¹ M.J. Madison: 820.

²⁶² *Feist Publications, Inc. v Rural Telephone Service Co Inc.* 499 US 340.

²⁶³ H.B. Abrams: 9. The Supreme Court held that the degree of creativity necessary in order to be entitled to copyright protection is “extremely low” such that “[t]he vast majority of works make the grade quite easily.” K.L. McDaniel and J. Juo: 170. Even a slight amount of original authorship will suffice. K.L. McDaniel and J. Juo: 170.

²⁶⁴ H.B. Abrams: 5.

the court's opinion can be interpreted to mean that the inclusion, exclusion and order of presentation of data will be deemed sufficiently creative if the arrangement reflects some personal reaction to or personal analysis of the data rather than merely fitting facts into obvious, pre-existing formats.²⁶⁵ Accordingly, highly personal choices are not necessary; the selection need only originate from thoughtful evaluation and choice.²⁶⁶

The *Feist* test has subsequently been applied in a number of cases in the U.S.; a work will not be treated as original or receive copyright protection, unless there is some creativity involved in the expression.²⁶⁷ Recent opinions in the cases of *Eckes v Card Prices Update*²⁶⁸ and *Financial Information, Inc. v Moody's Investors Service*²⁶⁹ insisted that the production of a compilation display originality in the "selection, creativity and judgement in choosing" the compiled materials.²⁷⁰ These opinions have rejected the "sweat of the brow" approach, holding that effort alone cannot satisfy the requirement of originality for a compilation.²⁷¹ One of the most important consequences of *Feist* is that it interjected a distinct inquiry concerning creativity into the originality analysis.²⁷²

Subsequent to *Feist* U.S. courts frequently analyse the "intellectual production" and "thought" of an author when making the threshold determination of copyright eligibility.²⁷³ Accordingly, the U.S. standard for originality is somewhat similar to the standard in civil law countries like France and Germany.²⁷⁴ Despite the fact that *Feist* addressed the formulation of compilation works the broader effects of the ruling that creativity ought to be regarded as "making it clear that copyright rewards originality, not effort"²⁷⁵ has important implications for the contemplation of originality in various other copyright contexts. Abrams submits that if courts consistently adhere to the

²⁶⁵ H.B. Abrams: 17. The Supreme Court in *Feist* invoked the U.S. Constitution several times, stating that "originality is the constitutionally mandated prerequisite for copyright protection." P. Samuelson: 2.

²⁶⁶ A. Rahmatian: 14.

²⁶⁷ K. Hariani and A. Hariani: 500.

²⁶⁸ *Eckes v Card Prices Update* 736 F2d 859 (2d Cir 1984).

²⁶⁹ *Financial Information, Inc. v Moody's Investors Service* 808 F2d 204 (2d Cir 1986).

²⁷⁰ H.B. Abrams: 9.

²⁷¹ H.B. Abrams: 9.

²⁷² H.B. Abrams: 14.

²⁷³ D.S. Ciolino, A.R. Christovich and E.A. Donelon: 392.

²⁷⁴ K. Hariani and A. Hariani: 502.

²⁷⁵ K. Hariani and A. Hariani: 500. H.B. Abrams: 41.

standard for originality as established in *Feist*, then it seems likely that the standard for originality in derivative works would focus on what original contribution of sufficient creativity was made by the preparer of the derivative work.²⁷⁶ It is submitted that this higher standard for originality may in fact serve to alleviate the need to apply fair use broadly altogether.²⁷⁷

In the digital world the copyright system ought to be more concerned with sustaining the creative authorship of work that will further the goals of the copyright system because “authorship” and “originality” no longer provides sufficient guidance to evaluate the creative value of UCC.²⁷⁸ Accordingly, for the purpose of determining whether a digital derivative work is eligible for copyright protection, the creativity must be regarded on a continuum because each new work builds to some extent on pre-existing works.²⁷⁹ The purpose of maintaining and enforcing copyright rights in the digital context ought not to be for the sake of encouraging creativity, but to sustain creativity.²⁸⁰ After *Feist*, the originality requirement cannot be satisfied merely in time or expense, or in its vulnerability to competition.²⁸¹ *Feist* sent an unmistakable message that pure labour, or sweat of the brow, does not deserve protection.²⁸² Perhaps, the greatest importance of *Feist* is that of the policy perspective it brings afore by establishing a standard that prevents copyright from being used to bar public access to facts and data *per se*.²⁸³ *Feist* demonstrates the costs that monopoly imposes on the public are not limited merely to high prices, but include the inability of downstream users to create new works or compilations on the basis of what has gone before.²⁸⁴

²⁷⁶ H.B. Abrams: 41.

²⁷⁷ D.A. Simon: 345.

²⁷⁸ A. Ng: 872. M.J. Madison: 822.

²⁷⁹ J.D. Lipton: 782.

²⁸⁰ A. Ng: 866.

²⁸¹ H.B. Abrams: 42. Canadian position on “originality” was recently settled in light of the finding in *Feist*. The Federal Court of Appeal in *Tele-Direct (Publications) Inc. v. American Business Information Inc.* [1998] 2 F.C. 22 (Can.) held that as a result of the North American Free Trade Agreement (NAFTA), Canadian courts could no longer accept amere “sweat of the brow” test, and that it should adopt the “creative spark” test from *Feist*. K. Hariani and A. Hariani: 501.

²⁸² E.F. Judge and D. Gervais: 408.

²⁸³ H.B. Abrams: 44.

²⁸⁴ H.B. Abrams: 44.

In evaluating a work for copyright protection under *Feist* the focus of inquiry is not on the individual elements of the work but on the combination of those elements in the work as a whole.²⁸⁵ Wong submits that the additional analysis of the nature of the resulting changes will allow courts to view the otherwise-competing works in context and apply a more nuanced analysis of derivative uses, which would constitute a substantive and contribution to learning and progress.²⁸⁶ The strongest transformative fair uses are those that modify the contents, function, and purpose in a significant and obvious manner, turning work.²⁸⁷ Thus, an approach to fair use that focuses on the result of the derivative work would serve more useful in the cloud than emphasising the purpose of the defendants work.²⁸⁸

It seems that the determining factor when contemplating whether derivative work is original for the sake of copyright recognition is the element of choice – the possibility to choose one alteration over another.²⁸⁹ With these choices the author is able to express his or her creative abilities in terms of which he or she stamps the work with his or her “personal touch”.²⁹⁰ It may thus be possible to fashion a more refined approach to the originality inquiry concerning user-derived content by adopting a user’s right perspective, essentially viewing the derivative creator as simultaneously a user and an author – as someone who builds on the work of others and also participates in an on-going creative process that depends on engagement with such others and their works.²⁹¹ Originality can therefore be about the relationship between an author and a user.²⁹²

Canada offers a particularly useful perspective for comparative originality studies.²⁹³ In 2004 the Supreme Court of Canada in the *CCH* case introduced Canada’s current originality standard by finding that the work must originate from the author in that it

²⁸⁵ K.L. McDaniel and J. Juo: 171.

²⁸⁶ M.W.S Wong: 1138.

²⁸⁷ M.D. Murray: 46.

²⁸⁸ M.W.S Wong: 1127.

²⁸⁹ A. Rahmatian: 13.

²⁹⁰ A. Rahmatian: 13.

²⁹¹ M.W.S Wong: 1092.

²⁹² M.W.S Wong: 1092.

²⁹³ Canada’s Copyright Act is a hybrid that draws on both the common law and civil law traditions, and at various times and for various types of works it has drawn on both the U.K.’s “sweat of the brow” standard (industrious standard) and the U.S. *Feist* standard. E.F. Judge and D. Gervais: 389.

needs to be “more than a mere copy,” but “must be the product of an author’s exercise of skill and judgment” that it “must not be so trivial that it could be characterised as a purely mechanical exercise.”²⁹⁴ According to the court in the *CCH* case the “exercise of skill and judgment” standard the court defined “skill” as “the use of one’s knowledge, developed aptitude or practiced ability in producing the work,” and “judgment” as “the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.”²⁹⁵ The court subsequently held that the exercise of skill and judgment will “necessarily involve intellectual effort.”²⁹⁶

Recent findings by the Court of Justice of the European Union (CJEU) are said to acknowledge the extension of the traditional understanding of originality in author’s rights systems to all works of copyright by requiring that the work be the result of the author’s personal intellectual creation.²⁹⁷ It has been submitted that the CJEU is exerting pressure on the U.K. to change its conception of originality in copyright in order to bring it into line with a more author’s-rights-based approach.²⁹⁸ At least notionally, the recent CJEU rulings have raised the originality threshold slightly by requiring of works to be creatively original to qualify for copyright protection in the case of derivative works.²⁹⁹

5.5 CONCLUSION: TAKING A TRANSFORMATIVE STEP

Given that numerous varied types of copyrightable works, and the numerous emerging technological means for manipulating content to create derivative works, overly emphasising transformative use as a prerequisite for either fair use or copyright eligibility in UCC could turn out to be limiting rather than an enabling factor.³⁰⁰ Future case law may determine the boundaries of the transformative use to

²⁹⁴ E.F. Judge and D. Gervais: 390-391.

²⁹⁵ E.F. Judge and D. Gervais: 390-391.

²⁹⁶ E.F. Judge and D. Gervais: 390-391.

²⁹⁷ A. Rahmatian: 6. *Infopaq International v DanskeDagbladesForening* [2009] ECDR 16 (Case C-5/08). *Football Dataco Ltd and others v Yahoo! UK LTD and others*, 1 March 2012 (Case C-604/10).

²⁹⁸ A. Rahmatian: 6.

²⁹⁹ A. Rahmatian: 32.

³⁰⁰ M.W.S Wong: 1105.

produce clarity in the UCC context,³⁰¹ but establishing a clear framework within which transformative use can be applied to the transformative fair use and transformative derivative works in the cloud would aid fostering the semiotic democracy the cloud offers whilst maintaining a robust copyright regime. This position has been contemplated in recent national and international legislative approaches which propose that a combination of exclusive rights and exceptions and limitations can also be amended.³⁰²

The 2006 *Gowers Review* makes it clear that in the U.K. there is currently no express or mandated consideration of transformative use as an element in fair dealing.³⁰³ It accordingly suggests amending applicable E.U. copyright law to allow for an exception for creative, transformative or derivative work right within the parameters of the Berne three-step test.³⁰⁴ It called on the EU's Copyright Directive to add transformative use to the list of exemptions against copyright infringement in order to ensure greater protection and facilitation of transformative UCC.³⁰⁵ It is, however, submitted that there are drawbacks and risks associated with establishing a completely open norm into copyright systems that traditionally provides for circumscribed limitations and exceptions that offer a good deal of predictability and legal security.³⁰⁶ The same can be said of the development of South African copyright law for cloud application.

Professor Hugenholtz and Professor Senftleben contends that a measure of flexibility should be available inside the current copyright framework, but attaining that flexibility does not necessarily require the introduction of an American-style general fair use provision into narrower frameworks of transformative uses such as adaptations.³⁰⁷ While the need for a derivative work right and subsequent exceptions of transformative use is essential for the application of copyright to user-derived

³⁰¹ Organization for Economic Co-operation and Development. *The Participative Web: User-Created Content*. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 47.

³⁰² Organization for Economic Co-operation and Development. *The Participative Web: User-Created Content*. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 47.

³⁰³ M.W.S Wong: 1131.

³⁰⁴ Organization for Economic Co-operation and Development. *The Participative Web: User-Created Content*. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 47. M.W.S Wong: 1077.

³⁰⁵ M.W.S Wong: 1134.

³⁰⁶ P.B. Hugenholtz and M.R.F. Senftleben: 29.

³⁰⁷ P.B. Hugenholtz and M.R.F. Senftleben: 29.

content it is submitted that the integration of these elements into South African copyright law cannot be done haphazardly. They therefore recommend introducing a measure of flexibility that operates alongside the existing structure to combine the advantage of legal security and technological neutrality.³⁰⁸ Transformative use, despite being relevant at times, should play a subsidiary role in the fair use analysis.³⁰⁹ To date it does not seem that there has been any substantial undertaking by U.K. policy makers and legislators to address the recommendations made by the Gowers Review. However, in 2007 the U.K. Intellectual Property Office released a response to the Gowers Review, “Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions.”³¹⁰ The document is a consultation that looks at how the adjustments recommended by the Gowers Review might be made to identify where the boundaries should lie to ensure that the copyright system remains adequate to regulate copyright in the digital age.³¹¹ The document asserts that: “A system of strong rights, accompanied by limited exceptions, will provide a framework that is valued by and protects right holders and is both understood and respected by users.”³¹² It does not seem that there has been any substantial legal development in the U.K. since the request to respond to the consultation to help the government consider the optimal location of exception boundaries that functions appropriately by operation of law.

