Facilitating Access to Knowledge by Asserting Users' Rights: An Israeli Case Study

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Abstract

Can users' rights support Open Access (OA)? On 2007 a new copyright act[1] was enacted in Israel. Prof. Niva Elkin-Koren claimed in her article "Users' Rights" that the new act can be interpreted by the courts as the act that changed the status of users' rights to a privilege and not a mere defense.[2]

In our paper we would like to take another step and to explore the question whether recognition of users' rights as a Hohfeldian right or as a Hohfeldian privilege[3] can support OA and free culture.

The new copyright act of 2007 introduced some important changes to the Israeli copyright's regime. One such change is the shift from a *fair dealing* doctrine under the old regime to a *fair use* exemption in the new act. This change extends the permitted uses.[4] The fair use clause is the primary right in the arsenal of users' rights.

In our paper we focus on the Israeli court decisions related to the issue, as a case study. However our findings can be relevant to foreign legal regimes as well. Especially, we analyze a new Israeli court ruling[5] regarding internet streaming of football games, a ruling that is on appeal at the Israeli Supreme Court.

We claim that the recognition of users' rights as Hohfeldian privilege by courts could have a significant influence on the future of free culture and OA.

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We are grateful to Prof. Niva Elkin-Koren for her comprehensive comments on the earlier draft. We would also like to thank the anonymous readers for their enlightening comments.
[1] Copyright Act, 2007 [in Hebrew] (a translated copy is available with the authors).
[2] Niva Elkin-Koren, *Users' Rights under Copyright, in* AUTHORING RIGHTS : READINGS IN COPYRIGHT LAW 327 (Michael Birnhack and Guy Pessach Ed., 2009) (Hereafter: Niva Elkin-Koren, *"Users' Rights"*).[in Hebrew].
[3] Wesley Newcomb Hohfeld was an American jurist. Hohfeld suggested a new analysis. A privilege according to Hohfeld description is the correlative of "no right" and the opposite of duty. In contrast to a privilege – a right, according to Hohfeld, is the opposite of no-right and is the correlative of duty. For further discussion and explanation see section C hereafter.
[4] Sec. 19 of the Copyright Act, 2007.
[5] Misc. Civ. App. 11646/08 The Football Association Premier League Ltd v. Anonymous (not published, 2 September 2009) [in Hebrew].

Introduction

The article examines the interrelationships between user's rights and the OA notion in the Israeli Copyright regime throughout its law and significant verdicts especially concerning the fair use clause. In our paper we would like to explore the question whether recognition of users' rights as a Hohfeldian right or as a Hohfeldian privilege[6] can support OA and free culture.

In the first section of the article we will discuss the relations between OA and Copyright. Section B will detail the move from "Fair Dealing" doctrine that was a part of the previous mandatory copyright act that was in force in Israel until 2008, to the "Fair Use" clause that is now part of the new 2007 Copyright Act. Section C will discuss OA and User's rights in Copyright laws: what is the difference between a "privilege" and a "right" and what are the OA ramifications of those differences in the eyes of the Economic, Balance and Aim Approaches. Section D will examine Israeli Court Decisions – Fair Dealing and Fair Use as facilitator of OA. Section E of the article discusses the Premier League District Court Decision that was delivered recently based on the new 2007 Copyright Act. In the latter section we examine the question is there a new legal status of user's rights in the new act and what is fair use or fair dealing – a privilege or a right according to Israeli copyright law.

A. Open Access and Copyright

The OA notion has emerged in light of the contradiction between the ability to easily share exchange and distribute information in the scholarly and research environments via the internet on the one hand, and the legal and technological barriers that the

[6] See supra note 3.

traditional publication, for example, imported to the virtual world on the other hand.[7] In order to keep the functionality of the internet, there should be preservation of OA and a legal balance between OA and property rights.[8] There are scholars who argue that the primary goal of the OA scholarly publishing is to enable wider and more efficient distribution of scholarly materials.[9]

OA should also be preserved to allow people to be exposed to ideas and to works and thus, maintain freedom of speech and the creating of new works.[10] Copyright laws might put barriers on OA. The goal of copyright laws is to keep the balance between incentives to the authors to create new works and the preservation of the public domain and of free notions.[11] In order to give incentives to authors to create, the copyright act grants authors the ability to prevent others from reproduction, publication, public performance, broadcasting, making the work available to the public, making of a derivative work.[12] By these rights the author can put legal barriers on accessing his work. Whereas copyright allows the creator to control his work and therefore, among other things, to forbid access to his work, OA aims to allow accessibility to the work.

