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Reconstructing fairness:  
The problem with fair use exclusivity

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# Reconstructing fairness: the problem with fair use exclusivity\*

Maurizio Borghi

## Abstract

Exemptions from copyright infringement play a pivotal role in the new digital economy. Tech companies rely heavily on fair use, fair dealing and other statutory exceptions, as well as on safe-harbour limitations of liability. For many businesses, the availability of a copyright exemption represents an asset that is as valuable as other intellectual property rights in their portfolio. This trend is also reflected at policy level worldwide, where so-called ‘fair use industries’ push for stronger exemptions by use of strategies and arguments that are very similar (albeit specular) to those applied by traditional copyright industries to lobby for stronger copyright protection.

This changing role of copyright exemptions carries important policy and doctrinal implications, which form the subject of this chapter. The key point of discussion is that beneficiaries of exemptions are often in a position to create proprietary or quasi-proprietary entitlements around their copyright-exempted uses, thereby turning exemptions into de facto exclusive rights in reverse. I call this phenomenon ‘fair use exclusivity.’ The chapter considers some paradigmatic examples of fair use exclusivity. It then discusses, from a normative perspective, possible approaches that legislators can adopt to ensure a fair, unbiased functioning of copyright exemptions in the new digital environment.

**Keywords:** copyright, fair use, exceptions and limitations, Big Data, Google, private copy

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\* Forthcoming in: Daniel Gervais (ed.) *Fairness, Morality and Ordre Public in Intellectual Property* (Edward Elgar, 2020).

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## 1. Introduction: towards a fair use standard for copyright exceptions and limitations?

The ‘Hargreaves Review’ made several recommendations on modernizing copyright law that were taken on board in the UK copyright reform of 2014.<sup>1</sup> The chapter introducing copyright exceptions reported a statement of the then Prime Minister David Cameron announcing the government’s reforming plan:

The founders of Google have said they could never have started their company in Britain. The service they provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there, they have what are called “fair use” provisions, which some people believe gives companies more breathing space to create new products and services.<sup>2</sup>

The Review downsized significantly the ‘Google narrative’ on fair use and eventually did not recommend transplanting the US provision in UK law.<sup>3</sup> However, David Cameron’s statement expresses a widely-shared assumption on the virtues of an open-ended and ‘flexible’ system of copyright exceptions and limitations, as epitomised by the US doctrine of fair use. Two points are worth noting in this regard. Firstly, exceptions are no longer seen just as ‘safety valves’ that balance the property interests of the copyright owners with the users’ needs to access information and other public interests goals. Far more than that, they now constitute key drivers of innovation and creativity, essential ingredients of the digital economy and strategic assets for leading-edge tech companies.

The second point is that the US fair use model has acquired standing internationally as the paradigmatic example of a system that is capable of responding promptly to the challenges of technology and to accommodate new technology-enabled uses of copyright works. Accordingly, with the advent of the digital economy, fair use went from a barely tolerated transgression of the international copyright regime to a model of inspiration for the rest of the world.<sup>4</sup> In this vein, many copyright scholars have convincingly argued that a flexible system of exceptions is not only desirable, but also achievable under international obligations in countries other than the US.<sup>5</sup>

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<sup>1</sup> Copyright and Related Rights Regulations 2014, amending the Copyright, Designs and Patents Act 1988.

<sup>2</sup> Iain Hargreaves, *Digital. Opportunity. A Review of Intellectual Property and Growth* (2011), par 5.12.

<sup>3</sup> *Ibid.* par 5.19.

<sup>4</sup> Compare Ruth L. Okediji, ‘Toward an International Fair Use Doctrine’, (2000) 39 Colum. J. Transnat’l L. 75 (advocating for explicit provisions in international law that enable fair use to survive) and Richard J Peltz, ‘Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law’ (2009) 27 Tex. Intell. Prop. L.J. 267 (observing how the fair use concept has achieved traction in international legal circles).

<sup>5</sup> P. Bernt Hugenholtz, ‘Flexible Copyright: Can the EU Author’s Rights Accommodate Fair Use?’ in Ruth Okediji (ed.) *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017), 275 (arguing that a flexible regime of exceptions and limitations is compatible with the legal framework of European copyright); Christophe Geiger,

The virtues of a broad, reliable and adaptable system of copyright exemptions are undeniable. However, new problems may arise when exemptions become strategic assets and resources that tech companies compete for in the information market. The more a resource is valuable and non-substitutable, the greater the chances it attracts proprietary or quasi-proprietary claims. To put it succinctly: companies competing in the data and information markets do not just aim for *more* fair use. They also struggle to secure *exclusive* fair use of valuable resources. This drift raises the question of whether the current fair use system, as now in the process of becoming the global standard for copyright exemptions, is still fit for the purpose of enabling fair access to information, or whether adjustments are needed.

The issue posed by the use of copyright exemptions by tech companies inscribes itself in the broader question of the scope and limits of ‘proptertization’ of information and data. In the last twenty years, legal scholars have focused extensively on how copyright and related rights can confer strong, unjustified market power on the rights holders in the networked digital environment.<sup>6</sup> Little attention has been paid so far on how exceptions and limitations to copyright can equally bestow substantial market power to the beneficiaries of a certain limitation or finding of fair use.<sup>7</sup> This chapter contributes to filling this gap by discussing some notable examples, as well as possible solutions that legislators can pursue to ensure fair, unbiased functioning of copyright exemptions in the new digital environment.

The chapter proceeds in three parts. First, it presents the structure of the problem in its doctrinal and policy aspects. Second, it discusses three cases that illustrate the point, namely mass digitization, text mining and digital private copying. Finally, it proposes four possible legislative approaches to the problem, and concludes with some considerations on how the scholarly debate can be taken forward on the future of copyright exemptions.

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Daniel Gervais and Martin Senftleben, ‘The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’ (2014) 29 Am. U. Int’l L. Rev., 581 (explaining how flexible exceptions are permitted under the Berne Convention’s three-step-test); Lionel Bently and Tania Aplin, ‘Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism’, S. Frankel (ed), *Is Intellectual Property Pluralism Functional?* (Edward Elgar 2018) (reading the exception for fair quotations in the Berne Convention as imposing a ‘global mandatory fair use’). See also Tito Rendas, ‘Destereotyping the Copyright Wars: The “Fair Use vs. Closed List” Debate in the EU’ (2015), <https://ssrn.com/abstract=2657482> (challenging the received wisdom that sees the EU system of copyright exceptions as ‘unflexible’ and predictable, and arguing that the opposite is in fact true).