The construction of such a measure of “transformative use” needs to be done with regard for the recent acknowledgment by scholars and legislators that UCC often falls outside the scope of traditional notions for fair use and copyright eligibility in the case of derivative works. Canada’s Supreme Court decision in *CCH* presents the dominant precedent, together with *Feist*.³¹³ The court interestingly interprets that “something intellectual” as “namely skill and judgment” and its incorporation of the

³⁰⁸ P.B. Hugenholtz and M.R.F. Senftleben: 29.

³⁰⁹ T.F. Cotter: 753.

³¹⁰ U.K. Intellectual Property Office. Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions.<<http://www.ipso.gov.uk/consult-copyrightexceptions.pdf>>. Retrieved 16 December 2013.

³¹¹ U.K. Intellectual Property Office. Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions.<<http://www.ipso.gov.uk/consult-copyrightexceptions.pdf>>. Retrieved 16 December 2013: 1.

³¹² U.K. Intellectual Property Office. Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions.<<http://www.ipso.gov.uk/consult-copyrightexceptions.pdf>>. Retrieved 16 December 2013: 1.

³¹³ E.F. Judge and D.Gervais: 389.

notion of “comparing different possible options” in the definition of judgment aligns the standard with the European test of personal choices.³¹⁴ Thus, while widening the gap between the new standard of an “exercise of skill and judgment” and industriousness (or “skill and labour”), the court effectively aligns the new standard with the civil law “intellectual contribution.”³¹⁵

The Section 29.21 of the Canadian Copyright Modernisation Act provides some insight on how transformative use as a fair use defence can be constructed to allow for the creation of user-derived content that also qualifies for copyright protection. Under the non-commercial user-generated content provision (the so-called ‘YouTube’ exception) individuals can use existing work available to the public in creating a new work and authorize the dissemination of that new work if: (a) the use and dissemination of the new work is solely for non-commercial purposes; (b) the source of the material is mentioned in the new work where it is reasonable to do so; (c) the individual had reasonable grounds to believe the existing work was not itself infringing copyright; and (d) the use or authorization to disseminate the new work does not have a substantial adverse effect on the exploitation of the existing work. This provision provides for the creation of “mash-ups” on YouTube.³¹⁶ Accordingly, this exception confers a special standing for the creation of new copyright works that arises through the use of pre-existing works – transformative use.³¹⁷

³¹⁴ E.F. Judge and D. Gervais: 392-393.

³¹⁵ E.F. Judge and D. Gervais: 392-393.

³¹⁶ P.E. Bain: 2. The non-commercial UCC exception to copyright infringement in the Canadian Copyright Modernisation Act allows individuals to perform on any form of published copyright works all acts otherwise reserved to copyright holders for the creation of new copyright works. P. Chapdelaine: 8.

³¹⁷ P. Chapdelaine: 9.

CHAPTER 6

ADJUDICATING COPYRIGHT INFRINGEMENT IN THE CLOUD

A fundamental premise upon which cloud computing is based is that it does not matter where data is stored, but where it can be accessed from – anywhere.¹ It must be recognised that the Internet is engineered to work on the basis of logical, not geographical indications.² From a legal perspective, however, the distributive nature of the cloud creates jurisdictional uncertainty.³ Who has jurisdiction over a matter involving cloud computing? Which laws will apply? These questions are of particular importance with regard to the regulation of copyright in cloud computing. The cloud, and the content generated therein, may not be subject to territorial, jurisdictional or geographical boundaries, but commercial law operates in a world where boundaries are very important.⁴

It is important to realize that the cloud and its uses are subject to the same legal rules applicable to any other service that operates over the Internet.⁵ However, given that cloud computing is a relatively new technological development it is submitted that there is currently no special jurisdictional and choice of law rules to help determine the adjudication of copyright issues that arise in the cloud.⁶ It is submitted that the discussion of the applicable law and jurisdiction in cyberspace invites a thorough analysis of the internet's cross-border nature from a technical standpoint because the method(s) by which technology delivers online communication and interaction will ultimately affect the impact of the law on the issue.⁷ Due to the fact

¹ D.M. Given. <<http://www.lommen.com/pdf/SXSW-2012/Music-In-the-Cloud-A-Business---Legal-Primer.aspx>>. Retrieved 22 May 2013: 1. C.I. Kyer and G.M.A. Stern: 1.

² H. A. Haloush: 1134. G.J. Wrenn: 97. Each computer in the network communicates with the others by employing machine-language conventions known as the Internet Protocol. H. A. Haloush: 1134.

³ C.I. Kyer and G.M.A. Stern: 1. Internet Protocol provides functions that break up a piece of digital data into discrete packets of bits which is then transported across various combinations of networks to their destination. H. A. Haloush: 1134. These packets may follow any of a number of different routes, which may change from minute to minute, from computer to computer until they reach their final destination where they are reassembled again: there is no centralised control of the packet routing. H. A. Haloush: 1134.

⁴ C.I. Kyer and G.M.A. Stern: 2.

⁵ C.I. Kyer and G.M.A. Stern: 1. These laws usually comprise of domestic law, foreign law, international law and convention. C.I. Kyer and G.M.A. Stern: 2.

⁶ T. Kono and P. Jurcys: 6.

⁷ H. A. Haloush: 1133.

that the cloud is multinational it is submitted that a clear understanding of conflict of laws is vital for addressing the jurisdictional considerations associated therewith.⁸

6.1 SOUTH AFRICAN POLICY ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS

The growth in cross-border trade inevitably leads to an increase in international civil disputes, which, in turn has generated new disputes about the service of process and the recognition and enforcement of foreign judgements.⁹ It has been widely acknowledged that: “the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant of his assets are to be found.”¹⁰ South Africa is currently not a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.¹¹ South Africa has accordingly not kept pace with the developments on international judicial co-operation, and the problem is most acute in the case of recognition and enforcement of judgments.¹² Thus, while the issue of international judicial co-operation is a broad topic with a variety of issues, i.e the process of service, taking of evidence etc., the discussion concerning the regulation of the cloud warrants that attention be directed at the recognition and enforcement of foreign judgments involving IP disputes.

South African common law on the recognition and enforcement of foreign judgments is sporadic and somewhat confusing, and due to its unfounded doctrinal basis South

⁸ C.I. Kyer and G.M.A. Stern: 2.

⁹ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 2. The increase in cross-border transactions would naturally cause an upshot in litigation. Y. Choong: 354.

¹⁰ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 2.

¹¹ Wakefield, R. Enforcement of Foreign Judgments. <<http://www.werksmans.com/wp-content/uploads/2013/04/enforcement.pdf>>. Retrieved 30 November 2013: 108.

¹² South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 2.

African courts rely heavily on English precedents for guidance.¹³ Generally, any plaintiff wishing to enforce or recognise a foreign judgment must first prove that the rendering court was internationally competent – the element that is by far the most important in common-law action.¹⁴ The determination of international competence is contemplated with respect to the close connection between the judgment debtor and the rendering court.¹⁵ South African common law seems to provide a few grounds in terms of which jurisdiction in an international matter can be claimed on the basis of a “real and substantial connection”,¹⁶ but the ambiguities surrounding some of the essential questions that arise when international jurisdiction is asserted require legislative address. The recognition and enforcement of foreign judgements assumes that an order issued by an organ of a foreign state required the considered decision of an impartial tribunal, involving that application of law to fact, which then became binding on the parties or their privies, but South African courts have never had the occasion to pronounce on how to define the term “judgement” accordingly.¹⁷ Moreover, according to English law, a South African court may only enforce foreign judgments sounding in fixed sums of money.¹⁸ What is more, South African common law has no clear rule indicating whether our courts are competent to pronounce on the validity of foreign judgments.¹⁹

¹³ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 32. Given the extensive borrowing from English law it is currently uncertain whether the restrictions concerning the enforcement of foreign judgments in English law apply to South African law. South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 37.

¹⁴ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 44.

¹⁵ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 87.

¹⁶ Wakefield, R. Enforcement of Foreign Judgments. <<http://www.werksmans.com/wp-content/uploads/2013/04/enforcement.pdf>>. Retrieved 30 November 2013:109.

¹⁷ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 34.

¹⁸ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 37.

¹⁹ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013:

Currently, the only course of action for foreign judgement creditors is to sue under the common law which entails bringing an action to have the judgment made into an order of the local court.²⁰ South African courts will enforce a foreign judgment if certain requirements primarily based on Roman Dutch law are met.²¹ Accordingly, a foreign judgment is not directly enforceable in South Africa, but the judgment constitutes a cause of action that will be enforced by South African courts if the requirements set out in *Jones v Krok*²² are met: that (1) the foreign court must have had international competence as determined by South African law; (2) the judgment must be final and conclusive and must not have become superannuated; (3) the enforcement of the judgment must not be contrary to South African public policy (which includes the rules of natural justice); (4) the judgment must not have been obtained by fraudulent means; (5) the judgment must not involve the enforcement of a penal or revenue law of the foreign state; and enforcement must not be precluded by the Protection of Businesses Act 99 of 1978.²³ Accordingly, South African law does not require that reciprocity, or “comity”,²⁴ be shown before a foreign judgment will be enforced.²⁵ If the requirements for enforcement are met, a South African court will enforce a foreign judgment irrespective of whether any form of reciprocity of enforcement exists between the two jurisdictions in question.²⁶

31. Where the value of the amount in a foreign judgment is less than R300,000 enforcement actions may be brought in the magistrates' courts, but actions for the enforcement of foreign money judgments worth more than R300,000 must be brought in the High Court of South Africa. Wakefield, R. Enforcement of Foreign Judgments. <<http://www.werksmans.com/wp-content/uploads/2013/04/enforcement.pdf>>. Retrieved 30 November 2013: 109.

²⁰ R.F. Oppong: 916. South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments. 2011 Report. <http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 2.

²¹ Wakefield, R. Enforcement of Foreign Judgments. <<http://www.werksmans.com/wp-content/uploads/2013/04/enforcement.pdf>>. Retrieved 30 November 2013: 109.

²² *Jones v Krok* 1995(1) SA 677(A).

²³ R.F. Oppong: 916. Wakefield, R. Enforcement of Foreign Judgments. <<http://www.werksmans.com/wp-content/uploads/2013/04/enforcement.pdf>>. Retrieved 30 November 2013: 109. The requirements for the recognition and enforcement of foreign judgements as established in South African case law seem consistent with other common law approaches. See Y. Choong. (2007) Enforcement of Foreign Judgments: The Role of the Courts in Promoting (or Impeding) Global Business. *International Journal of Human and Social Sciences*. Vol 2, Issue 6.

²⁴ Comity is “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” G.J. Wrenn: 105.

²⁵ Wakefield, R. Enforcement of Foreign Judgments. <<http://www.werksmans.com/wp-content/uploads/2013/04/enforcement.pdf>>. Retrieved 30 November 2013: 109.

²⁶ Wakefield, R. Enforcement of Foreign Judgments. <<http://www.werksmans.com/wp-content/uploads/2013/04/enforcement.pdf>>.

While it is submitted that the common law is adequate to function independently in order to facilitate the recognition and enforcement of foreign judgements, is entails a slow and potentially cumbersome process with various obstacles that courts have to overcome.²⁷ Accordingly, to expedite the process and obtain reciprocal treatment for South Africa judgments abroad South African law does provide for certain statutory procedures in terms of the Act applicable to the matter at hand.²⁸ In matters concerning the recognition and enforcement of foreign courts concerning copyright infringement in the cloud The Enforcement of Foreign Civil Judgments Act 32 of 1988 provides the aggrieved party with mechanisms to utilise the common-law action.²⁹ Accordingly, the Act provides the aggrieved party with an alternative action process that reduces both the time and costs involved in the common law action.³⁰

However, concerning the recognition and enforcement of foreign judgments, the Enforcement of Foreign Civil Judgments Act's scope is limited because it does not find application in cases involving non-monetary judgments, and judgements based on penal or revenue laws are specifically excluded.³¹ What is more, the Act only applies to enforcement proceedings in the magistrate's courts where the financial limit on monetary actions are R300000: foreign judgments in excess of that amount require that that the action is brought before the High Court where the procedure for enforcement is governed by common law.³² Moreover, the range of application currently available in terms of the Enforcement of Foreign Civil Judgments Act is

Retrieved 30 November 2013: 111-112.