The Budapest Open Access Initiative defines OA in connection with literature as follows:

> "The literature that should be freely accessible online is that which scholars give to the world without expectation of payment. Primarily, this category encompasses their peer-reviewed journal articles, but it also includes any unreviewed preprints that they might wish to put online for comment or to alert colleagues to important research findings. There are many degrees and kinds of wider and easier access to this literature. By "open access" to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited. . . ."[13]

We can see that according to the Budapest definition – the authors should waive their copyright in the work for the sake of the public interest, but for the moral rights – to be acknowledged and to control the integrity of the work. In other words, the authors have

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[7] Paula Gargiulo, *Open Access in Italy: Achievements and Future Prospects*, 34 INT'L J. LEGAL INFO. 377, 377-378 (2006); Robert C. Denicola, *Copyright and Open Access: Reconsidering University Ownership of Faculty Research*, 85 NEB. L. REV. 351 (2006).

[8] Ethan Preston, *Finding Fences in Cyberspace: Privacy and Open Access on the Internet*, 6 J. TECH. L. & POL'Y 3 (2001)

[9] See for instance a discussion of the issue regarding the legal information market: James G. Milles, *Redefining Open Access for the Legal Information Market*, 98 LAW LIBR. J. 619, 628 (2006).

[10] See for general discussion David Wolitz, *Open Access and the First Amendment: A Critique of Comcast Cablevision of Broward County, Inc. v. Broward County*, 3 YALE J. L. & TECH. 6 (2001).

[11] For a different approach that calls to think not of a balance in copyright but on a dialogue – see Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 J. CORP. L. 991 (2009).

[12] See sec. 11-17 of the Copyright Act, 2007

[13] Budapest Open Access Initiative, February 14, 2002 Budapest, Hungary, available at: www.soros.org/openaccess/read.shtml.

copyright, however they give the public the permission to use their work as long as the integrity of the work is preserved and they are properly credited.

While there are more definitions to OA – most of them more or less comply with the same basic principles: the ability to access the material, and the ability to read and use it. The major difference among the various definitions is whether OA includes measures to assure long-term preservation or not.[14]

The interrelations between OA and copyright laws are complicated. On one hand, the OA definition acknowledges the existence of copyrights and is actually based on them (otherwise the authors will not be able to control their works and therefore will not be able also to prevent other people from putting barriers on the access to their own works). Whereas on the other hand copyright laws could also raise barriers on the access to a work, as we saw above.

There are some solutions to this delicate balance. The popular solution, which is commonly used in OA journals, is to adopt the Creative Commons Attribution License.[15] The license authorizes potential users to use the copyrighted work as long as they credit the original creator.[16] In this way OA is preserved – the original author allows the public to access and to use his work while at the same time he can still legally control his work and make sure that nobody else will forbid the access to it.

In this article we examine whether OA can be facilitated also by the courts' interpretation of the terms "fair use" and "fair dealing" by classifying them as users' rights as will be explained later on. We will analyze some of the decisions held by the Israeli courts concerning "fair use" and "fair dealing" to determine whether courts interpreted these legal terms in the spirit of OA. In particular we examine a decision which was recently delivered by the District Court Judge Michal Agmon-Gonen. However, before discussing court decisions we have to note that there was recently a change in the Israeli Copyright Act – by which the Israeli legislature converted the "fair dealing" clause into a "fair use" one.