<sup>6</sup> See Lawrence Lessig *The Future of Ideas: The Fate of the Commons in a Connected World* (Random House 2001) (‘The law of copyright makes [parts of our culture property of the few], even though the law of copyright was never meant to create any such power’, p 11; ‘beyond [fair use], the content of our culture is controlled by an ever-expanding scope of copyright’ p. 110).

<sup>7</sup> But see Guy Pessach, ‘Toward a New Jurisprudence of Copyright Exemptions’ (2015) 55 IDEA, 287 (suggesting principles that legislators and courts should take into account to mitigate ‘potential distribution gaps between powerful corporate media entities that [...] rely on copyright exemptions’, 308). See discussion *infra*, sec. 4.2.

## 2. Fair use exclusivity and the changing nature of copyright exemptions

I call ‘fair use exclusivity’ the situation in which the beneficiary of an exemption has an exclusive right over the use permitted under the exemption. The situation has emerged recently in the US under the fair use system, but it affects in principle all systems of copyright exemptions, including statutory exceptions and safe-harbour limitations of liability. Fair use exclusivity is a trans-national phenomenon that raises both doctrinal and policy issues.

### 2.1 Doctrinal implications

Lawful uses of copyright works are either uses that are authorized by the copyright owner or uses that are exempted from infringement by operation of law. In the former case, the lawfulness of the use extends only to the beneficiary of the authorization (unless the copyright owner voluntarily relinquishes her rights, for instance by means of an open licence).<sup>8</sup> It is a binary relation, whereby the power of control over certain uses of the work that the law recognizes to the author is transferred (wholly or partially) to another subject, or to other subjects. In the latter case, by contrast, the lawfulness extends to a whole category of users and to all subjects that engage in a certain use. It is a relation of one to all, in which the author’s exclusive control is suspended to the benefit of an indefinite number of potential users.

Accordingly, a legal ruling that a certain kind of use is exempted from copyright infringement sets a precedent on which not only the defendant, but every subsequent user can rely on, thus limiting the power of control of copyright owners over any same or similar activities of future users. This effect is more evident in cases of judicially-created defences such as fair use and, to some extent, fair dealing. However, the same is true also for legislative-codified defences such as statutory exceptions, limitations and safe harbour limitations of liability, insofar as their application to specific activities is a matter of judicial interpretation. For example, a judicial decision that the provision of a cloud service for remote recording of television programmes is shielded by the private copy exception would enable *all* future providers to offer similar services, while an opposite ruling would outlaw all those services.<sup>9</sup>

By giving latitude to permitted uses of an indefinite number of potential users, copyright exemptions are expected to promote values such as competition, innovation, cultural pluralism and

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<sup>8</sup> Philip Johnson “‘Dedicating’ copyright to the public domain’ (2008) 71 *Modern Law Review*, 587 (discussing the legal effect of an author dedicating a copyright work to the public domain).

<sup>9</sup> See the discussion *infra*, sec. 3.4.

democracy.<sup>10</sup> However, such expectation may be frustrated if the beneficiary of an exemption can exclude others from benefiting of the same exemption, for instance by exercising exclusive control over the exempted use. In this case, the exemption may have the opposite effect of fostering concentration of power, cultural homogeneity and constrains to subsequent innovation. The power of control over that particular use has not been released; it has only been transferred to another subject. Yet this situation is all but uncommon in today's digital economy.

## 2.2 The rise of 'fair use industries'

The changing nature of exemptions is reflected at policy level. Up until ten years ago, copyright legislation was subject to intense lobbying from 'copyright industries,' a broad category of stakeholders, from publishers to broadcasting organizations, that share a common interest in strong copyright protection and enforcement. Recently, other equally (if not more) powerful groups of interests have joined the policy arena with the aim of counteracting the narrative developed by copyright industries over the years.<sup>11</sup> They express opposite priorities, namely: less regulation, more relaxed enforcement and broader scope for copyright exemptions. They petition for 'flexible copyright "exceptions" and better crafted "safe harbours"' as instruments to foster economic growth and innovation.<sup>12</sup> Tech giants like Google have lobbied specifically for the adoption of US-style fair use in other jurisdictions and against anti-piracy legislation.<sup>13</sup> In the US, the Computer and Communications Industry Association (CCIA) claims to represent the interests of 'copyright exceptions industries,' defined globally as industries that rely on exceptions to copyright law.<sup>14</sup> Interestingly, the strategies and arguments look very similar (albeit specular) to those deployed by copyright industries over many years. These include fabrication of unilateral narratives (of which the 'Google fair-use narrative' is a key component), cavalier use of evidence and exaggeration of

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<sup>10</sup> See e.g. Neil W Netanel, 'Copyright and a Democratic Civil Society' 106 Yale L. J. (1996) 283; Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use* (The University of Chicago Press 2011); Fred von Lohman, 'Fair Use as Innovation Policy', 23 Berkley Tech. L. J. (2008).

<sup>11</sup> For a critical consideration of this relatively new phenomenon in the 'copyright wars', see Justin Hughes 'Fair Use and Its Politics – at Home and Abroad' in Ruth L Okediji (ed.), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017), 267-71.

<sup>12</sup> Lateral Economic, 'Excepting the Future Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions', Report prepared by John Houghton and Nicholas Gruen for the Australian Digital Alliance (August 2012), 2.

<sup>13</sup> J. Hughes 'Fair Use and Its Politics – at Home and Abroad', 267-8; Jamie Bartlett, *The People vs Tech. How the internet is killing democracy (and how we save it)* (Random House 2018), 148-150 (describing the anti-SOPA campaign launched by Google in 2015 as an example of 'potential distortion of the independent public sphere').

<sup>14</sup> <https://www.cciagnet.org> (accessed 20 March 2019).

representativeness, with ‘core fair use industries’ allegedly ranging from software developers to education institutions.<sup>15</sup>

The emergence of groups of interests around fair use and copyright exceptions is neither surprising nor, per se, troubling. To the extent that it balances the unilateral vision promoted by traditional copyright industries, it has even a positive effect on the policy debate. The phenomenon is interesting for copyright scholars because it signals a change in the way fair use and other copyright exemptions operate. They no longer just curb the market power of rights holders to the benefit of competitors within the copyright industry sector. They now transfer power from copyright industry to the fair use industry, where they become factors of (potential or real) market power.