²⁷ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 78.

²⁸ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 78.

²⁹ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 78.

³⁰ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 78.

³¹ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 79.

³² R.F. Oppong: 916. South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 79.

severely limited – the Minister had thus far only designated Namibia, which brings about the result that the judgments emanating from any other country must be enforced under the common-law action.³³ South Africa has not of yet entered negotiations to establish international agreements with other foreign states except Namibia, and therefore the common law is the currently the primary, if not only, method for enforcing judgments in the country.³⁴ What is more, the Enforcement of Foreign Civil Judgments Act³⁵ does not give any indication of what grounds on international competence suffice for South African courts to assert jurisdiction over an international matter.³⁶

South Africa's legal framework for the recognition and enforcement of foreign judgments is wholly inadequate for an era in which global cultural and social participation is a virtual matter. While the South African Law Reform Commission has recommended several amendments to The Enforcement of Foreign Civil Judgments Act 32 of 1988 to aid its implementation, the contemplation of adjudicating and recognising and enforcing foreign judgements in matters involving copyright infringement in the cloud requires extensive deliberation in light of cloud considerations and foreign precedents. It is submitted that the investigation required to navigate the maze of international initiatives, case law and jurisdictional approaches to aid South Africa's development of a framework to address matters of copyright infringement in the cloud is too extensive for the purpose of this discussion. The purpose of this study will therefore glaze over particular considerations for the purpose of establishing a general idea on approaches and problems associated with the recognition and enforcement of foreign judgments in matters of copyright infringement in cloud computing.

³³ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 83

³⁴ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 2, 31.

³⁵ 32 of 1988.

³⁶ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 87.

6.2 NAVIGATING THE COMPLEXITIES OF ASSERTING JURISDICTION OVER COPYRIGHT INFRINGEMENT IN THE CLOUD

The primary concern for the purpose of this study pertains to the potential litigation over the exploitation of intellectual property rights in the cloud, particularly with respect to copyright protection and enforcement. Prior to the dot-com boom of the 1990s personal jurisdiction was almost exclusively connected to the physical locations of users.³⁷ The exercise of jurisdiction in multi-state IP disputes has always been subject to great controversy, but the advancements of digital communication technologies has complicated the exercise of jurisdiction over multi-state disputes involving territorially limited intellectual property rights.³⁸ Traditional criteria³⁹ for asserting jurisdiction proves difficult to apply in the cloud environment.⁴⁰ Potential cloud users have a valid concern that the distributive nature of cloud computing services may put their businesses and personal data at risk to being subjected to unfamiliar, unacceptable foreign law.⁴¹

The need to create a legal framework that unifies the issues concerning the assertion of international jurisdiction has long been contemplated.⁴² However, the issue of establishing jurisdiction over an IP dispute in the cloud is one of the most complex ones.⁴³ IP assets frequently plays a role in cloud-based business models, and the exploitation of IP rights in all cloud cases involves the interests of at least three stakeholders: the originator of the information (the holder of the IP rights), the users of the information and the intermediary who provides cloud-based services.⁴⁴ Thus, from a private international law viewpoint the aggravating factor is the fact that the parties to a dispute are often located in different countries.⁴⁵

³⁷ D.C. Andrews and J.M. Newman: 27.

³⁸ T. Kono and P. Jurcys: 2.

³⁹ H. A. Haloush: 1134. The traditional approaches to determine jurisdiction is generally related to residence of the parties involved in the dispute, the location of the property as the subject matter of the dispute or the territory in which the infringing act took place. T. Kono and P. Jurcys: 7.

⁴⁰ T. Kono and P. Jurcys: 7.

⁴¹ C.I. Kyer and G.M.A. Stern: 2.

⁴² S.M. Richman and J.B. Richman: 20. P. Jurcys: 175.

⁴³ P. Jurcys: 176.

⁴⁴ T. Kono and P. Jurcys: 4.

⁴⁵ T. Kono and P. Jurcys: 4.

Article 41(1) of TRIPS requires Member States to implement enforcement procedures in their own national legislation.⁴⁶ Article 41(5) of TRIPS ensures that the holder of the intellectual property right is entitled to the remedies of injunction, damages and disposal of infringing goods and entitles jurisdiction to the Member States national courts, but does not place an obligation upon Member States to create a framework for the enforcement of intellectual property rights beyond the laws generally resorted under common law and statute.⁴⁷ Article 5(2) of the Berne Convention provides that: “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.” The actual purpose and meaning of this provision seems unclear, and there has been no agreement as to whether this provision provides any guidance to determine which country’s court should adjudicate a copyright matter.⁴⁸ In as far as international jurisdiction is concerned, Article 5(2) does assert the principle of national treatment⁴⁹ by requiring of member states to ensure that foreign authors are able to enjoy the same rights as those afforded to the national authors.⁵⁰

Before contemplating the assertion of jurisdiction over copyright infringement in the cloud certain aspects of its regulation require clarification. Firstly, many people mistakenly believe that parties to a virtual transaction may choose the laws that apply to their dealing with each other by using a choice of law clause.⁵¹ This is not entirely untrue because many jurisdictions permit parties to a multi-jurisdictional

⁴⁶ E. Gutierrez: 37. Article 41(1) of TRIPS states that: “Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”

⁴⁷ E. Gutierrez: 37. Article 41(5) of TRIPS states that: “It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.”

⁴⁸ T. Kono and P. Jurcys: 7.

⁴⁹ Article 5(1) of the Berne Convention states that: “Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights especially granted by this Convention.”

⁵⁰ T. Kono and P. Jurcys: 8.

⁵¹ C.I. Kyer and G.M.A. Stern: 3.

contract to choose the laws that apply to their contract in the absence of overriding public policy.⁵² Parties to a cloud service contract can choose which jurisdiction's laws will govern any disputes between them and also specify the forum for litigation of any such disputes.⁵³ Accordingly, the operators of clouds may be able to control their jurisdictional risks to a certain degree by preventing customers in certain jurisdictions from accessing the services.⁵⁴ "Choice of law" and forum selection clauses are thus a way to mitigate jurisdictional risks.⁵⁵ However, these clauses are not binding on third parties to the agreement i.e. end-users and content creator.⁵⁶

While international jurisdiction in tort cases is generally grounded in the place of the harmful act as well as the place of the produced effect, it must be recognised that the Internet is not a top-down structure.⁵⁷ Each computer connected to the Internet acts autonomously and is regulated by its own system administrator only.⁵⁸ The nature of a cloud computing service will have a strong impact on what jurisdictional law might apply because it is commonplace to click on a hypertext link - a link that appears on a web page to another web site - and be greeted by a message that conditions further access by consent to another legal regime.⁵⁹ Additionally, there are a wide range of evasion techniques can make it difficult for a state to regulate cyberspace activities.⁶⁰ Moreover, the choice of any geographical contact or any particular national law will be arbitrary in cyberspace.⁶¹ Accordingly, choice of law does not mean that tort claims will be dealt with under that law or that intellectual property created by the parties will be assessed under the law chosen.⁶² Thus the application

⁵² C.I. Kyer and G.M.A. Stern: 3.

⁵³ P.D. Flaherty and G. Ruscio: 13.

⁵⁴ C.I. Kyer and G.M.A. Stern: 7.

⁵⁵ P.D. Flaherty and G. Ruscio: 13.

⁵⁶ P.D. Flaherty and G. Ruscio: 13.

⁵⁷ Report Sofia 2012 – International Law Association on IP dispute adjudication. <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 6. H. A. Haloush: 1133.

⁵⁸ H. A. Haloush: 1133.

⁵⁹ H. A. Haloush: 1133. C.I. Kyer and G.M.A. Stern: 7. This process has the potential to amass great confusion concerning the contractual laws that find application since contracting in various different legal regimes has taken place. H. A. Haloush: 1133.

⁶⁰ H. A. Haloush: 1133. The current global context of economic activities combined with the territorial nature of intellectual property rights create the situation in which it is very common for the rights-holders to hold equivalent rights on the same object or work in more than one jurisdiction. P.A. De Miguel Asensio: 2.

⁶¹ H. A. Haloush: 1134.

⁶² C.I. Kyer and G.M.A. Stern: 3.

of laws either expressly or by implication cannot be contracted out by the parties.⁶³ Accordingly, this means that not all legal relationships that result from offering or using cloud computing services can be controlled through a choice of law clause.⁶⁴

Secondly, it is a common misconception that there are separate rules for determining jurisdiction in cyberspace.⁶⁵ There is no "location" of the Internet; there are one or more (usually more) localities in which the computers and participants involved can be found.⁶⁶ Conflicts in applicable laws are inevitable. Conflict of laws is central to cloud computing because the Internet, the very basis of the cloud, is multinational.⁶⁷ Therefore, the approach to gaining a clearer understanding of the issues is to understand that cloud computing is subject to the same legal rules as any other any service that operated over the Internet.⁶⁸

Thirdly, it is a common misconception that the jurisdiction for e-commerce issues is determined with reference to the server's location, because traditional legal doctrine treats the Internet as a medium that facilitates communication and commerce between one legally significant geographical location and another.⁶⁹ Cloud computing marks another unprecedented signpost in the technological development.⁷⁰ While it is technically possible to identify the server where the information is stored there exist various technical difficulties relating to the enforcement of copyright in the cloud.⁷¹ From a perspective that contemplates legal obligations it is important to note that the computer power of the cloud is frequently located in multiple different locations and countries across the network, often with different entities and participants involved in its delivery to the users of the

⁶³ C.I. Kyer and G.M.A. Stern: 3.

⁶⁴ C.I. Kyer and G.M.A. Stern: 3.

⁶⁵ C.I. Kyer and G.M.A. Stern: 3.

⁶⁶ G.J. Wrenn: 99.

⁶⁷ C.I. Kyer and G.M.A. Stern: 2. The conflict of laws is a series of national rules and principles that have been developed over centuries to assist legislatures and courts in dealing with three questions that arise in transactions with one or more international or at least multi-jurisdictional elements. C.I. Kyer and G.M.A. Stern: 2. Which courts have jurisdiction? Which laws will find application? When will a court enforce the finding of a court from another jurisdiction? C.I. Kyer and G.M.A. Stern: 2.

⁶⁸ C.I. Kyer and G.M.A. Stern: 2.

⁶⁹ H. A. Haloush: 1134. C.I. Kyer and G.M.A. Stern: 3.

⁷⁰ T. Kono and P. Jurcys: 20.

⁷¹ G. J. Wrenn: 97. T. Kono and P. Jurcys: 20.

service.⁷² Moreover, there is the common internet practice of "caching"⁷³ copies of frequently accessed resources which allows internet users to access materials on a particular site while in fact they are accessing copies of that work which is located on a different machine in a different geographical boundary.⁷⁴

While certain special laws have been passed to regulate the Internet, the general rule is that using the Internet as a method of doing business is subject to the same general rules and principles as other business methods that have an international or multi-jurisdictional element.⁷⁵ Some courts have already offered their opinions with regard to the irrelevance of the server for the purposes of determining the law governing activities in the cloud, but it is, nevertheless, agreed to that the location of the server in a third state might be of significance to asserting jurisdiction, especially if the plaintiff seeks to shut down the website.⁷⁶ Accordingly, the location of the server may or may not be a relevant fact to be taken into account in determining jurisdiction, but it is submitted that such consideration will depend on the context of the matter.⁷⁷

This contention leads to the fourth and last misconception - that there is a single set of rules to determine jurisdiction; there is no single, applicable international law for asserting jurisdiction over cloud matters because "jurisdiction" is so closely affiliated with the sovereignty of state.⁷⁸ It is submitted that there can arise a false sense of so called "jurisdictional neutrality" among users of the cloud who confuse the seamless nature of the technology with its implications on the parties' legal rights and obligations.⁷⁹ Potentially applicable laws will include any jurisdiction in which data is

⁷² G.J. Wrenn: 101. P.D. Flaherty and G. Ruscio: 2.

⁷³ "Caching" refers to a procedure whereby copies of a work are stored on local servers in order to enhance the performance and speed of access to digital networks, works operates on the premise that speed of access to such works will be enhanced if access is given to a server that is less distant. H. A. Haloush: 1133. The advantage of caching is that individuals get quicker access to information and improves the ability of the Internet as a whole to handle more usage. H. A. Haloush: 1133.

⁷⁴ H. A. Haloush: 1133-1134.

⁷⁵ C.I. Kyer and G.M.A. Stern: 3.

⁷⁶ T. Kono and P. Juncys: 20.

⁷⁷ C.I. Kyer and G.M.A. Stern: 3.