B. From "Fair Dealing" to "Fair Use" and Open Access Notion - The Israeli Copyright Act

On May 2008 the new Israeli Copyright Act of 2007 came into force. The new act replaced the mandatory act of 1911.[17] Whereas on the 1911 Act were just some limited permitted uses (i.e. - uses that can be done without the necessity to ask for a permission

[14] SPARC Open Access Newsletter, issue #64 www.earlham.edu/~peters/fos/newsletter/08-04-03.htm.
[15] Nicholas Bramble, *Preparing Academic Scholarship for an Open Access World*, 20 Harv. J. Law & Tec. 209, 252 (2006).
[16] See creativecommons.org/about/licenses/
[17] Copyright Act, 1911.

from the owner of the work), the 2007 Act devotes a whole and extended chapter named "Permitted Uses" containing fifteen clauses.[18]

In the early bill of 2005, the regulator explained that these clauses of permitted uses refer to the financial right not to the moral right,[19] and add that most of the clauses do not change the current law – but adopting existing norms, practicum and court rulings.[20] However the new act makes some important changes. It changes, for example, the fair dealing clause to a fair use clause, a change that extended the permitted uses.[21] In addition, in the new act the regulator refers also to technological changes and adds, for instance, special clauses for permitted uses in software.[22]

In this part we examine both acts and the change of the fair dealing clause into a fair use one. By analyzing the change we will try to reach some conclusion if the change can support the OA notion or not.

1. Fair Dealing in the 1911 Israeli Copyright Act

Section 2 of the 1911 Israeli Copyright Act defines what will be seen as an infringement of the creators' copyright. However in the same clause there are also included several exceptions. The main exception in the 1911 act is the "fair dealing" exception in section 2(1)(I):

> "2. (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute the infringement of a copyright:
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> (I) any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary: …"[23]

In order to be considered "fair" under the fair dealing doctrine, the use has to be for limited and clear purposes – private study, research, criticism, review or newspaper summary. Only these uses can be declared as fair dealing that does not reach the amount of an infringement.

The first evidence to the phrase "fair dealing" in legislation was found in the English Copyright Act of 1911. There are still some versions of the fair dealing doctrine in England and in few other common law countries such as Canada, New-Zealand, South Africa, and Australia.[24]

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[18] Chapter Four: Permitted Uses in Copyright Act, 2007 – sec. 18-32.
[19] See The Copyright Bill of 2005 – explanation to sec. 18 [in Hebrew].
[20] See, for example, id., explanations to sec. 19, 20 & 23 [in Hebrew].
[21] Sec. 19 of the Copyright Act, 2007.
[22] Sec. 24,26 of the Copyright Act, 2007
[23] Sec. 2 of the Copyright Act, 1911.
[24] Niva Elkin-Koren, *Users' Rights*, supra note 2, at 346-347. See also Copyright Act, 1911, 1 & 2 Geo.5, c. 46 (Eng.). There are earlier evidences to the use of some version of the fair dealing doctrine in court

The other exceptions of section 2 are much more specific and deal with certain unique situations such as: an author who is not the owner of the artistic work; a sculpture or artistic craftsmanship which is permanently situated in a public place or building; the reading or recitation in public by one person of any reasonable extract from a published work.[25]

The Israeli Courts in most of the copyright cases do not refer to these latter exceptions maybe because these exceptions are too narrow or just not correlated with the business world and the technological reality.[26]

2. Fair Use in the New Israeli Copyright Act of 2007

As noted before, the new Israeli Copyright Act dedicates a whole chapter for permitted uses.[27] According to the permitted uses, a user can, under some conditions, use the copyrighted work without the permission of the owner and without the need to pay the owner compensation for this particular use.[28] The permitted uses refer only to the economic rights and not of the moral rights, as mentioned before.[29]

Another significant difference between the old and new acts is the change of doctrines – from the fair dealing doctrine to the fair use doctrine. The fair use doctrine was adopted from United States copyright law. Actually, the new Israeli Copyright Act incorporated between section 107 of the American Copyright Act of 1976[30] and the development in the court rulings since the adoption of a hybrid doctrine by the Israeli Supreme Court in 1993.[31] The latter resembled in some senses to the fair use doctrine, but still had the barrier of the fair dealing closed list of permitted purposes of uses.[32]

The early bill of 2005 included an explanation why the Israeli legislator omitted the closed list of purposes of the fair dealing doctrine and completely adopted the fair use doctrine. One main reason is the fact that there are varieties of purposes that are not listed in the fair dealing clause – but still meet the basic goals of the copyright laws.