Examples of tech businesses relying on copyright exemptions abound. However, the extent of such reliance vary significantly across sectors and businesses. In some cases, the availability of an exemption is an irreplaceable condition for the sustainability of the ‘business model,’ while in other cases it just helps the business to save licensing costs. A news monitoring service like Meltwater relied on copyright exemptions to scan online news sources and provide users with clippings, headlines and links to the relevant articles. The activity was found permissible in the UK and under EU law as covered by the exception for temporary copying,<sup>16</sup> but it did not pass the fair use test in the US,<sup>17</sup> where the case was eventually settled.<sup>18</sup> Meltwater continued their business in the US by negotiating a licence to Associated Press, which manages copyrights for newspapers articles. Yet not all businesses relying on copyright exemptions survive an unfavourable court ruling. Tixdaq, a small tech company based in the UK, launched a successful app called Fanatix, where users were allowed to upload up to 8 seconds of broadcasts of Cricket matches accompanied by users’ comments. A court decision of 2016 dismissed Tixdaq’s claim that this use of broadcasts was fair dealing for news reporting,<sup>19</sup> and soon after the company entered administration. According to the Statement of the

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<sup>15</sup> For a critique of the methodology used in the studies commissioned by CCIA see George R Barker, ‘Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore’ (2012), available at <http://ssrn.com/abstract=2180769>.

<sup>16</sup> *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* [2013] UKSC 18; Case C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* [2014] E.C.D.R. 22.

<sup>17</sup> *Associated Press v Meltwater U.S. Holdings, Inc.* (S.D.N.Y. Mar. 21, 2013).

<sup>18</sup> Rosalind J Schonwald, ‘Associated Press v. Meltwater U.S. Holdings, Inc.: Fair Use, a Changing News Industry, and the

Influence of Judicial Discretion and Custom’ (2014) 29 Berkeley Tech. L.J. 799, 802.

<sup>19</sup> *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch)

administrators, ‘the reduced revenues following the Judgement led the company being unable to continue to trade.’<sup>20</sup>

### 3. Fair use as a factor of market power

The assessment of the economic value of copyright exemptions is a particularly challenging task, and no general conclusion can be made as to their importance for a given business. While the availability of copyright exemptions is generally beneficial to tech companies that make extensive use of third parties’ copyright works, it can be assumed that the benefit is more pronounced where the use in question cannot be easily secured by other means, in particular by means of licensing mechanisms. This typically occurs with so-called ‘mass-copying technologies,’ namely technologies that operate on the basis of routine and automatic copying of works *en masse*, for which no *ex ante* permission can be realistically sought.<sup>21</sup> There are a number of functions in today’s digital economy that rely on mass-copying in this sense, some of them feeding into the wide-reaching realm of ‘artificial intelligence’ (AI). These include for instance statistical algorithms, machine learning, text mining and other data analytics. Where the incidental character of copying is blatant, and no obvious exploitation of copyright works occur, courts have usually refused to find copyright infringement—not only in the US, where the fair use defence applies,<sup>22</sup> but also under the less flexible European system of copyright exceptions.<sup>23</sup>

The availability of copyright exemptions for mass-copying technologies has been subject to extensive judicial scrutiny. In some of these cases, a common element emerges, namely the fact that the defendant is in a position to ‘ring-fence’ the exempted use so to become the exclusive beneficiary of the exemption. Two judicial cases in the US illustrate this point.

#### 3.1 Mass digitization: crunching data on all of the world’s books

In a series of lawsuits brought by the Authors Guild against Google and its partner libraries, US courts have found that Google Books—a project consisting in digitizing ‘all world’s books’ and making them searchable online—is protected by fair use.<sup>24</sup> While acknowledging a *prima facie* case for

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<sup>20</sup> Statement of administrator’s proposals, *Tixdaq Limited*, High Court of Justice ref CR-2016-003330, par 4.1 (available from the UK Companies House database, the <https://beta.companieshouse.gov.uk>).

<sup>21</sup> Maurizio Borghi and Stavroula Karapapa, *Copyright and Mass Digitization: A Cross-Jurisdictional Perspective* (Oxford University Press 2013), 45-51; Matthew Sag, ‘Copyright and Copy-Reliant Technology’ (2009) 103 Nw. U. L. R., 1607.

<sup>22</sup> 17 U.S.C. § 107. See *Kelly v Arriba Soft Corporation* 336 F.3d 811 (CA9 2003) and its legacy.

<sup>23</sup> Directive 29/2001 on copyright in the information society, Art. 5. See M. Borghi and S. Karapapa, *Copyright and Mass Digitization* 34-43, and the cases therein discussed.

<sup>24</sup> *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied* 578 U.S. 849 (2016).

infringement, since Google reproduced in whole millions of books including a number of in-copyright works, all courts' ruling on the case concluded that Google had a fair use defence under section 107 of the Copyright Act 1976.

Between 2004 and 2012, Google has digitized over 20 million books, 4 million of which are either presumably or certainly in copyright.<sup>25</sup> Working in partnership with libraries of all over the world, Google scanned books from library collections, generated machine-readable texts by means of optical character recognition (OCR) software, kept digital copies of every book in its servers and gave the library a digital copy of their books. Books were then made searchable online, where snippets were given in response to search queries. US courts found this use of the plaintiff's works to be 'transformative,' in the sense that it assigns an entirely new purpose and function to the works.<sup>26</sup> Copying is purposely done to make books searchable and display snippets, that direct users to a broad selection of books. The use was deemed to be fair also on two other main grounds: first, the plaintiff did not convincingly demonstrate that there was a potential market for licensing uses such as those made by Google.<sup>27</sup> Second, perhaps more importantly, Google's use resulted in increased benefit for the public at large.