⁷⁸ C.I. Kyer and G.M.A. Stern: 3. H. A. Haloush: 1134. If courts perceive cyberspace as "borderless," the power of governments to regulate Internet-based activity will be unrestrained; a court will be in a position to impede on the sovereignty of states outside its own jurisdiction. G. J. Wrenn: 97.

⁷⁹ P.D. Flaherty and G. Ruscio: 3.

stored or accessed from, in which a person whose information has been collected is present, or where a party contracting for or providing services is located.⁸⁰ There is no “one size fits all” approach to determine the jurisdiction over data protection, which varies from country to country.⁸¹ Context is everything in looking at jurisdiction and the Internet.⁸²

There is no denying that the Internet’s universality is a great part of its strength as a tool for business, but that universality also creates unique risks.⁸³ Worldwide access exposes website operators and Internet publishers to the possibility of being hauled into courts around the globe.⁸⁴ The immediacy of this risk rises exponentially as businesses and individuals increasingly utilise “cloud computing” services in which data is stored on remote servers that could be located in any county in the world.⁸⁵

6.3 THE RECOGNITION AND ENFORCEMENT OF JURISDICTION: AN INTERNATIONAL PEROGATIVE

It is well known that the cloud is distributive in nature because data is collected, used, stored, processed and duplicated in multiple places often at the same time.⁸⁶ Besides the rules of common law, the recognition and enforcement of foreign judgments is regulated by bilateral treaties or multi-national international conventions.⁸⁷ As a matter of private international law courts in most countries assert legal jurisdiction in one of two ways: personal jurisdiction (*in personam*) over parties that are within a country’s territorial or legal domain and/or, the subject matter jurisdiction - where jurisdiction is taken over a particular type of dispute or case dealing with a specific subject matter.⁸⁸ Due to the territoriality principle, it is largely accepted that the adjudication of copyright infringements takes place in terms of the

⁸⁰ P.D. Flaherty and G. Ruscio: 9.

⁸¹ P.D. Flaherty and G. Ruscio: 9.

⁸² C.I. Kyer and G.M.A. Stern: 4.

⁸³ K. Wimmer, E. Pogoriler and S. Satterfield: 1.

⁸⁴ K. Wimmer, E. Pogoriler and S. Satterfield: 1.

⁸⁵ K. Wimmer, E. Pogoriler and S. Satterfield: 1.

⁸⁶ P.D. Flaherty and G. Ruscio: 3.

⁸⁷ Y. Choong: 354.

⁸⁸ P.D. Flaherty and G. Ruscio: 9. Besides the rules of common law, the recognition and enforcement of foreign judgments is regulated by bilateral treaties or multi-national international conventions. Y. Choong: 354.

law under which copyright protection is granted (the “*lex loci protectionis*” rule).⁸⁹ Accordingly, legal systems will only assert jurisdiction over parties or matters that have a “real and substantial connection” to them, so as to constrain the application of their laws in appropriate circumstances.⁹⁰ There are thus two main areas of difference with regard to the court discretion to decline jurisdiction over the dispute.⁹¹ Firstly, some legislative proposals contain special rules enumerating connecting factors which, if taken alone, are considered to be insufficient for a court to assert jurisdiction over the dispute.⁹² Secondly, some legislative instruments contain other kinds of discretionary provisions which generally empower the courts to decline jurisdiction.⁹³ These are two possible approaches of ensuring that courts hear cases that are closely related with the forum.⁹⁴

In common law countries it is required of the court to establish both the existence of subject matter jurisdiction⁹⁵ as well as personal jurisdiction⁹⁶ in order to exercise adjudicative authority over the matter.⁹⁷ In practical terms, the requirement for subject matter jurisdiction means that common law courts are not competent to hear disputes concerning the validity and infringement of foreign IP rights.⁹⁸ Thus, the adjudication of multi-state IP disputes must take place before courts of every state for which the protection is sought.⁹⁹ In civil law countries the general rule concerning personal jurisdiction is that a claim against a foreign defendant should be launched before the court of his/her domicile.¹⁰⁰

⁸⁹ ANONYMOUS. <<http://www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 1.

⁹⁰ P.D. Flaherty and G. Ruscio: 9.

⁹¹ P. Jurcys: 177.

⁹² P. Jurcys: 177.

⁹³ P. Jurcys: 177.

⁹⁴ P. Jurcys: 177.

⁹⁵ Subject matter jurisdiction refers to the requirement that a court has the power to hear the specific kind of claim that is brought before that court. Cornell University Law School. Legal Information Institute. <http://www.law.cornell.edu/wex/subject_matter_jurisdiction>. Retrieved 19 December 2013.

⁹⁶ Personal jurisdiction refers to the constitutional requirement that a defendant have certain minimum contacts with the forum of the designated so that the court may exercise power over the defendant. Cornell University Law School. Legal Information Institute. <http://www.law.cornell.edu/wex/subject_matter_jurisdiction>. Retrieved 19 December 2013.

⁹⁷ T. Kono and P. Jurcys: 8.

⁹⁸ T. Kono and P. Jurcys: 8.

⁹⁹ T. Kono and P. Jurcys: 8.

¹⁰⁰ T. Kono and P. Jurcys: 10. It is generally understood that the proceedings at the defendant’s forum makes it easier for the defendant to defend himself. T. Kono and P. Jurcys: 11. This general rule does

6.3.1 The “real and substantial connection”

Intellectual property disputes are disputes between parties over the IP rights associated with any of the IP laws.¹⁰¹ The right of prohibition contained in copyright is given effect to or enforced by and through a court: the power or capacity to enforce copyright through a court is the crux of copyright.¹⁰² A plaintiff seeking to enforce copyright and to pursue a claim of copyright infringement must firstly establish the subsistence of copyright in the work which is the subject of the proceedings and his title to such copyright or his right to enforce it.¹⁰³ Secondly, the plaintiff must show that rights under the copyright in the work have been infringed by the performance of one or more acts which fall within the scope of the copyright without the authority of the copyright owner.¹⁰⁴

As stated earlier, it is generally accepted that courts will take jurisdiction if there is a “real and substantial connection” between the jurisdiction and either the people involved or the subject matter of the dispute.¹⁰⁵ Accordingly, courts will take jurisdiction over people resident or domiciled in their jurisdiction or ones who have voluntarily submitted or attuned to the jurisdiction, as well as over property situated in their jurisdiction, but each national court system must decide for itself the extent of its *in personam* jurisdiction over Internet-related matters.¹⁰⁶ This seems to suggest that no matter where information might be stored in the cloud to the extent cloud computing services are consumed somewhere; there is a risk that the courts could claim jurisdiction based on the location of the user.¹⁰⁷ When one considers the cloud, personal jurisdiction is likely to be asserted over parties in a jurisdiction who are either providing or collecting personal information, using, holding or storing it.¹⁰⁸ Australian courts have indicated a tendency to assert jurisdiction when an entity is

not, however, apply if there is a valid choice of court agreement between the parties designating the courts of other states to hear the dispute. T. Kono and P. Jurcys: 11.

¹⁰¹ J.S.Bennet: 391.

¹⁰² O.H. Dean: 71.

¹⁰³ O.H. Dean: 71.

¹⁰⁴ O.H. Dean: 71.

¹⁰⁵ C.I. Kyer and G.M.A. Stern: 4.

¹⁰⁶ G.J. Wrenn: 104. C.I. Kyer and G.M.A. Stern: 4.

¹⁰⁷ C.I. Kyer and G.M.A. Stern: 4.

¹⁰⁸ P.D. Flaherty and G. Ruscio: 9.

“present” in the jurisdiction.¹⁰⁹ Typically, the “presence of a foreign corporation is determined by whether the company has transacted business for a definite period of time at some fixed place within the forum.”¹¹⁰ It is submitted that such a “presence” does not need to be physical, and thus conduct through intermediaries or agents also qualifies as “presence”.¹¹¹

Under Canadian law the dominant test for determining whether an organisation is subject to Canadian privacy law is whether it has a “real and substantial” connection to Canada because the organisation collects, uses or discloses personal information in the course of commercial activity by parties situated in Canada.¹¹² This test finds application to the Internet and therefore also the cloud.¹¹³ In Canada, the manner in which a cloud service provider establishes a platform in Canadian customers and advertises to them will impact whether Canadian courts will assert jurisdiction over their activities.¹¹⁴ In the case of *Bangoura v, Washington Post Co.*,¹¹⁵ the Ontario Court of Appeal in Canada reversed a lower court’s ruling that the *Post* was subject to Canadian jurisdiction for content that was available on the Internet. The trial court had held that the availability of the content on the *Post*’s website – even though it had been downloaded only once in the forum – was sufficient for jurisdiction.¹¹⁶ The Court of Appeal reversed the finding ruling that the content “did not reach significantly into Ontario.”¹¹⁷ The opinion expressed reciprocity concerns, observing that an exercise of jurisdiction in this case “could lead to Ontario publishers and broadcasters being sued anywhere in the world with the prospect that the Ontario courts would be obliged to enforce foreign judgements obtained against them.”¹¹⁸ The court in the matter of *Pro-C Ltd. v. Computer City, Inc.*¹¹⁹ identified two specific elements for the test for determining whether the courts will exercise jurisdiction over

¹⁰⁹ P.D. Flaherty and G. Ruscio: 11.

¹¹⁰ P.D. Flaherty and G. Ruscio: 11.

¹¹¹ P.D. Flaherty and G. Ruscio: 11.

¹¹² D.M. Given. <<http://www.lommen.com/pdf/SXSW-2012/Music-In-the-Cloud-A-Business--Legal-Primer.aspx>>. Retrieved 22 May 2013: 8. P.D. Flaherty and G. Ruscio: 10.

¹¹³ P.D. Flaherty and G. Ruscio: 10.

¹¹⁴ P.D. Flaherty and G. Ruscio: 10.

¹¹⁵ *Bangoura v, Washington Post Co.* 18 ILR 668, [2005] O.J. No. 3849 (Ont. C.A.), leave to appeal dismissed, [2006] SCCA No. 497 (February 16, 2006).

¹¹⁶ K. Wimmer, E. Pogoriler and S. Satterfield: 3.

¹¹⁷ K. Wimmer, E. Pogoriler and S. Satterfield: 3.

¹¹⁸ K. Wimmer, E. Pogoriler and S. Satterfield: 3.

¹¹⁹ *Pro-C Ltd. v. Computer City Inc.*, [2001] 3600 (Ont. C.A.); reversing (2000) 7 C.P.R.

a website: (1) the nature and quality of commercial activity on the site, with “[a]t one end of the spectrum ... situations where a defendant clearly does business over the Internet,” with, at the other end, “a passive website that does little more than make information available to those who are interested in it”; and (2) the extent to which the hosting organisation has knowledge that they are making sale to residents on a particular foreign jurisdiction.¹²⁰

The U.S. has generally taken a common law approach to establishing its law relating to jurisdiction and the Internet.¹²¹ The principles of asserting international jurisdiction in the U.S. were first developed by the court. In the case of *International Shoe Co. v. Washington*¹²² the U.S. Supreme Court decided that *in personam* jurisdiction may be asserted if the defendant had sufficient minimum contacts with the forum and such exercise of jurisdiction did not offend traditional notions of fair play and substantial justice.¹²³ In the U.S. courts generally assume jurisdiction over any cloud service provider located anywhere in the world as long as the provider itself is subject to U.S. jurisdiction.¹²⁴ Similar to the Canadian approach, the U.S. test for asserting jurisdiction is one of “minimum contact”.¹²⁵

The leading case for the asserting jurisdiction in the context of the Internet is the case of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*¹²⁶ where the court held that jurisdiction is proportionate to the nature and quality of the commercial activity that an organisation conducts over the Internet.¹²⁷ However, recent cases seems to have departed from the finding in *Zippo*, holding instead that minimum contact is established by purposeful direction, a forum related claim, as well as

¹²⁰ C.I. Kyer and G.M.A. Stern: 5.

¹²¹ K. Wimmer, E. Pogoriler and S. Satterfield: 12.

¹²² *International Shoe Co. v. Washington* 326 U.S. 310 (1945) 316.

¹²³ D.C. Andrews and J.M. Newman: 15. P. Jurcys: 179. T. Kono and P. Jurcys: 14. In its traditional jurisdictional analysis, a U.S. court may consider whether there has been “some act by which [a] defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum state.” G.J. Wrenn: 2002.

¹²⁴ P.D. Flaherty and G. Ruscio: 10.

¹²⁵ P.D. Flaherty and G. Ruscio: 10.