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decisions in Britain and the court was also the first institute that gave the name "fair dealing" to the doctrine. The first time, however, the doctrine was mentioned in an act was in the English version of the Copyright Act of 1911. For a further discussion see Niva Elkin-Koren, *Users' Rights*, supra note 2, at 347 footnote 57.

[25] Sec. 2 of the Copyright Act, 1911 [in English].

[26] Niva Elkin-Koren, *Users' Rights*, supra note 2, at 347.

[27] Chapter four includes the followings: Use of works in juridical or administrative procedures, Reproduction of a work deposited for public inspection, Incidental Use of a Work, Broadcast or copying of work in public place, Computer Programs, Recording for Purposes of Broadcast, Temporary Copies, Additional artistic work made by the author, Renovation and Reconstruction of Buildings, Public Performance in an Educational Institution and Permitted Uses in Libraries and Archives.

[28] Sec. 18, of the Copyright Act, 2007.

[29] Supra note 19.

[30] 17 U.S.C § 107.

[31] See C. A. 2687/92 Geva v. Walt Disney Co., P.D 48(1) 251 (1993).

[32] For further discussion see Neil Netanel, *Israeli Fair Use from American Perspective, in* AUTHORING RIGHTS : READINGS IN COPYRIGHT LAW 377 (Michael Birnhack & Guy Pessach ed. 2009) [in Hebrew].

Therefore in order to give the opportunity to the courts to decide in a wide spectrum of situations whether there is a fair use even if the purpose of the use is not on the written list – the legislator decided to omit that obstacle, to omit the closed list. Furthermore, the legislators explained that they tried to keep the delicate balance between the author and the user and therefore the extension and the opening of the closed list came in order to balance the extension of the author's rights.[33]

In light of the above, the new act has an open list of purposes, i.e. there are purposes that are declared as fair use inside the act itself, but this list is not binding and there can be different purposes that are not mentioned in the list – but still can be considered as a fair use.

The fair use doctrine is declared today in Section 19 of the new Israeli Copyright Act in the following manner:

> "(a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.
> (b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following:
> (1) The purpose and character of the use;
> (2) The character of the work used;
> (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
> (4) The impact of the use on the value of the work and its potential market.
> (c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use."

As one can see, in order to be considered fair, four nonexclusive-open factors have to be taken into account.

According to the explanations in the 2005 bill, the first factor intends to examine for example, whether the purpose of the use is commercial or non-commercial such as teaching, research and so on. The second factor examines the character of the work itself – is it a photograph or a music or a literature work for instance and is it on its highest market value at the moment or not. The third factor tests the scope of the usage of the work in relation to the work as a whole, not only on a quantity manner but also in a quality one. The forth factor deals with the financial outcome of the use on the potential market of the original work. In this factor the court examines whether the use interfere, in an impropriate way, with the reasonable financial expectations of the work's owner.[34] These four factors are also a list of open considerations – thus courts can take into consideration more factors if they find it necessary.

In addition, sec. 19(c) of the 2007 Act allows the Minister of Justice to enact regulations prescribing conditions under which a use shall be deemed a fair use ex-ante.

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[33] Supra note 19, at 1125-1126.
[34] Id., at 1126.

The change of the fair dealing doctrine into a fair use clause – with an open list of fair purposes, can show on a tendency of the regulator to extend users' rights. It also keeps the delicate balance between the incentives to create new works and the extension of the author's financial rights to the need to permit the public to use works for the promotion of culture and knowledge, while keeping the notions of free speech, freedom of creation and open and fair competition.[35] This change of doctrines can be also viewed as another step towards the preservation of OA, as will be explained hereafter.

The change of doctrines is not a revolution, but rather an evolution. In order to explain that claim – we shall discuss decisions and rulings of the Israeli courts since 1993 in section D of the article, but before we shall discuss first the relations between OA and users' rights in copyright law and the definitions we use in this article.

C. Open Access and Users' Rights in Copyright Laws

Before we can discuss the issue in question, first we have to realize there is a linguistic difference between a right as a claim and a right as a privilege. In addition, we have to understand also the legal difference between a right and a defense.