While a discussion of the complexities of this case is beyond the scope of this chapter, this last point deserves some consideration. 'Public benefit' has been addressed extensively in the Google Books cases. In particular, in the first decision of the District Court of New York in 2013, J Chin's fairly succinct opinion devotes a whole section on the benefits of Google Books.<sup>28</sup> To be sure, in a decision on a service that is used by millions of persons, a discussion of the public benefits deriving from it is not misplaced. However, such a discussion strikes for the relatively narrow perspective adopted by the Judge. In essence, the Judge focused on establishing the benefits deriving from the *specific* defendant's use of the plaintiff's works, and at no point he addressed the question of whether there is a public benefit in leaving the contended use *as such* outside authorial control. However, the fact that fair use cases are facts-specific does not imply that courts should consider a defendant's use in isolation. An analysis of public benefit, if necessary, should assess a defendant's use in the broader

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<sup>25</sup> Numbers reported in the Petition for a Writ of Certiorari, *Authors Guild, Inc. v. Google Inc.*, 578 U.S. 849 (2016), 1. The current status of the project is unclear, with some commentators arguing that the project has been unofficially discontinued after 2013; see Scott Rosenberg, 'How Google Book Search Got Lost', *Wired*, 11 April 2017.

<sup>26</sup> 'We have no difficulty concluding that Google's [use] has a highly transformative purpose, in the sense intended by *Campbell*', *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

<sup>27</sup> See however the Expert Report of professor Daniel Gervais in support of the plaintiffs (explaining how a market-based mechanism based on collective management could function) *Authors Guild v. HathiTrust*, case no. 1:2011cv06351, S.D.N.Y., filed 12 September 2011, Filing 109.

<sup>28</sup> *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

context of the availability of the same kind of use to future third parties.<sup>29</sup> But this is precisely the point with Google Books: no third parties will ever benefit from the finding of fair use, for the simple reason that the use in question is essentially non-replicable.

### 3.2 Non-replicable fair use

The non-replicability of Google's fair use is not an inevitable consequence of mass digitization. It is an intended effect of the way in which the project has been designed by Google.

The Google Books program comprises the Partner Program and the Library Project.<sup>30</sup> Under the Library Project, Google has scanned books and other material from public libraries all over the world, and made them searchable online through its search engine. The library gives Google access to its books and gets a digital copy in return. The use of the digital copies created under this program is regulated by the agreements that Google has signed with the libraries. In all those agreements, Google retains the freedom to make all possible uses of the digital copies, while the library has no permission to carry out, or to allow others to carry out, acts that involve automated and systematic access to the digital copies. Moreover, the library is under the obligation of implementing technological measures to restrict automated access to the corpus of digitized books or to any portion of it. So, while each library has access to their own digital copies and can make use of them as part of their service—for instance, for purpose of preservation or access to print-disabled persons—no one besides Google has 'automated access' to the *whole* corpus of digitized books. By effect of these agreements, Google has exclusive use of the corpus to perform searches. This exclusivity also extends to all uses involving large-scale automated processing, such as search engine optimization, text and data mining, and machine learning. Briefly, Google has exclusivity over the computational potential of the whole corpus. No other mass-copying technology can make use of the corpus besides Google.<sup>31</sup>

To be sure, competitors are not foreclosed from engaging themselves in mass digitization of books and developing their own services, even more so now that this activity has been judicially recognized as fair use. However, this is a purely speculative option. Although the digitization agreements between Google and the libraries are non-exclusive, and in theory a library is free to enter

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<sup>29</sup> This principle is implicit in the fair use analysis and has found constant application in jurisprudence. See *Campbell v Acuff-Rose* 510 U.S. 569 (in finding that a parodic version of the song *Oh Pretty Woman* was fair use, the Supreme Court made the point that there is a public benefit in leaving the making of parodies outside the scope of the author's exclusive rights. However, the Court did not enter into the specific merits or public benefit deriving from the defendant's parody as such.)

<sup>30</sup> *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

<sup>31</sup> See M. Borghi and S. Karapapa, *Copyright and Mass Digitization*, 104-110.

into a further digitization contract with a Google's competitor, no library can have an interest in digitizing its collection twice. Digitization is by definition a once-and-for-all operation.

The combined effect of these two elements—the 'natural monopoly' enjoyed by the first-comer in digitization *and* the 'artificial monopoly' created by contractual and technological restrictions imposed on automated access—appoints to the use in question the character of a non-replicable use. Practical reasons prevent competitors to create an analogous corpus of digitized books, while legal and technological impediments prevent them to engage in judicially recognized fair uses of those books. Google's fair use has created the conditions for exclusive technological use all the world's books.<sup>32</sup>

### 3.3 Computational analysis of millions of students essays

A further example of fair use exclusivity is provided by the case of Turnitin, the software developed by iParadigms and used by high schools and universities all over the world to automatically detect plagiarism in students' essays. Students of education institutions that subscribe to iParadigm's service must submit their written assignments online to Turnitin. The service performs a digital comparison of the students' work with content available from other sources and creates an 'Originality Report' suggesting a percentage of the work that appears not to be original. The software operates on the basis of text mining from a large quantities of sources, including a large database of papers previously submitted by students for marking.<sup>33</sup> This database, allegedly featuring nearly one billion students' papers, forms a major part of Turnitin's value, as well as an essential infrastructure for its service.<sup>34</sup> There are two reason for this. First, access to this database enables tackling offences that are among the most common ones but are particularly difficult to detect, such as 'borrowing' from past years' students, or from students from another school, and 'outsourcing' the essay to third parties.<sup>35</sup> The second, more important reason is that data gathered from plagiarism searches are useful for machine learning and 'train' algorithms, to improve the service and develop new products.<sup>36</sup> For such AI

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<sup>32</sup> Reference here is to a whole range of so-called 'non display uses' that Google can perform on books, such as text mining, deep learning, algorithm's training, and automated translation. See Maurizio Borghi and Stavroula Karapapa 'Non-Display Uses of Copyright Works: Google Books and Beyond' 1 Queen Mary J. of I.P. (2011) 1.

<sup>33</sup> Turnitin claims to have 'the world's largest collection of internet, academic, and student paper content,' including '929 million archived student papers'; <https://www.turnitin.com/about/content> (accessed 20 March 2019).

<sup>34</sup> Stephen Sharon, 'Do Students Turn Over Their Rights When They Turn in Their Papers? A Case Study of Turnitin.com' (2010) 26 *Touro L. R.*, 14, 26.

<sup>35</sup> The software can detect the latter offence if the third party in question delivers the same or similar essay to different students/customers, or re-uses parts in multiple essays. Modern 'coursework consulting services' promise to deliver 'Turnitin proved' essays (see David Matthews, 'We can write it for you wholesale', *Times Higher Education* 10 October 2013).