¹²⁶ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997).

¹²⁷ D.C. Andrews and J.M. Newman: 27-29. K. Wimmer, E. Pogoriler and S. Satterfield: 12.

reasonableness, fair-play and substantial justice.¹²⁸ Accordingly, various courts have recently suggested that focus ought to be on whether the publisher in question has specifically targeted its content to the forum state instead of focusing on the interactivity of the site.¹²⁹ Moreover, the U.S. will assert jurisdiction over a matter involving the cloud where the effects of extra-territorial behaviour therein adversely affects commerce or harms citizens within the U.S.¹³⁰ Accordingly, the “minimum contact” requirement is met if the defendant purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits of protection of its laws.¹³¹

As in other common law jurisdictions, the *forum non conveniens* doctrine¹³² has often been invoked before U.S. courts, and it requires the court to consider two elements: first, the existence of an alternative forum that has jurisdiction to hear the case; and, second, which forum would be most convenient and where the adjudication of the dispute would best serve the ends of justice.¹³³ In deciding whether it is convenient to decide the case, the court must weigh public and private interests, which include access to proof, availability to witness, and other practical problems that would make the trial of the case easy, expeditious and inexpensive.¹³⁴

Recently, the courts have started applying the so called “market effect” doctrine, which had been initially proposed by World Intellectual Property Organization (WIPO) for online trademark cases.¹³⁵ It defines the infringement as occurring only in

¹²⁸ P.D. Flaherty and G. Ruscio: 10. Yet regardless of how the test is articulated, U.S. courts currently require “something more” than the availability of content on a website in another jurisdiction to meet the minimum requirements. G.J. Wrenn: 102.

¹²⁹ K. Wimmer, E. Pogoriler and S. Satterfield: 13.

¹³⁰ P.D. Flaherty and G. Ruscio: 10.

¹³¹ P. Jurcys: 179. T. Kono and P. Jurcys: 14.

¹³² Latin for “a forum which is not convenient.” The Free Dictionary by Farlex.<<http://legal-dictionary.thefreedictionary.com/forum+non+conveniencs>>. Retrieved 28 November 2013. The doctrine is employed when the court approached by the plaintiff is inconvenient for witnesses or poses an undue hardship on the defendant, who must petition the court for an order transferring the case to a more convenient court. The Free Dictionary by Farlex.<<http://legal-dictionary.thefreedictionary.com/forum+non+conveniencs>>. Retrieved 28 November 2013.

¹³³ P. Jurcys: 179. T. Kono and P. Jurcys: 15.

¹³⁴ P. Jurcys: 179.

¹³⁵ Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed? <<http://www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 3.

the countries where the conduct had a commercial effect.¹³⁶ The actual way in which a cloud computing service is designed, advertised subsequently used can actually have a significant impact on what jurisdiction might apply.¹³⁷ The case of *Bragg v Linden Research*¹³⁸ is one of the leading cases in which the court gave effect to the “market effect” approach for determining personal jurisdiction. In *casu* the legal question concerning the assertion of personal jurisdiction arose from the court’s inquiry into whether property rights are enforceable in the virtual realm.¹³⁹ Linden was a Delaware corporation headquartered in California, but Bragg brought the matter before a federal district court in Pennsylvania.¹⁴⁰ Irrespective of the geographical disparity, the court found that the national advertising campaign undertaken by Linden provided a basis for personal jurisdiction because its function was to induce individuals to interact and establish direct contact with the company.¹⁴¹ In the matter of *Forward Foods LLC v Next Proteins, Inc.*¹⁴² the court held that Next Proteins’ electronic activities had created sufficient minimum contacts the New York and that the company had “clearly transacted business within the state” such that personal jurisdiction was established.¹⁴³ The contemplation of this finding arose from the contention of the fact that there was a “virtual data room where Defendants uploaded documents for Emigrant to review in New York”.¹⁴⁴ Accordingly, interactivity seems to be a significant factor to determine the whether there is sufficient minimum contact for a court to assert personal jurisdiction over a matter that arises from cloud computing.¹⁴⁵

¹³⁶ Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed? <<http://www.atrip.org/Content/Essays/Rita%20Matullionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 3.

¹³⁷ C.I. Kyer and G.M.A. Stern: 5.

¹³⁸ *Bragg v Linden Research Inc.*, No. 06-4925, 2007 U.S. Dist. WL 1549013 (E.D. Pa. May 30, 2007).

¹³⁹ R.E. Christ and C.A. Peele: 1.

¹⁴⁰ R.E. Christ and C.A. Peele: 1.

¹⁴¹ R.E. Christ and C.A. Peele: 1.

¹⁴² *Forward Foods LLC v Next Proteins, Inc.* 2008 BL 238516 (N.Y. Sup. 2008). In *casu* the defendant Next Proteins, who had its headquarters in California, hired an outside company to create a “virtual data room” into which Next Proteins could upload electronic documents related to their business to allow entities interested in purchasing the company to access the “room” by way of a password. F.M. Pinguelo and B.W. Muller: 1. Next Proteins provided the co-plaintiff, Emigrant Capital, a Delaware corporation, with such a password. F.M. Pinguelo and B.W. Muller: 1.

¹⁴³ F.M. Pinguelo and B.W. Muller: 1.

¹⁴⁴ F.M. Pinguelo and B.W. Muller: 1.

¹⁴⁵ R.E. Christ and C.A. Peele: 1.

The real and substantive connection test also assists the determination of the enforcement of a foreign court's finding in a matter involving copyright infringement in the cloud. The B.C, Court of Appeal decision in *Braintech v. Kostiuk*¹⁴⁶ gives us some idea of when a court will enforce the judgement of another jurisdiction.¹⁴⁷ In *casu* the appeal court stated that:

“It is apparent the “real and substantial connection” relied upon for the assumption of jurisdiction by the Texas court is the alleged publication there of a libel which affected the interests of resident present and potential investors. This is true only if the mode of communication through the Internet supports this conclusion.... In the circumstance of no purposeful commercial activity alleged on the part of Kostiuk and the equally material absence of any person in that jurisdiction having “read” the alleged libel all that has been deemed to have been demonstrated was Kostiuk’s passive use of an out of state electronic bulletin. The allegation of publication fails as it rests on the mere transitory, passive presence in cyberspace of the alleged defamatory material. Such a contract does not constitute a real and substantial presence. On the American authorities this is an insufficient basis for the exercise of an *in personam* jurisdiction over a non-resident.”¹⁴⁸

Another case that provides us with insight concerning the question of enforcement of a foreign court's decision as a result of the e-commerce activities is the case of *Disney Enterprises Inc. v. Click Enterprises Inc.*¹⁴⁹ in which the Ontario court was asked to enforce a judgement awarded in New York State against an Ontario corporation.¹⁵⁰ The question that arose *in casu* was whether the New York court could properly exercise jurisdiction against Click to such extent that a court in the corporation's home jurisdiction would enforce the judgement against the

¹⁴⁶ *Braintech v. Kostiuk* 171 D.L.R. (4th) 46. Kostiuk was alleged to have used the Internet to transmit and publish defamatory information about Braintech. C.I. Kyer and G.M.A. Stern: 6. Braintech succeeded in obtaining a default judgement in the District Court of Texas against Kostiuk and subsequently commenced action on this judgement in the Supreme Court of British Columbia, Canada. C.I. Kyer and G.M.A. Stern: 6. Braintech obtain favourable judgement to which an appeal was launched premised on the question of whether there existed a real and substantial connection between Texas and the parties to the dispute or the defamation alleged to have taken place in that state. C.I. Kyer and G.M.A. Stern: 6.

¹⁴⁷ C.I. Kyer and G.M.A. Stern: 6.

¹⁴⁸ C.I. Kyer and G.M.A. Stern: 6.

¹⁴⁹ *Disney Enterprises Inc. v. Click Enterprises Inc.* (2006) 267 D.L.R. (4th) 291. The Ontario corporation offered consumers tools and services to aid the downloading copyrighted films online.

¹⁵⁰ C.I. Kyer and G.M.A. Stern: 7.

corporation.¹⁵¹ In order to address the issue, the court utilised the real and substantial connection test and found that such a connection did in fact exist in the fact that the *Click* “had a commercial purpose that utilised the Internet to enter the U.S. to carry out its activities,” and that the judgement could be enforced by the Ontario court.¹⁵²

The decisions grappling with the international jurisdiction in the internet age reflects two common themes.¹⁵³ Firstly, courts have tended to emphasize the rights of the plaintiff to seek redress for harms while downplaying the defendant’s rights to procedural fairness and free expression.¹⁵⁴ In the matter of *Association Union des Etudiants Juifs de France v. Yahoo! Inc.*¹⁵⁵ involved two French organisations dedicated to combating anti-Semitism who sued Yahoo!, a U.S.-based Internet service provider and web publisher, for posting Nazi memorabilia on its auction site within French territory.¹⁵⁶ The plaintiffs *in casu* argued that the accessibility of the site in France rendered it in violation of a French law that prohibits the possession and sale of Nazi artefacts.¹⁵⁷ The French court agreed with the plaintiffs and ordered Yahoo! to prevent French users from accessing the auction site.¹⁵⁸ The court also stated that Yahoo! would be penalized 100,000 Francs per day of delay in implementing the order despite the presentation by Yahoo! of evidence that fully blocking French access to the site was technologically impossible.¹⁵⁹ Secondly, the decisions do not appear to be guided by clear rules but rather are fact-intensive inquiries that consider a wide array of factors, a tendency that has led to an inconsistent body of law relating to international jurisdiction.¹⁶⁰

¹⁵¹ C.I. Kyer and G.M.A. Stern: 7.

¹⁵² C.I. Kyer and G.M.A. Stern: 7. The New York court was found to have sufficient jurisdiction for the original claim brought by *Disney* because the defendant “had continuous and on-going business contacts with residents of New York through their interactive websites, which were targeted at residents of this state.” C.I. Kyer and G.M.A. Stern: 7.

¹⁵³ K. Wimmer, E. Pogoriler and S. Satterfield: 3.

¹⁵⁴ K. Wimmer, E. Pogoriler and S. Satterfield: 3.

¹⁵⁵ *Association Union des Etudiants Juifs de France v. Yahoo! Inc.*, 6 ILR 434, Tribunal de Grande Instance de Paris, Nov. 20, 2000.

¹⁵⁶ K. Wimmer, E. Pogoriler and S. Satterfield: 2.

¹⁵⁷ K. Wimmer, E. Pogoriler and S. Satterfield: 2.

¹⁵⁸ K. Wimmer, E. Pogoriler and S. Satterfield: 2.

¹⁵⁹ K. Wimmer, E. Pogoriler and S. Satterfield: 2.

¹⁶⁰ K. Wimmer, E. Pogoriler and S. Satterfield: 3.

6.4 RECENT INTERNATIONAL LEGISLATIVE INITIATIVES

The current legal framework regulating the enforcement and protection of copyright has been harmonised by a number of treaties under the so-called “TRIPS Plus” system, but none of these international instruments contain any provisions concerning the recognition of jurisdiction in copyright matters that arise in the cloud.¹⁶¹ In response, several efforts have been undertaken to create universal and predictable laws, and at least some courts have begun exercising restraint in asserting jurisdiction over claims that could potentially be brought in any forum in the world.¹⁶² Any attempt to create covenants that regulate the enforcement and recognition of foreign judgments arising from intellectual property rights disputes have not been successful beyond regional application.¹⁶³ There, however, have been promising developments recently to codify the principles that website publishers should be subject only to the laws of their home states.¹⁶⁴

The emergence of the cloud, and the plethora of issues associated with the copyright attached to the content therein, gave rise to numerous new issues related to the enforcement of IP rights.¹⁶⁵ One of the main questions in this regard is whether it is reasonable to confer broad jurisdiction over a multi-state copyright infringement to the courts of a state where the proprietor of copyright is resident. Some guidance on the debate concerning the jurisdiction over copyright infringement in the cloud can be found in recent legislative proposals drafted by several expert groups. These specialised groups emerged when it became clear that the Hague Judgement Project would not achieve its original objectives.¹⁶⁶

6.4.1 The “Principles”

More comprehensive sets of rules dealing with jurisdiction, choice of law and recognition and enforcement of foreign judgement in multi-state IP disputes were

¹⁶¹ T. Kono and P. Jurcys: 7.

¹⁶² K. Wimmer, E. Pogoriler and S. Satterfield: 4.

¹⁶³ P.A. De Miguel Asensio: 2.

¹⁶⁴ K. Wimmer, E. Pogoriler and S. Satterfield: 4.