1. A Privilege as Opposed to a Right

Before we discuss the issue whether the new act in Israel should be interpreted as the creator of a new Hohfeldian right and not just mere privilege, first we have to realize why it is important, if at all, in the context of OA, to acknowledge the fair use defense as a privilege or a right.

A privilege according to Hohfeld description in his brilliant article "Fundamental Legal Conception as Applied in Judicial Reasoning"[36] is the correlative of "no right" and the opposite of duty.[37] In other words – if X has a privilege of using a work in a fair sense Y has no right in that X shall not use the work in a fair sense. In addition, if X has a privilege to use a work fairly, X does not have a duty not to use the work.[38]

In contrast to a privilege – a right, according to Hohfeld, is the opposite of no-right and is the correlative of duty. In other words, if X has a right of using a work in a fair sense Y has a duty to provide X the necessary means to use the work in a fair sense.[39]

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[35] Id., at 1116, 1125-1126.

[36] Wesley Newcomb Hohfeld *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [This article was followed by another article that was published on 1917. See Wesley Newcomb Hohfeld *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917)]. For further discussion of Hohfeld's theory see J. M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119 (1990).

[37] Wesley Newcomb Hohfeld (1913) id., at 32.

[38] Id., at 32-33.

[39] Id., at 30-32.

The daily use of the term "right" is very wide. The word "right" in various events can be a range of different terms such as – claim, privilege, power, prerogative and immunity.[40] Hohfeld suggested to see the definition of the term "right" in its narrow definition – and thus to distinguish between rights and privileges, rights and immunities.

In the Black's law dictionary there is a wider definition of the terms. The word "privilege", for example, is defined, among other things, as "a peculiar right, advantage, exemption, power, franchise, or immunity held by a person or class, not generally possessed by others",[41] whereas the term "right" is defined among other things, as "A power, privilege, or immunity guaranteed under constitution, statutes or decisional laws, or claimed as a result of long usage".[42] However there is a narrow definition of the term right in which it is defined as "an interest or title in an object of property; … a legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act. … In this sense 'right' has the force of 'claim,' and is properly expressed by the Latin '*jus*'".[43]

If we follow Hohfeld's definitions – when one person has a lawful "defense" against another person – should that defense be a right (claim) or is it enough to consider it as a privilege?

Hohfeld in his article gave an example how the self defense – should be seen:

> "if X commits an assault on Y by putting the latter in fear of bodily harm, this particular group of facts immediately create in Y the privilege of self-defense,-that is, the privilege of using sufficient force to repel X's attack; or, correlatively, the other-wise existing duty of Y to refrain from the application of force to the person of X is, by virtue of the special operative facts, immediately terminated or extinguished."[44]

As we can see – Hohfeld claimed that the self defense is a privilege and not a right. In other words – an attacked person has the privilege to defend himself however he does not have a right to do so. The privilege does not exist if the attack is over – or in other words if the attacker stops, the victim of the attack has a duty to stop any application of force. Because the victim has a privilege and not a right – there is no duty to help the victim to preserve self defense or to help the victim in fulfilling it.

This does not mean that every legal defense should be interpreted as a mere privilege and not as a Hohfeldian right. However we have to remember the ramifications of this classification.

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[40] Id. See also Wesley Newcomb Hohfeld *"Some Fundamental Legal Conceptions as Applied in Judicial Reasoning"* 26 YALE L.J. 710, 717 (1917).

[41] HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY WITH PRONUNCIATIONS 1197 (6th ed., 1990).

[42] Id., at 1324.

[43] Id.

[44] Wesley Newcomb Hohfeld (1913), supra note 36, at 26. For further discussion see also Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement*, 41 Stan. L. Rev. 1343 (1989).

Moreover, another question concerning the legal difference between a right and a defense is the burden of proof. That is also the case with the fair dealing clause.[45] Most of the defenses are not independent claims that can be brought into action in advance. The defense is usually raised ex-post when one has to defend himself. In this sense this is not a right (claim) that one can demand to force another to fulfill, but a privilege that the other has no right to prevent.