<sup>36</sup> In 2018, iParadigms has announced the imminent release of an 'Authorship Investigation' service to detect 'contract cheating'. The AI software 'will monitor and learn the writing styles of individual students and flag up content which

technology to work, the quantity of data available is a key ingredient that gives a critical edge over competitors.<sup>37</sup>

The act of copying, storing and processing essays submitted electronically by students for the purpose of marking has been challenged in court as infringing students' copyright in their (supposedly) original expressions: the act was judged to be fair use by the Fourth Circuit Court of Appeals in 2009.<sup>38</sup> As in other cases of 'technological fair use' the argument of the court revolved around the 'transformative' nature of the use.<sup>39</sup> Citing the District Court approvingly, the Fourth Circuit confirmed that iParadigm's use of the plaintiff's works was 'highly transformative' and provided 'a substantial public benefit through the network of educational institutions using Turnitin.'<sup>40</sup>

Similarly to what we observed in the case of Google Books, the finding of fair use in favour of iParadigms enables the company to acquire exclusivity over a certain permitted use. First, students are expected to submit their coursework for examination only once, and this means that no competitor can independently create the database of students' essays possessed by iParadigms. Second, the database is not available to competitors who may engage in similar fair uses as those that iParadigms performs on students' essays, such as text mining and other deep-learning analytics. Fair use legitimizes and strengthens a position of power in the market for online services for education.<sup>41</sup>

### 3.4 Digital private copying and time shifting

The use of copyright exemptions to acquire or consolidate power in the secondary market for the work is not unique to fair use. Tech companies may benefit from statutory exceptions, such as those

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shows considerable divergence from their previous work.' (John Warner, 'Another Terrible Idea from Turnitin', *Inside Higher Ed*, 6 February 2018 <<https://www.insidehighered.com/blogs/just-visiting/another-terrible-idea-turnitin>> accessed 20 March 2019).

<sup>37</sup> As expressed in the context of the Google Books case, 'the very worst [search] algorithm at 10 million words is better than the very best algorithm at 1 million words.' (Objection of Yahoo! Inc to Settlement Agreement, Authors Guild Inc v Google Inc, No 1:05-CV-08136, 8 September 2009, 25).

<sup>38</sup> *AV et al v iParadigms, LLC*, 562 [2009].

<sup>39</sup> 'The use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without actually adding to the original work.' Ibid. 639. For a critical review of this decision see Sharon, 'Do Students Turn Over Their Rights When They Turn in Their Papers?', 16-31.

<sup>40</sup> *AV et al v iParadigms, LLC*, par. 6.

<sup>41</sup> While permitted under fair use, storing students' essays for longer than necessary for the purpose of detecting plagiarism may run afoul of EU data protection law, even more so that the European Court has recently ruled that assignments submitted for examination and comments made by the examiner constitute 'personal data' of the student (Case C-434/16, *Nowak v Data Protection Commissioner* [2018] 1 W.L.R. 3505). More generally, concerns about the way in which the company monetizes on students' IP rights have been raised on the occasion of the acquisition of Turnitin by Advance Publications in March 2019. See Anna McKie '£1.3 billion Turnitin sale spotlights intellectual property fears', *Times Higher Education*, 11 March 2019 <<https://www.timeshighereducation.com/news/ps13-billion-turnitin-sale-spotlights-intellectual-property-fears>> accessed 20 March 2019.

that copyright laws afford to individuals to make copies for personal private use. Storage services and cloud computing are the most obvious examples, but not the only ones. Technologies like sound recognition, automated text reading and automated translation rely on the availability of large amounts of private copies of works made by end users.<sup>42</sup> A particular case of private copying is the so-called time-shifting exemption, that allows users to record a TV programme for later viewing.

Manufacturers of reproducing devices have benefited from private copying and time shifting exemptions far before the advent of the internet. However, the digital economy has made these copies more valuable as such. Companies derive market power not only, and not primarily, from selling the technology to reproduce and store private copies, but also from amassing large quantities of copies and related users' data.

This point has been observed by an Australian court in a case on unlicensed reproduction of broadcasts by an online service.<sup>43</sup> The defendant was a small tech company that provided internet users with an online facility to record free to air television programmes and play them back on compatible devices. The company relied on the 'time shifting' exception for 'private and domestic use'<sup>44</sup> to argue that that if the person does make a copy in the circumstances laid down by law, then the provision of a recording facility does not infringe copyright in the broadcast. The judge observed *obiter* that end users' private copies are part of a 'business case' aimed at gaining competitive advantage in the market for internet TV broadcasting, and that the service offered by the defendant 'would give it the significant market benefit of a leading position in the digital television industry.'<sup>45</sup> This consideration did not preclude the judge from finding for the defendant, on the ground that it was the user, and not the company, who made the recording and communicated it within private and domestic circles.<sup>46</sup>

Other courts have addressed similar uses with opposite outcomes.<sup>47</sup> These cases highlight the changing nature of the private copying exception, from a provision that protects the interests and

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<sup>42</sup> David R. Pekarek Krohn, 'Media-Rich Input Application Liability' (2010) 17 Mich. Telecomm. Tech. L. Rev., 201 (discussing possible copyright liability of sound-recognition applications such as Shazam and Midomi).

<sup>43</sup> *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (No 2) [2012] FCA 34

<sup>44</sup> Copyright Act (AU), s. 111.

<sup>45</sup> *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (No 2) [2012] FCA 34, 41 (Rares J). The same conclusion was reached in the US in *Fox Broad. Co. v DISH Network*, 723 F.3d 1067 (9th Cir. 2013) (users of a set-top box digital recorder engage in fair use time-shifting).

<sup>46</sup> *Ibid.*, 45.

<sup>47</sup> Most notably the US Supreme Court in *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 573 US (2014) (retransmission of time-shifted streams of television broadcasts is a 'public performance' of the broadcasts) and the European Court of Justice in Case C-256/16 *VCAST Limited v RTI SpA* [2018] ECDR (provision of cloud service for remote recording of television programmes is 'communication to the public', not exempted under the private copying exception).

rights of end-users against interference from copyright owners<sup>48</sup> to key components of tech companies' business models. To be sure, manufacturers of devices such as VCR and twin-tape cassette recorders relied too, indirectly, on the lawfulness of private copying.<sup>49</sup> However, they were not in a position to make use of private copies. By contrast, private copies of television programmes in the digital networked environment enable tech companies to acquire a large amount of data that may give significant competitive edge to the company that is able to exercise exclusive control over them.