¹⁶⁵ T. Kono and P. Jurcys: 17.

¹⁶⁶ T. Kono and P. Jurcys: 18.

prepared in the U.S., Europe and Asia.¹⁶⁷ These Principles were drafted in the light of particular legal traditions and have specific legal goals.¹⁶⁸ For instance, the American Law Institute (ALI) drafted the ALI Principles with a vision that they could provide some normative proposals for the adjudication of multi-territorial intellectual property disputes.¹⁶⁹ The Principles for Conflict of Laws in Intellectual Property (CLIP Principles) were drafted on the basis of the existing E.U. practices and with an intention to influence the legal process in Europe, and the members of the CLIP working group consisted of six different countries on both sides of the Atlantic.¹⁷⁰

The creation of two more working groups to investigate the private international law issues related to cross-border IP rights were formulated in Japan and Korea.¹⁷¹ The first and most prominent of these works was initiated under the auspices of the “Transparency of Japanese Law Project”. Similar to the objectives of the ALI and CLIP Principles, one of the objectives of the Transparency Principles was to provide for some practical proposals for the Japanese lawmaker which at the time of drafting was preparing new rules on international civil procedure.¹⁷² The second work, the so-called Waseda group, closely co-operated with another group of scholars in South Korea, and thus the joint Japanese-Korean Principles came into effect.¹⁷³

These Principles introduce some practical solutions with regard to the adjudication of copyright infringement disputes in the digital environment.¹⁷⁴ However, none of them have a binding legal value; they intend to provide guidelines for courts, legislative

¹⁶⁷ P.A. De Miguel Asensio: 5. T. Kono and P. Jurcys: 18.

¹⁶⁸ T. Kono and P. Jurcys: 18.

¹⁶⁹ P.A. De Miguel Asensio: 5. T. Kono and P. Jurcys: 18. Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed? <<http://www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 5.

¹⁷⁰ P.A. De Miguel Asensio: 5. T. Kono and P. Jurcys: 18. Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed? <<http://www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 5.

¹⁷¹ INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012). <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 3.

¹⁷² T. Kono and P. Jurcys: 18. INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012). <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 3.

¹⁷³ INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012). <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 3.

¹⁷⁴ T. Kono and P. Jurcys: 18.

bodies or international organisations on international private law issues in cross-border intellectual property disputes.¹⁷⁵ Despite representing different common and continental law traditions these Principles have resulted in rather similar set of rules.¹⁷⁶ Each of the Principles establish different matters that fall under the scope of the respective jurisdictional rules, but the notion of exclusive jurisdiction adopted by all three sets of Principles, the Transparency Principles excluded, only provides for the aspects of foreign IP rights litigation which are typically included in each of the rules: namely, IP subsistence, scope, validity and registration.¹⁷⁷ In addition to determining the matters that fall within the subject matter of their jurisdiction, each Principle determines the varying procedural actions that fall under their exclusive jurisdiction regulation.¹⁷⁸ Moreover, each of the Principles determines differently the effects of judgements concerning the validity of IPRs registered in foreign jurisdictions, but all sets of Principles are based on the premise that IPRs infringements are torts.¹⁷⁹ As a general rule throughout the various Principles, despite the few differences between the Principles, all of the analysed proposals have retained a territorial approach in the disputes over IP rights.¹⁸⁰

In conjunction to establishing a threshold for the assertion of international jurisdiction in IP disputes, the various Principles also contemplate and make provision for the recognition and enforcement of judgements rendered by the forum from which

¹⁷⁵ Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed? <<http://www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 5.

¹⁷⁶ Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed? <<http://www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 5

¹⁷⁷ P.A. De Miguel Asensio: 18. INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012) <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 5.

¹⁷⁸ INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012). <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 5.

¹⁷⁹ INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012). <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 6.

¹⁸⁰ Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed? <<http://www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 15. INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012). <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 7.

redress is sought.¹⁸¹ The purpose therefore is submitted to derive from the need to foster international enforceability of judgements to ensure the effective and adequate protection of IP rights.¹⁸² However, due to the limitations of existing international conventions and the lack of global agreements, the rules that provide for the recognition and enforcement of foreign judgements concerning IP matters typically depend on the laws of the country in which enforcement is sought.¹⁸³

While these Principles provide insight to the regulation of asserting jurisdiction in matters involving cross-jurisdictional disputes concerning IP it must be remembered that they were drafted by groups of practicing lawyers and academics and therefore have no binding force.¹⁸⁴ Nonetheless, their normative implications could be materialised by the courts who could take these Principles into consideration when interpreting and applying national conflicts rules in actual cases.¹⁸⁵ It is therefore contended that a vigilant eye ought to be kept on the developments in court precedent to address the asserting of jurisdiction in matters of copyright infringement in the cloud.¹⁸⁶

6.4.2 Alternative Dispute Resolution (ADR)

It must be remembered that few IP disputes are submitted to ever reach litigation.¹⁸⁷ In reality, most enforcement of IP rights takes place *not* in court, but in the everyday

¹⁸¹ The Principles subject ubiquitous, “instantaneous and worldwide,” infringements to the so called “close connection” rule and provide an exemplary list of factors on which basis the “close/closest connection” is to be determined.

Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed? <<http://www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 6-7. The development of the “ubiquitous infringement” rule seeks a compromise between territoriality and universality approaches. Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed? <<http://www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf>>. Retrieved 5 December 2013: 17.

¹⁸² INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012). <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 11.

¹⁸³ INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012). <<http://www.law.kyushu-u.ac.jp/programs/english/ila2012/images/ILA-SOPHIA%20Report.pdf>>. Retrieved 24 May 2013: 11.

¹⁸⁴ T. Kono and P. Jurcys: 19.

¹⁸⁵ T. Kono and P. Jurcys: 19.

¹⁸⁶ T. Kono and P. Jurcys: 19.

¹⁸⁷ J.S. Bennet: 400.

practices of IP owners and their lawyers.¹⁸⁸ "Cease and desist" letters, phone calls, and negotiations with alleged infringers constitute the bulk of IP enforcement efforts in trademark and copyright practice.¹⁸⁹ Moreover, the litigating of intellectual property disputes in a cross-border context is complex due to the territoriality principle.¹⁹⁰ Recent international scholars have proposed that the use of Alternative Dispute Resolution (ADR) can successfully find application to electronic commercial and intellectual property disputes that involves parties from different jurisdictions, provided that they are arbitrable.¹⁹¹

This submission is founded in the fact that an arbitration agreement effectively and conclusively replaces the jurisdiction of the court because it employs techniques that are not localised to any particular procedural and substantial jurisdictional frameworks.¹⁹² The OECD has noted that: "ADR has the potentiality to provide an adequate vehicle which can enhance parties' access to justice because it ensures that an international framework is established to protect internet users at the same level as in other forms of commerce."¹⁹³ Accordingly, electronic cross-border disputes can be processed in ADR without the need to reconcile different legal systems because ADR provides procedural flexibility.¹⁹⁴

In this regard WIPO has noticed that arbitration provides a single procedure for resolving multi-jurisdictional disputes without recourse to several different national court actions.¹⁹⁵ The WIPO Arbitration and Mediation Centre accordingly make provision for ADR options for the resolution of international intellectual property disputes.¹⁹⁶ Although the centre is focused on resolving international IP disputes, it could as easily be used to resolve national IP disputes where the nation involved is a

¹⁸⁸ W. T. Gallagher: 455.

¹⁸⁹ W. T. Gallagher: 455.

¹⁹⁰ J. De Werra: 299.

¹⁹¹ J.M. Boban: 13. H. A. Haloush: 1137. "Arbitrability" denotes "the quality of a dispute as being susceptible to being resolved by arbitration. J.M. Boban: 13.

¹⁹² H. A. Haloush: 1137.

¹⁸⁸ H. A. Haloush: 1138.

¹⁹⁴ H. A. Haloush: 1137.

¹⁹⁵ WIPO Arbitration and Mediation Centre: Dispute Resolution for the 21st Century <http://www.wipo.int/export/sites/www/freepublications/en/arbitration/779/wipo_pub_779.pdf>. Retrieved 16 December 2013: 2-3.

¹⁹⁶ J.M. Boban: 32.

WIPO Member state.¹⁹⁷ Moreover, WIPO has specifically addressed the three main concerns about the use of ADR for resolving IP disputes, specifically: confidentiality, the use of interim measures, and the availability of expert neutrals. From this perspective, the online jurisdictional challenge posed by the advent of the internet could be addressed by online ADR through the conceptualisation of parties' consent to adjudicate disputes without dependence on the exercise of jurisdiction in a forum state.¹⁹⁸ The challenging problem that is presented by the law that should be applied in resolving the merits of cyberspace disputes could be viewed as a global, moving target jurisdiction to be decided through online ADR on a case by case basis by parties interested in resolving the dispute. As a result, online ADR is a legitimate solution for disputes in cyberspace where parties' consent plays a fundamental role in the assertion of a proper jurisdiction.¹⁹⁹

6.5 CONCLUSION

There are no universally agreed upon rules to govern the accessibility of law enforcement involving cloud computing, an ever evolving technological advancement.²⁰⁰ Both service providers and users are increasingly faced with divergent, and at time conflicting, rules governing the jurisdiction over user content.²⁰¹ The complication in cases based on web content is the effect of UCC because it comprises of content that has no official connection or relationship with the publisher.²⁰² Leading authors on law and jurisdiction in cyberspace have contended that there is a need to recognise the power of technology while at the same time respecting traditional sovereignty.²⁰³

¹⁹⁷ J.S. Bennet: 406.

¹⁹⁸ H. A. Haloush: 1138. Since no state has the sole power to set the rules or standards or to say how they are applied in cyberspace, it has been submitted that substantial effective rules for dispute settlement can be agreed to by the parties in the form of ADR since it offers private, rather than sovereign, solutions. H. A. Haloush: 1146.

¹⁹⁹ H. A. Haloush: 1146.

²⁰⁰ K. Wimmer, E. Pogoriler and S. Satterfield: 15.

²⁰¹ K. Wimmer, E. Pogoriler and S. Satterfield: 15.

²⁰² K. Wimmer, E. Pogoriler and S. Satterfield: 4. Migration to the cloud and the subsequent distribution of UCC exemplified by publishers such as Facebook, which emphasises information sharing with its user-centred design, has raised questions about when a publisher should face liability for content posted by a user particularly urgent. K. Wimmer, E. Pogoriler and S. Satterfield: 4.

²⁰³ H. A. Haloush: 1134-1135.

As seen in the discussion involving case law for asserting jurisdiction in a cloud matter, it is quite evident that the mere presence of data in a particular jurisdiction at the time of its access would be sufficient to exercise jurisdiction over the owner of the data.²⁰⁴ While this situation does ensure that the copyright infringement effected in the cloud could more easily be regulated it impedes on the concept that the rights and obligations of an Internet publisher ought to be governed by the laws of the country in which it originates.²⁰⁵ But trying to tie the laws of any particular territorial sovereign to interactions and transactions on the Internet is a daunting challenge because the nature of the Internet is inherently international.²⁰⁶

Accordingly, while the nature of the Internet permits access by all users to publicly posted material wherever it may be located, the mere availability of material in a jurisdiction should not be sufficient to establish *in personam* jurisdiction.²⁰⁷ Instead, in its jurisdictional analysis, a court should consider the location and relationship to the forum, if any, of the people, activities, content and technology at issue.²⁰⁸ More importantly, a court must focus on a critical criterion: whether the parties to be held responsible for the content at issue expressly aimed at or "targeted" the forum.²⁰⁹ It is submitted that significant law reform, both internationally and domestically, is required to provide the consistency and predictability necessary to foster confidence in the inevitable extension of technology for cloud storage and access.²¹⁰ Moreover, the utilisation of online ADR is a matter worth pursuing for the effective and concise address of copyright infringement disputes in the cloud.

In the age of technology innovation it is submitted that South African law – both at common law and in statute - for the recognition and enforcement of foreign judgments is both ambiguous and incomplete. South Africa's participation in the Hague Conference on international private law has aided its preparation for

²⁰⁴ K. Wimmer, E. Pogoriler and S. Satterfield: 15.

²⁰⁵ K. Wimmer, E. Pogoriler and S. Satterfield: 15.

²⁰⁶ H. A. Haloush: 1134-1135.

²⁰⁷ G. J. Wrenn: 98.

²⁰⁸ G. J. Wrenn: 98.

²⁰⁹ G. J. Wrenn: 98.