OA can be achieved by the recognition of users' rights (claims or privileges) in the copyright law. If the courts recognize users' rights (claims or privileges) there is the ability to include OA as one of those rights. As will be explained further on – we claim that OA can be preserved by the recognition of users' rights as a Hofeldian privilege by the courts. The recognition of users' rights as a Hohfeldian right (claim) might change the copyright delicate balance, as will be explained in details hereafter, and therefore might cause the extension of the authors rights and might put new barriers on OA in the long term.

We shall try to see how the courts recognized the fair use and fair dealing defense as users' rights (claims) or privileges in light of the Hohfeldian definitions. Before doing so we shall try now to explain our comment that OA can be preserved by the courts' recognition of users' rights as a Hohfeldian privilege.

2. Right or Privilege – Open Access Ramifications

If fair use is a right, then there is a duty, according to the Hohfeldian analysis, for the creator to enable that right, among other things – to give OA or a different access to the work – an access in which the user would be able to fulfill his right for fair use. If the work is not given in an OA format and is not published in other ways that confirm a proper access to the work, the user can claim that his basic right for fair use was harmed and therefore ask for a relief such as a compulsory OA to the work.

However, the public interest of OA to copyrighted materials can be preserved by recognizing a strong and existing Hohfeldian privilege of fair use and not necessarily a Hohfeldian right.[46]

Needless to say if the fair use clause is interpreted as a users' right (claim) it obviously will give the possibility to establish OA in a wide manner. The user will be able to ask for a declaratory relief that he is entitled to be given access to a work in order to fulfill his right of fair use. In doing so we create a new duty – a creator's duty to give access to his work. It will probably promote OA, but it can also create a chilling effect on the

[45] See, for example, Zohar Efroni, *Towards a Doctrine of "Fair Access" in Copyright: The Federal Circuit's Accor*, 46 IDEA 99, 105 (2005).
[46] Niva Elkin-Koren, *Users' Rights*, supra note 2, at 361-366.

incentive to create new works and might cause a response that would create new legal barriers on OA.

There are several approaches in the legal literacy regarding articles that grant users' rights such as the fair use clause. We believe that the fair use clause should be considered as a stronger privilege and not be considered as a Hohfeldian right (claim) in light of each and every one of these approaches, and still we think that OA as a social benefit and as public interest will be preserved and even extend, as we explain next.

2.1. The Economic Approach[47]

The Economic Approach looks at fair use as a way to overcome specific market failures. For example, reaching all of the works' owners, negotiating with them and enforcing their contracts might be too expensive for the user of the work in relation to the gain he might achieve from his use eventually and therefore would avoid the use from the outset.

We believe that by recognizing fair use as a right (claim) we might get to a similar situation only from the opposite perspective: the costs of the work's owner (the creator) would get too high in relation to the royalties he might get from his work and therefore would avoid the publication or even the creation of his work from the beginning. When fair use is considered as a right (claim) – we mount more costs on the creator who would now have to make a possible access probably online (according to the definition of OA as mentioned above). In addition the costs to give access to his work are not just the costs to make the work available but also the loss of royalties because of the free rider phenomena, which will be increased once the works will be intensively accessible. However according to that approach, some OA has to be preserved in order to be able to lower the costs on future creation. That can be done, as explained earlier, by creating a stronger privilege than it was in the past, in order to overcome the market failure.

2.2. The Balance Approach[48]

The Balance Approach sees the fair use clause as one of the tools for balancing between the creator's right for royalties and the public's rights of accessing cultural and educational items, achieving freedom of speech, freedom of information and so on. This balance is very delicate. It means that only when there is a social value that the public has an interest to promote and at the same time the use that the public wishes to do with the protected work is not commercial and does not harm the creator financially, that use should be permitted.

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[47] Id., at 329-334
[48] Id., at 334-341.

Having the fair use as the users' right (claim) and by that creating a new duty of the creator to publish his work in OA might change the current balance and therefore might extend the creators' right once again in order to preserve the balance. Therefore also in light of the Balance Approach it would be best to consider the fair use doctrine as a Hohfeldian privilege and not as a Hohfeldian right.