#### 4. Reconstructing fairness

Fair use exclusivity may frustrate the purpose of fair use, and copyright exemptions in general, of maintaining a robust public domain to spur future innovation and creativity. While proprietary entitlements over essential infrastructures in the information market may attract *ex post* antitrust scrutiny,<sup>50</sup> the question remains whether copyright has in itself the resources and principles to mitigate *ex ante* the detrimental effects of exclusivity over permissible uses.

The question has received so far only sporadic attention from jurisprudence. In the prolonged Google Books case, antitrust concerns contributed significantly to the rejection of the proposed Settlement Agreement.<sup>51</sup> The US government submitted that the agreement would have given Google 'a de facto monopoly over unclaimed works' and a unique position with respect to online book searches.<sup>52</sup> The concern was entirely reflected in the judgement that found the proposed Agreement inadmissible, since—among other things—it would have provided Google with a 'significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission.'<sup>53</sup> As discussed in the previous section, this is precisely the effect that the finding of fair use in favour of Google produced. However, at no stage of the litigation did this concern attract the attention of the courts. The following sections present four possible approaches to address this problem.

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<sup>48</sup> See Stavroula Karapapa *Private copying* (Routledge 2012).

<sup>49</sup> *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984) (manufacturing and selling of video-cassette recording is not contributory infringement, as making private copies of TV programmes is permissible fair use); *CBS Songs v Amstrad* [1988] 2 All ER (manufacturers of twin-tape recorders do not authorize end users' copyright infringement).

<sup>50</sup> See generally Allen P. Grunes and Maurice E. Stucke, *Big Data and Competition Policy* (Oxford University Press 2016). See also M. Borghi and S. Karapapa, *Copyright and Mass Digitization*, 110-115 (discussing the 'refusal to license' doctrine as applied to electronic archives and databases).

<sup>51</sup> *Authors Guild, Inc v Google Inc*, 770 F Supp 2d 666 (SNDY 2011).

<sup>52</sup> *Ibid.* 671.

<sup>53</sup> *Ibid.* 673.

#### 4.1 Reframing the fourth fair use factor

Considerations on the market for the use of the work are part of the analysis of fair use, specifically in the fourth factor, ‘the effect of the use upon the potential market for or value of the copyrighted work.’<sup>54</sup> This factor has once been described as ‘undoubtedly the single most important element of fair use,’<sup>55</sup> but has lost some traction in the analysis of the more recent cases on mass-copying technological uses. Judicial decisions on these cases have mainly focused on the first factor, namely the ‘purpose and character of the use,’ which has been often referred to as the ‘transformative’ factor after the seminal work of Pierre N. Leval.<sup>56</sup> Such factor, initially construed as requiring the expenditure of some *creative* input by the alleged fair user, in the sense that the use in question altered the work in a creative way, has been since expanded to cover purely *technological* uses, which ‘transform’ the work in the sense of giving it a new function.

The more the ‘transformative factor’ gained traction, the more the analysis of the ‘market factor’ became inconclusive. This is barely surprising, given the increasing complexity of markets enabled by new digital technologies. In *Associated Press v Meltwater*, the market factor weighed against the defendant, as the plaintiff was able to demonstrate that there was a licensing market for the use made by the defendant. The latter competed in a market where the plaintiff had put effort to establish a presence, and so the court was persuaded that the use adversely impacted the potential market for and the value of the plaintiff’s works.<sup>57</sup> By contrast, in all the decisions on the Google Books case courts found that the fourth factor weighed for the defendant, or was at best neutral, either because there was no sufficient evidence of a potential market for the use made by the defendant or because there was no adverse effect on the value of the plaintiff’s work.<sup>58</sup>

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<sup>54</sup> 17 U.S.C. § 107.

<sup>55</sup> *Harper & Row v. Nation Enterprises* 471 U.S. 539, 566 (1985) (citing Melville B Nimmer, *Nimmer on Copyright* (1984), § 13.05[A]). Similar considerations also inform the fair dealing analysis in the UK: see *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142 (‘by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor’s exploitation of the copyright work’, Lord Phillips citing Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs* (3<sup>rd</sup> edition, 2000), 20.16). For a comparison between US fair use and UK fair dealing see Ilanah Simon Fhima, ‘Fairness in Copyright Law: An Anglo-American Comparison’ (2017) 34 Santa Clara Comput High Technol Law J, 44.

<sup>56</sup> Pierre N Leval, ‘Toward a Fair Use Standard’, 103 (1990) Harv. L. Rev., 1105 (arguing that the core value of fair use lies in promoting uses that *transform* the original work into something new).

<sup>57</sup> *Associated Press v Meltwater U.S. Holdings, Inc.* (S.D.N.Y. Mar. 21, 2013), 51. The court rejected the defendant’s argument that the use was comparable to that of a search engine (‘adopting technology used by search engines does not by itself make one a search engine’).

<sup>58</sup> *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (fourth factor strongly in favour of fair use); *Authors Guild, Inc. v Google* 804 F.3d 202 (2d Cir. 2015) (no effect on the ‘protected aspect’ of the plaintiff’s works); *Authors Guild, Inc. v. Google Inc.*, 578 U.S. 849 (2016) *cert. denied* (no demonstrable loss of sale); *Authors Guild, Inc. v HathiTrust*, 902 F. Supp. 2d 455 (S.D.N.Y. 2012) (speculative and at best minimal harm); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (no cognizable market harm).

These cases illustrate a crucial point with the fourth factor analysis, namely the fact that the analysis is concerned exclusively with the harm that results because the defendant's use serves as a *substitute* for a use that the plaintiff would be legitimately entitled to make of its work. If the defendant's use is sufficiently 'transformative' to fall outside the scope of the protected interests of the plaintiff, then there is no market substitution since the use would impact an entirely different market.<sup>59</sup> No other considerations as to the effects of the use on such 'different' market are needed to reach a conclusion.