²¹⁰ K. Wimmer, E. Pogoriler and S. Satterfield: 15.

accession to the various conventions on international judicial co-operation.²¹¹ However, until South African policy makers and judges do not address the gaps in both common law and statute South African courts will have little authority to guide the recognition and enforcement of foreign judgments involving matters of copyright infringement in the cloud.

The discussion in this chapter has merely touched on some of the issues associated with the recognition and enforcement of foreign judgments because the contemplation of asserting jurisdiction in matters involving copyright infringement in the cloud is a matter that requires substantial national and international collaborative efforts. It is crucial that the matter receive further attention. International initiatives have been undertaken to start the formulation of principles that aid the recognition and enforcement of foreign judgments in matters concerning the cloud, and there has been substantial progress. However, until South Africa specifically addresses the adjudication of copyright infringement in the cloud it is unequipped to adequately regulate matters accordingly.

²¹¹ South African Law Reform Commission. Recognition and Enforcement of Foreign Judgments.2011 Report.<http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf>. Retrieved 30 November 2013: 3.

CHAPTER 7

CONCLUSION

This study investigated the insufficiency of South African copyright law to adequately regulate the conduct of users who can acquire, remix, upload, derive and share vast amounts of copyrighted works via the Internet. The purpose of this study was to analyse the potential developments in copyright law for cloud application within a South African context. The intended analysis began with the determination and evaluation of the intricate relationship that seems to exist between the cloud, which from the working definition provided for by NIST refers to a global technical infrastructure that gives users access to a repository of software and data via an Internet connection, the content that is generated in and derived from the information therein and the dualistic nature of copyright law.

It is established that UCC, deemed to be a social phenomenon, is the response of members of society who is eager to participate in the development of their social and cultural experiences. UCC is the manifestation of the various democratic rights the South African community endears. However, it was established that traditional copyright law is struggling to regulate and accommodate cloud computing and UCC because it ignores the reality of the cloud and its distributive and innovative capacity. Accordingly, Chapter 2 establishes that there has been a dynamic shift in the already unhinged relationship between authors and their audiences: a shift that has sparked renewed interest in realising the true purpose of copyright law – to stimulate artistic creativity for the good of the general public.

It is submitted that if cognisance of the “law” and propensity to maintain the rights of the author above the realisation of social or utilitarian goals then the law, more specifically copyright law, fails as an institution designed to promote the progression of science and arts through works of authorship.¹ The law is not only about rules, principles and precedent: its validity is supported by society’s attitude toward the law

¹ A. Ng: 880.

and its interpretation of, and belief in, the legal system.² The law ought to have regard for the number of communities and communal interests that share and build upon commonly held content on the web.³ Professor Hugenholtz and Professor Senftleben assert that the current lack of flexibility in the copyright framework undermines the very fundamental freedoms, social interests and economic goals of copyright law.⁴ “Whereas social media have in recent times become an essential means of social and cultural communication, current copyright law leaves little or no room for sharing ‘user-generated content’ that builds upon pre-existing works.”⁵ It was accordingly determined that a progression towards a copyright system which recognises the interests of users is necessary if policy makers and legislators wish to avoid the dilution and weakening of the copyright regime.

In light of this contention, Chapter 3 investigates a primary source of the tension that prevents that adequate application of copyright law to cloud computing and UCC. The attachment of strict liability to copyright infringement, which originates from the proprietary nature of copyright, proves erroneous for various reasons. The foundation for the doctrine of strict liability, however, is too deeply rooted in the proprietary nature of copyright law that subversion therefrom would require a complete re-conceptualization of the premises upon which copyright is founded. Accordingly, the intended evaluation undertaken in Chapter 3 aimed to contemplate the strengthening and expansion of the counter mechanism that subverts the imbalance strict liability brings about in the cloud-copyright relationship – the doctrine of fair use.

There is no easy way to draw a line between what is permissible and what is not when it comes to UCC and the copyrighted work involved in its production.⁶ However, exceptions to copyright infringement have become an increasingly important legal vehicle to address the conflict between the interests of copyright holders and users which has been exacerbated by constantly evolving technologies.⁷

² A. Ng: 883.

³ A. Ng: 882.

⁴ P.B. Hugenholtz and M.R.F. Senftleben: 10.

⁵ P.B. Hugenholtz and M.R.F. Senftleben: 10.

⁶ E.Lee: 1510.

⁷ P. Chapdelaine: 1.

As rights expand simultaneously with the development of new information and communication technologies, society pays the price as the maximisation of the collective welfare is effected with the compromise of the copyright system.⁸ The enactment of the WTC attests to this realisation.

Chapter 3 accordingly sets out and evaluates the fair dealing and fair use approaches of Australia, the U.K., the U.S. and Canada in order to establish the standards according to which their doctrines function and have been developed to find application in the cloud. Against the fair dealing doctrine of South African copyright law these fair dealing doctrines seem to have moved or started moving beyond the confines of a traditional copyright system while South African fair dealing remains subject to its innate uncertainty. Each of the comparative jurisdictions, some more than others, were discovered to have made significant progress in the development of their fair dealing and fair use doctrines to better accommodate copyright application to UCC.

The Supreme Court of Canada in the *CCH* case characterised exceptions to copyright holders' exclusive rights as "users' rights," and not mere loop holes in Canada's Copyright Act.⁹ In a single decision the Canadian Supreme Court elevated fair dealing from a limited exception that was largely viewed as being ineffective to establishing a balance and recognition of user rights.¹⁰ When combined with the provisions contained in Canadian Copyright Modernisation Act the Supreme Court in the *CHH* case is a big step toward clarifying the divide between fair use and fair dealing,¹¹ effectively turning the Canadian fair dealing provision into a fair use provision that can find application in the cloud and the regulation of UCC. Moreover, the *CCH* decision provides a powerful reminder that the rights conferred by copyright law are not absolute.¹² Chapter 3 reveals that fair dealing and fair use remain the best mechanisms to realise the much needed recognition of users' expectations to utilise the cloud and its content for their own creative and innovative purposes. Moreover, the development of fair dealing and fair use doctrines to accommodate

⁸ A. Ng. 881.

⁹ P. Chapdelaine: 1.

¹⁰ M. Geist: 169.

¹¹ M. Geist: 170.

¹² M. Geist: 169.

the use of copyrighted materials in the cloud will ensure that copyright law retains its legitimacy as a system of law that can provide clear regulation with regard to UCC.

In light of this contention Chapter 4 of the study specifically addresses the development of the fair dealing doctrine to afford personal use a more substantiated scope for regulating user-copied content originating from a legitimate source. User-copied content entails the transmission of copyrighted content in its entire form from one device to another, an act that amounts to direct copyright infringement and accordingly attaches strict liability. However, many users are under the impression that they have a legitimate interest in the personal use of copyrighted material they exchanged money for. Chapter 4 establishes that the personal use exception is justifiable and provided for in general terms in various jurisdictions. It does, however, become clear the reliance on personal use in the digital age is not well established, and legitimate expectations seem to be neglected because of the emphasis placed on the economic value of copyright. It is established that the current personal use exception is a poor tool for addressing personal use in the cloud. Consequently, it is argued that the personal use exception needs to be supported by other legal tools that supplement the premise of personal use.

“Copy ownership” serves to justify the expectation of personal use of works legitimately acquired because that it helps address copyright law’s credibility crisis by closing the gaps between the copyright holder’s interpretation of the law and the public’s understanding thereof.¹³ Copy ownership is found to offer a reliable mechanism for users who do not disregard copyright premises, but whose enjoyment of their personal property is restricted by the overly-emphasised rights held by the copyright holder of the work. Copy ownership, however, raises questions relating to the manner in which a court will navigate the contention between two proprietary rights; given the copy owner is now also essentially a property owner.

There has thus been little to no reliance by courts on copy ownership when contemplating the application of fair use. Accordingly, the deliberation of an opposing proprietary right to that of the copyright holder may be well argued, but not well

¹³ A. Perzanowski and J. Schultz: 2070.

substantiated. It is submitted that copy ownership on its own is not enough to contend the assertion of rights by a copyright holder in his or her work. Copy ownership needs the doctrine of copyright exhaustion because it strengthens the justification of personal use as a result of the restrictions it places on the rights of copyright holder to control the distribution of his or her works after he or she consents to parting therewith. Copyright exhaustion thus substantiates personal use because it functions on the premise that the rights of the copyright holder cannot continue perpetually. The application of copyright exhaustion in the digital context has been the subject of much contention in previous years, but it seems that the idea has taken root in the academic and judicial community.

The contemplation of copyright exhaustion in the context of cloud computing is not without obstacles. The use of licenses by copyright holders is widely employed to circumvent personal use by extending the rights afforded under copyright law in contractual terms. As a result, digital copyright licenses are used to prevent the application of copyright exhaustion because they prevent the transfer of ownership when a user pays money for digital products. Licenses and EULA are used to contractually remove fair use and to undermine the economic exchange that takes place when a user pays money for digital products. Hence, the court in the *UMG* case established that a license cannot be applied haphazardly but needs to be confined to very specific considerations for its validity.

The most hailed development concerning the recognition of a personal use exception supported by the doctrine of copyright exhaustion can be seen in the *UsedSoft* case. The EUCJ *in casu* recognised that users who pay the purchase price for their products (games) become the owners of that copy and is therefore entitled to exercise all rights of ownership. The court recognised the legitimacy of copyright exhaustion in the digital context and set the stage for a well-supported personal use doctrine. It is yet to be determined what the effect of this finding will have on the courts in other jurisdictions, and the economic impact of the decision is yet to be established.

Apart from the acknowledgement by the court in the case of *UsedSoft* of the role copyright exhaustion serves in the digital context the doctrine of personal use has

also gained some legislative substance in the recently enacted Canadian Copyright Modernisation Act. The Act creates three new exemptions of acceptable fair dealing on a personal use basis which seem to provide a broad spectrum of personal uses within specific perimeters. The manner in which these provisions function when applied to real-time copyright issues arising from the cloud is yet to be determined. However, given the proximity of Canadian law to British law the developments in the Canadian Copyright Modernisation Act should provide a familiar framework for South African policy makers and legislators to direct the development of fair use exceptions that allow for personal use.

Chapter 4 focuses on the UCC that is transmitted in its entirety for purposes that are not transformative. The transformation of cloud content is, however, a very common occurrence. The adaptation, remixing and the incorporation of various copyrighted materials to create “new” content, for commercial or non-commercial purposes, generally takes place without permission from the copyright holder. Accordingly, the creation of these derivative works generally involves the substantial reproduction of various original works during the adaptation process.

Chapter 5 investigated the function and application of the derivative work right in cloud computing in order to determine the platform from which to address user-derived content from a copyright perspective. The derivative work right is corollary to the adaptation right employed in British law and therefore also South African law, but the derivative work right provides a much broader scope for adaptation than the adaptation right which provides for specific adaptations only. Thus, the broader exclusive right provided for by the derivative work right ushers in a broader fair use exception, transformative use, which is provided for by the U.S. Copyright Act. It is well established that U.S. fair dealing has been hailed as being the most flexible and accommodating version of the doctrine, and transformative use is its foremost nominee despite not being specifically provided for in the U.S. Copyright Act. While the exact application of transformative use is largely undefined, the underlying premise that arises from U.S. case law is that transformative use plays an essential role in accommodating the generation of innovative works and is therefore justifiable for various reasons.

Chapter 5 analysed the corollary relationship between the derivative work right in U.S. copyright law and the adaptation right in U.K. copyright law. The adaptation right, while stricter in its application, provides greater legal certainty for the application of its opposing fair dealing considerations, whereas transformative use affords greater scope for substantially more variations that cannot be addressed under the stricter fair dealing doctrine. In the context of the cloud it seems that the derivative work right and the complementary transformative use exception functions better and provides more accommodating regulation in the cloud. While various jurisdictions have started contemplating the implementation of a transformative use provision in their copyright law, the direct incorporation of the exception may not be suitable for all legal systems. It has thus been argued that the flexibility of the transformative use exception ought to operate alongside structured exceptions.

In order gain insight towards the structuring of these exceptions it is necessary to explore the essentials of copyright law that will determine the manner in which the proposed exceptions ought to be structured. Firstly, there is an undefined overlap between the reproduction right and the derivative work right. This overlap blurs the correct application of transformative use in the fair use analysis. In the *RDR Books* case the court drew a neat distinction between the reproduction right and the derivative work right by emphasising that the analysis of transformation requires the realisation that the transformation of a work cannot be tied to only one factor of any fair use or fair dealing analysis. The appropriate transformative use of an original work would tip the scales in favour of fair use when all the fair use factors contained in Section 107 of the U.S. Copyright Act are considered together.¹⁴ This approach would serve well in the context of user-derived content because it would aid the distinction between works that simply amounts to reproduction and works whose purpose and result serves to transform the original work beyond its original intention. The court was of the opinion that transformation for the sake of fair use ought to be focused on the reader's reaction to the work, and not the author's intention behind its production.

¹⁴ M.D. Murray: 16.

The notion of transformative use is, however, not confined to the fair use analysis, but is also employed to determine whether an allegedly transformative derivative work would qualify for copyright protection given the fact that the work is substantially derived from the “original” works of other authors. Transformative use in the fair use analysis primarily requires that the work create new meaning and new expression with a further purpose and different character than the original.¹⁵ In the case of *Castle Rock* the court provided that: (1) transformation of content is not indicative of a transformative purpose and therefore fair use, although a more than minimal content transformation can indicate a transformation purpose: and (2) actual transformation of the content rather than the purpose with which the transformation is effected is the key to producing a derivative work, provided that the transformation results in a “new mode of presentation,” even if it is for a non-transformative purpose.¹⁶ The court, however, did not clarify whether the transformation required to circumvent the alleged infringement involved in the creation of a derivative work is the same transformation required for a copyright eligible derivative work.¹⁷

It was therefore necessary to determine the extent to which a transformative derivative work needs to comply with the copyright requirements for copyright recognition after it has been found to be transformatively fair. It must be borne in mind that the fundamental element of user-derived content and the transformative use thereof within the context of this study is that it is done in a cut and paste manner. While the transformation is subject to variation, the creation of the user-derived content originates from pieces of other works in a variety of compilations. This raises questions concerning the standard of originality a transformative derivative work will need to adhere to in order to qualify for copyright protection, because the ease with which transformation can be effected seems to negate the very labour principle upon which copyright is founded.

The premise of this contention stems from the assertion that the originality standard in South African copyright law is too low, and that if applicable as is then even the most insignificant adaptations and minimally derivative works in the cloud would

¹⁵ M.D. Murray: 23.

¹⁶ M.W.S Wong: 1121.

¹⁷ M.W.S Wong: 1121.

qualify for copyright protection. Essentially, if copyright law is to be adapted to afford users greater freedom to use copyrighted works then the copyright requirements ought to be adapted to ensure stricter compliance for copyright recognition. The ultimate purpose of copyright law is the production of innovative works that benefit the public after all. Accordingly, Chapter 5 critically analysed the inherent notions of “originality” and “author” that come afore when the recognition of copyright in transformative derivative works is contemplated for cloud application.

In the analysis of these notions it was determined that the notion of “authorship” is founded on very specific features, the most common of which entail the genius, contribution, or labour exerted to produce a work. While the recognition of the author remains an important aspect of copyright in the digital context, it was argued that there needs to be a shift in the traditional narratives thereof to recognise that users can be authors and those authors are essentially users. Moreover, it is contended that authorship in the digital context ought to be characterised as a mode of use that is subject to the originality standard in order to ensure that the conditions that encourage authorship are maintained. Authorship in cloud computing is determinable from the integrity of the work produced and preserved by paternity of the work.

This contention leads to the analysis of the originality requirement for the application of copyright recognition for user-derived content. The originality requirement for copyright protection is the “*sine qua non*” of copyright,¹⁸ but a proper definition has never been formulated; only approximations of the term have thus far been attempted.¹⁹ In the matter of *Feist* the U.S. Supreme Court held that the originality standard requires an element of creativity in order for copyright recognition to find application. The *Feist* creativity standard has subsequently been confirmed in various cases.

The originality standard in South African copyright law, however, does not necessitate any creativity considerations. The Supreme Court of Appeal in the matter of *Haupt* rejected *Feist*’s standard of minimal creativity and applied U.K.’s substantial

¹⁸ O.B. Arewa: 484. D.S. Ciolino, A.R. Christovich and E.A. Donelon: 393. K. Hariani and A. Hariani: 492.

¹⁹ A. Rahmatian: 22.

“sweat of the brow” standard.²⁰ Accordingly, the mere effort of producing the work confers upon the work copyright protection. However, the requirement for “creative effort” in the working definition for UCC implies that a certain amount of creative effort needs to be put into creating the work or adapting existing works to construct a new one i.e. users must add their own value to the work.²¹ In its current formulation, the test for originality under South African law does not provide any adequate insight to determining the “originality” of user-derived content, and current provisions to determine originality under South African law fail to encompass UCC for copyright application.

How then can the insufficiency of South Africa’s “originality” standard be addressed for the purpose of determining the copyright eligibility of derivative works, or adaptations as referred to in South African law, in the cloud? It was suggested that one way in which to approach derivative works for the contemplation of copyright protection is to realise that nothing in the world is “truly” original because all creativity ultimately draws from already existing works.²² This approach acknowledges that creativity is a process determined by the individual characteristics and traits of the author. The observation that a work is indeed creative stems from the subjective analysis of onlookers. How then do we find a compromise between the high *Feist* “creativity” standard and the low “sweat of the brow” standard utilised in South African law for the copyright recognition of user-derived content in cloud computing? Canada seems to have provided us with an answer.

The Canadian Supreme Court in the *CCH* case presented a “workable yet fair standard” between the “too low” sweat of the brow standard, which “shifts the balance...too far in favour of the owner’s rights, and fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works” and the “too high creativity standard” of the U.S which, the court contended, “implies that something must be novel or non-obvious (a standard similar to the originality requirement for recognising patents) even though has been accepted that

²⁰ E.F. Judge and D. Gervais: 397.

²¹ Organization for Economic Co-operation and Development. The Participative Web: User-Created Content. <<http://www.oecd.org/sti/38393115.pdf>>. Retrieved 26 June 2013: 8.

²² I. Hoare: 4.

originality does not require novelty.²³ Accordingly, the Supreme Court held that the exercise of skill and judgment will “necessarily involve intellectual effort.”²⁴

The strongest transformative fair use is one which modifies the contents, function, and purpose of the original work in a significant and obvious manner.²⁵ It therefore seems that the determining factor when contemplating whether a derivative work is original for the sake of copyright recognition is the element of choice – the possibility to choose one alteration over another in an intelligent manner.²⁶ It is submitted that South African public will benefit from the convenience of literary and artistic works in a robust copyright system because the system itself will provide the necessary balance between competing rights of individual authors, who at times create for non-commercial reasons, and their audiences which include users of their works and new authors seeking inspiration.²⁷

Moreover, the Canadian “intellectual” standard for originality takes cognisance of its British roots, but recognises that mere effort is not enough. This originality standard ought therefore to be used to aid the development of South African copyright law to formulate an originality standard that adequately regulates the recognition of copyright protection with respect to transformative derivative works in the cloud. Both the South African public and its policy makers need to understand that, as an institution that aims to provide the best route to the future, copyright laws must guarantee that the proper conditions for authorship exist so that society’s welfare is maximised through the creation of diverse forms of literary and artistic works.²⁸ The low originality standard can therefore not remain. It is submitted that the provisions contained in the Canadian Copyright Modernisation Act provides a clear framework within which transformative use can be applied to transformative fair use and transformative derivative works in the cloud to foster the semiotic democracy the cloud offers whilst maintaining a robust copyright regime.

²³ E.F. Judge and D. Gervais: 392.

²⁴ E.F. Judge and D. Gervais: 390-391.

²⁵ M.D. Murray: 46.

²⁶ A. Rahmatian: 13.

²⁷ A. Ng: 882.

²⁸ A. Ng: 883.

For the largest part of this study the focus was directed at addressing the application of copyright law to very specific UCC. The study could not, however, be complete without contemplating the broader context within which copyright for cloud computing would find application. The fundamental premise upon which cloud computing is based is that it does not matter where data is stored, but where it can be accessed from – anywhere.²⁹ The Internet is, after all, engineered to work on the basis of logical, not geographical indications.³⁰ Chapter 6 therefore shifts the focus to address the virtual jurisdiction within which the cloud operates to contemplate the effect thereof on the enforcement and recognition of adjudication within real, discernible territorial confines.

The analysis in Chapter 6 starts with a discussion on the current position in South African law on the recognition and enforcement of foreign judgements under common law and in terms of the Enforcement of Foreign Civil Judgements Act.³¹ It is determined that the current framework for the recognition and enforcement of foreign judgments in South African law is restricted and inadequate to provide potential foreign plaintiffs in cloud copyright matters the means whereby they can approach South African courts to enforce their rights or have the court recognise a judgment given by a foreign court. There have been recommendations to amend the Enforcement of Foreign Civil Judgements Act, but the appropriate amendments cannot be effected without adequate cognisance of the complexities associated with asserting and adjudicating copyright in cloud computing.

As a result, Chapter 6 navigates the complexities and misconceptions policy makers are faced with when contemplating jurisdictional issues that arise in the regulation of cloud computing matters. It becomes evident that the universality of the Internet creates unique risks and that regulation on an international standard needs to be established and implemented. Accordingly, there is an evaluation of the current jurisdictional approaches to establish the mechanisms whereby jurisdiction in cloud matters can be asserted and foreign judgments recognised by a court. It is

²⁹ D.M. Given. <<http://www.lommen.com/pdf/SXSW-2012/Music-In-the-Cloud-A-Business---Legal-Primer.aspx>>. Retrieved 22 May 2013: 1. C.I. Kyer and G.M.A. Stern: 1.

³⁰ H. A. Haloush: 1134.G.J. Wrenn: 97.

³¹ 32 of 1988.

established that the “real and substantial connection” test has seen some judicial development in various jurisdictions, and it seems that the “market effect” doctrine seems to have gained prominence and recognition by WIPO – for online trademark infringement at least. However, thus far most approaches seem to focus on the rights of the plaintiff while downplaying the defendant’s rights to procedural fairness, an issue that contradicts the recognition of the proposed expansion of copyright exemptions for cloud application in recent legislative and judicial development.

There has been some harmonisation of a framework for the regulation of copyright in the cloud with the drafting of various “Principles.” These principles introduce some practical solutions with regard to the adjudication of copyright infringement disputes in cloud computing, but the extent of its effects eludes us because they are not legally binding and are not fully synchronised. At best, these principles provide us with well established guidelines to direct the development of a framework for the recognition and enforcement of foreign judgments on cloud copyright matters for South African application. It is recommended that South African policy makers keep an eye on the application of the principles by international forums. Until such time the use of ADR seems to provide an adequate means by which the infringement and enforcement of copyright in cloud computing can be addressed. However, until South African policy makers and legislators address the regulation of copyright in cloud computing South African law is unequipped to adequately address copyright issues that arise in cloud computing.

South Africa has only very basic copyright laws which are not currently aligned with international best practice.³² South African copyright legislation has not been updated to provide for key digital copyright issues, and the enforcement of online copyright is generally poor.³³ It is also of notable importance that the current Copyright Act makes no reference to any work created in, acquired from or processed via the Internet. Copyright in the virtual realm is not currently provided for, or even contemplated in any South African legislation. Ebersohn contends that the

³² A method or technique that has consistently shown results superior to those achieved with other means, and that is used as a benchmark. <<http://www.businessdictionary.com/definition/best-practice.html#ixzz2Wr8JWFhW>>. Retrieved 21 June 2013.

³³ <http://cloudscorecard.bsa.org/2013/assets/PDFs/country_reports/Country_Report_South_Africa.pdf>. Retrieved 22 May 2013.

South African Copyright Act ought to be re-written from scratch in order to modernise it to adequately provide for copyright in the digital age.³⁴ This contention is not entirely unfounded, but it requires the contemplation of the Act in a much broader sense than the focus of this study. As far as the cloud and UCC is concerned the South African Copyright Act is archaic and unable to effectively provide guidance on the application of copyright law to UCC and its complexities.

There is a definite need for copyright reform in South African law. In accordance with the purpose of this study, it is submitted that the creation of exemptions that regulates copyright in the cloud ought to be constructed around the Internet to provide a flexible, user-friendly approach for ensuring an environment that supports innovation is maintained whilst providing technological neutrality. It is submitted that the modernising of the Act ought to be done with consideration of the recent progressive judicial and legislative developments. Accordingly, South African policy makers need to stop looking for reasons not to implement the provisions contained in the WCT concerning the regulation of copyright in the virtual realm. They need to start entertaining some of the theoretical and practical efforts undertaken by other jurisdictions in their attempt to regulate copyright in cloud computing in a more effective manner.

³⁴ G.J. Ebersohn: 266.

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