A more sensible approach to the fourth fair use factor would include an assessment of the potential risk of fair use exclusivity. In other words: the 'effect of the use upon the potential market' should be read as incorporating the effects of the use on the *secondary* market of the copyrighted work as such, namely the market generated by the new, 'transformative' use. Is the use likely to give to the defendant a de facto monopoly in such market? If this is the case, then certain special conditions may be imposed on the fair user. The next two sections suggest possible approaches in this respect.

#### 4.2 Compulsory share-alike provision on fair uses

A mechanism inspired by the 'share-alike' provision of the Creative Commons licences has been proposed by Guy Pessach.<sup>60</sup> Creative Commons licenses are public copyright licenses that can be attached to a work to authorize its use by any third party under certain conditions.<sup>61</sup> Under the 'share-alike' provision, any member of the public is free to use and make adaptations of the work *on condition* that the resulting work is licensed under the same or a compatible licence. Any claim of exclusive rights over the resulting work would invalidate the initial licence, thereby turning the user into a copyright infringer.<sup>62</sup>

An analogous provision in the copyright exceptions system would help overcome the problems with fair use exclusivity. Under a 'reciprocal share-alike' requirement, beneficiaries of an exception or finding of fair use would be obliged to ensure that other third parties can lawfully benefit

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<sup>59</sup> As Jane Ginsburg observed in relation to the fourth-factor analysis in *Authors Guild v HathiTrust*: 'The court has [...] drawn the explicit conclusion suggested in earlier decisions in which it indicated that a "transformative use" fills a transformative market, which did not substitute for the work's usual markets. A "transformative use," then, by definition exploits a non-traditional market.' (Jane C. Ginsburg, 'Fair Use for Free, or Permitted-but-Paid?' (2014) 29 Berkeley Tech. L. J. 1383, 1399).

<sup>60</sup> Guy Pessach, 'Reciprocal Share-Alike Exemptions in Copyright Law' (2008) 30 Cardozo L. Rev., 101.

<sup>61</sup> <https://creativecommons.org> (accessed 20 March 2019).

<sup>62</sup> [https://wiki.creativecommons.org/wiki/ShareAlike\\_interpretation](https://wiki.creativecommons.org/wiki/ShareAlike_interpretation) (accessed 20 March 2019). The 'share-alike' provision draws inspiration from the GNU General Public License for software, which aims at ensuring that software code remains free from proprietary entitlements even when modified or changed.

from the same or similar use.<sup>63</sup> Under this provision, the fair user would lose the right to make use of the plaintiff's work if she does not comply with the *ex post* obligation to secure an equal right to fair use to third parties. In the case of Google Books, the provision would prevent Google from imposing contractual or technological restrictions on third parties' use of the digitized copies of books made under the fair use defence.<sup>64</sup> Similarly, Turnitin would be obliged to secure other parties access to its database of students' essay for purposes of plagiarism detection and text mining. In general, beneficiaries of fair use or exceptions will be prevented from exercising exclusive rights over the exempted uses. As Pessach convincingly argues, making copyright exemptions reciprocal, i.e. conditional on the share-alike provision, corresponds well with core values that contemporary scholarship attach to copyright, from economic efficiency to distributive and democratic values.<sup>65</sup>

In its simplicity, the proposed provision is well suited to integrate the fourth factor analysis by adding a mandatory element of fairness towards second-generation fair users.

#### 4.3 Right to access sole-source databases

In the examples discussed above,<sup>66</sup> the availability of a fair use defence or of a statutory exception enables tech companies to build unique collections of informational resources upon which they may exercise exclusive control. The problem raised by proprietary control of information is not new to copyright law, insofar as it challenges the venerable old principle of non-protectability of facts and information as such. More specifically, the issue has been addressed in the context of the legal protection of databases and the particular problem raised by so-called 'sole-source databases.'<sup>67</sup> Copyright protection extends to the way in which data or other material has been selected and arranged, but it does not extend to the data or material as such.<sup>68</sup> However, if the latter only subsists as part of a specific database, or, in other words, if the database in question is the *sole source* of that

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<sup>63</sup> G. Pessach, 'Reciprocal Share-Alike Exemptions in Copyright Law', 108 ('Whenever a party that uses copyrighted materials relies on a copyright exemption, subsequent users who wish to access and use the new expression (which uses the original copyrighted materials) for similar legitimate and socially valuable purposes should be legally entitled do so freely, and should be legally entitled to overcome technological protection measures and contractual limitations in this regard.')

<sup>64</sup> Ibid. 114.

<sup>65</sup> Ibid. 122-126.

<sup>66</sup> Supra, sec. 3.1 to 3.3.

<sup>67</sup> See for example Jerome H. Reichman and Pamela Samuelson, 'Intellectual Property Rights in Data' (1997) 50 *Vanderbilt L. Rev.* 51.

<sup>68</sup> TRIPs Agreement, art. 10(2).

material, then any exclusive rights over the database give *de facto* exclusivity over the use of that data or material as such.<sup>69</sup>

The problem has been addressed by legislators during the preparatory work for the much controversial EU directive on the legal protection of databases.<sup>70</sup> To prevent possible misuse of such legal protection in order to create monopolies over information, facts and ‘raw’ data, the Commission initially proposed a special set of provisions for sole-source databases, which revolved around a system of compulsory licensing.<sup>71</sup> The system did not make its way into the final text of the directive, where the legal protection of databases was instead made subject to some conditions and exceptions that, in theory, could have prevented the ‘monopolization’ of facts and raw data.<sup>72</sup> In particular, a provision secures ‘lawful users’—including users that either are authorized by the rightholder or perform an act permitted by law—with the contractually non-overridable ‘right’ to extract and/or re-utilize insubstantial parts of the database.<sup>73</sup>

A similar problem to that of sole-source databases arises in relation to ‘non-replicable uses’ of copyright works, which, as seen earlier,<sup>74</sup> trigger the problem of use exclusivity. In this case, the right to carry out that particular use of the copyright work should be subject to an obligation to secure that third parties are not restricted from accessing the resulting information. This obligation should be more stringent than the one imposed on database owners, in that it would apply to the whole set of works and not just an ‘insubstantial’ part of it, and it would be independent from the subsistence of rights in the database.

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<sup>69</sup> Both Google Books and Turnitin’s database of students’ essays are, among other things, sole-source databases, for the reasons explained above.

<sup>70</sup> Estelle Derclaye, *The Legal Protection of Databases: A Comparative Analysis* (Edward Elgar 2008). As acknowledged in the Evaluation Report on the Database Directive, ‘[t]here is a long-standing principle that copyright should not be extended to cover basic information or ‘raw’ data’. Commission, DG Internal Market and Services Working Paper, First Evaluation of Directive 96/9/EC on the Legal Protection of Databases (2005), 23. The principle has been applied by the European Court by reference to the *sui generis* database right in Case C-203/02 *British Horseracing Board Ltd v William Hill Organisation Ltd* [2004] E.C.R. I-10415.

<sup>71</sup> Proposal for a Council Directive on the legal protection of databases, COM(92) 24 final — SYN 393, (1992), art. 8(1), and Explanatory Memorandum, para.3.1.1 and 3.2.8.

<sup>72</sup> Maurizio Borghi and Stavroula Karapapa, ‘Contractual restrictions on lawful use of information: sole-source databases protected by the back door?’ (2015) 37 E.I.P.R. 505, 507-11.

<sup>73</sup> Directive 96/9/EC, art. 8 and 15. The European Court has restricted the exercise of this right to users of databases that are protected by either copyright or the *sui generis* database right in Case C-30/14 *Ryanair Ltd v PR Aviation BV* [2015] 2 All E.R. (Comm) 455. For a critical examination of this ruling see Borghi and Karapapa, ‘Contractual restrictions on lawful use of information: sole-source databases protected by the back door?’ (2015) 37 E.I.P.R. 505.

<sup>74</sup> *Supra*, sec. 3.2.

#### 4.4 Permissible Uses with Opt-outs

A further approach consists of incorporating an *ex post* ‘opt-out’ mechanism in fair use. A number of formally infringing acts in the online environment are already *de facto* permitted unless the rightholder objects. This is either because the transaction costs are too high, since the use involves mass quantities of works and a low value per transaction, or because rightholders normally consider that it is in their interests not to challenge the use.<sup>75</sup> By effect of *de facto* permitted uses, copyright has in some instances turned from a system of permission and *ex ante* authorization to an ‘opt-out’ system.<sup>76</sup>

Copyright law has incorporated opt-out rules to regulate situations where there is a significant public benefit in enabling uses of masses of works for which individual permission cannot be realistically sought. Under an opt-out scheme, a certain use of copyright works is permitted (either free of charge or upon payment of a fee) *unless* the author expressly objects and asks to be excluded from the use. Probably the earliest example of this kind is the system of extended collective licensing, which has applied in Scandinavian countries since the 1960s to regulate certain uses of works in broadcasting, reprography and cable re-transmission. The system has recently grown in popularity in the context of mass digitization of librarian material, and has also inspired recent legislation on digital exploitation of orphan works and of out-of-print works.<sup>77</sup> The opt-out rule was also the basis of the licensing system envisioned in the rejected Google Books Settlement Agreement, where authors were given a right to have their books excluded from the program within a given time frame.<sup>78</sup> Other legal systems, for instance data protection law, have progressively introduced opt-out rules whereby the right holder can object certain uses and can request information to be erased or transferred to other parties.<sup>79</sup>

In the context of technology-enabled uses covered by fair use or other statutory exception, an opt-out rule may reduce the risk of ‘fair use exclusivity.’ By legalizing a number of uses of works in the context of mass-copying technologies, the exemption would still give leeway to technological

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<sup>75</sup> See Tim Wu, ‘Tolerated Use’ (2008) 31 Columbia J. of Law and the Arts, 617; Graham Greenleaf and Catherine Bond, ‘Public rights in copyright: What makes up Australia’s public domain?’ (2013) 23 A.I.P.J. 111 (considering non-objection to “benign uses” of works as constituting a *de facto* public domain).

<sup>76</sup> For a discussion in relation to digital libraries see Oren Bracha, ‘Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property’, (2007) 85 Tex. L. Rev. 1799.

<sup>77</sup> Directive 2019/790 on Copyright in the Digital Single Market, art. 8 (introducing a compulsory licensing system to enable cultural institutions to digitize out-of-print works).

<sup>78</sup> For a critical assessment of the opt-out rule in the Agreement see M. Borghi and S. Karapapa, *Copyright and Mass Digitization*, 78-80 and the judicial documents therein cited.

<sup>79</sup> General Data Protection Regulation 2016/679, art. 17 (right to erasure / ‘right to be forgotten’), art. 20 (‘right of data portability’), art. 21 (‘right to object’).

innovation; however, by giving authors a right to opt out, it would limit exploitative behaviours and exclusionary practices. The exemption would define a permitted act with a safeguard clause. Since it would apply only to reproductions that are functional to making technological adaptations, it would not affect all other rights, namely public communication and distribution. Also, it would not exempt reproductions made for other purposes, as well as ‘creative’ adaptations. The exemption would not preclude finding of infringement or fair use, and it would not interfere with existing exceptions and limitations as applied to reproduction for purposes other than making technological adaptations.

## 5. Conclusion

The problem with big data monopolies and concentration of power in the data and information markets is a complex and multifaceted one.<sup>80</sup> This chapter has addressed a special, and so far largely neglected aspect of this phenomenon, namely the role of fair use and copyright exceptions in the creation of market power by tech companies. It suggests that the problem raised by what I termed ‘fair use exclusivity’ is inherent to the very functioning of copyright exemptions in today’s technological environment, and requires policy and legislative intervention. This is particularly so in the current state of the scholarly debate on copyright exceptions and limitations in Europe, as dominated by the quest for a flexible system that approximates the US fair use standard. The chapter has suggested four possible approaches to correct the distortions of fair use exclusivity: a revised four-factor analysis that includes considerations for the effects of fair use on the secondary market; the imposition of a share-alike condition on beneficiaries of fair use and other statutory exemptions; special obligations imposed on fair use beneficiaries when the use is a non-replicable one; and default opt-out provisions for copyright owners. The proposed approaches are complementary and overlap in many respects. Their actual implementation requires further research and inquiry into the legal, economic and policy implications of technology-enabled uses of copyright works. This inquiry is much needed today to ensure the system of copyright exemptions is *fair*—not just to copyright owners, but, perhaps more importantly, to present and future generation fair users.

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<sup>80</sup> See, from a competition-law angle: Allen P. Grunes and Maurice E. Stucke, *Big Data and Competition Policy* (Oxford University Press 2016), and Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016).