2.3. The Aim Approach[49]

The Aim Approach interprets the permitted uses as a way to carry out the copyright regime goal: to encourage as many creativity and creative works as possible for the public best interest. In the light of this approach a full control of the creator at his work is not beneficial with the public since every new work is in some way depended on the existence of other works due to processes as inspiration and acquiring knowledge. However a certain balance, according to this approach has to be preserved. The creator should have *some* control over his work *including* on the accessibility to his work while on the other hand – the public aims and goals should also be preserved.

If we follow this approach we might reach the conclusion that recognizing fair use as a right (claim) might encourage more creativity since a user-creator would have a wider range of works to learn from and to be aspired by. On the other hand we must remember that even the Aim Approach has a balance to consider – has to take into account the creators' interests to have some control on their work. Therefore, according to this approach – interpretation of fair use as a wide Hohfeldian privilege will serve OA and will preserved the current balance in the best manner.

D. Israeli Courts' Decisions – Fair Dealing and Fair Use as Facilitator of OA

In this section we analyze several courts decisions which applied the fair use doctrine. Our purpose is to determine whether the fair use doctrine as applied by Israeli courts could facilitate OA by recognizing it as part of users' rights. We shall review some of the key court rulings in Israel that dealt with fair dealing or fair use clauses. While doing so, we shall examine how these rulings treated the notion of users' rights, even though they did not necessarily related to it directly.

We start with rulings based on the Copyright Act of 1911 and move forward to the era after the new act came into force. Some of the following cases were delivered by the Magistrates Courts and therefore they do not have any precedential authority. Yet, the significance of analyzing these cases is that it could give us an indication of the how Israeli Courts observe fair dealing. The cases we analyze are organized chronologically. After the new act came into force – a new decision of the District Court was delivered.

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[49] Id., at 342-345.

The new ruling will be discussed in the next section in more details. However we argue that even though the district court ruling is based on the new act and established a new level of legal status for users' rights, it does not come out of nowhere. The District Court decision was the first court ruling that formally adopted Prof. Elkin-Koren "users' rights" notion, however although it seems as a revolution it is merely an evolution because the court rulings before the new act widened already the protection of users' rights through the fair dealing clause without the formal and direct recognition of the legal status of the doctrine as users' rights. The revolution is in the new legal status that the court implies – the changing from a Hohfeldian privilege into Hohfeldian right. In other words – even though there is an appeal on the District Court decision in the Supreme Court these days – we can hope that based on the other verdicts since 1993 – the Supreme Court will at the very least recognize fair use as a users' Hofeldian privilege. As long as users' rights are becoming wider and wider – there is more room for OA claims.

1. Dudu Geva Case[50]

On December 30th, 1993 the Israeli Supreme Court delivered its verdict regarding Dudu Geva, a famous commix illustrator who made a book called the "The Book of the Duck" in which he wished to use the Donald Duck figure in one of his stories that was named "Moby Duck". The court had to rely on the fair dealing clause in the 1911 Copyright Act and used a very wide interpretation to the term "criticism" that was considered as an allowed fair dealing purpose. Furthermore, it was the first time the Supreme Court decided to adopt the fair use factors in order to decide if the use that had been done could be considered as fair. The court decided to use those four factors and asked the following questions: (1) was the use of Donald Duck commercial?; (2) Did it promote any social, educational or cultural purpose?; (3) How wide was that scope of the alleged infringing act?; and (4) What was the harm for the potential market value of the original work of Walt Disney? Since the purpose was clearly commercial (a commercial book), and since there was no added value or satire in using Donald Duck character there was no social value to use it and because substantial portion of the original work was used, Geva was given an injunction for his infringement.

This analysis reveals that even while the 1911 Act was in force, the court applied the same standards which were later adopted by the legislature and codified into the new Act. The court also considered financial, social, educational and cultural aspects in its decision. This was the first step towards the adoption of a wider user defense and hence towards more openness. The rulings that followed the Geva decision further widened the scope of the users' exemption.

[50] Supra note 31.

2. Charlie Chaplin Case[51]

Israeli state lottery used Charlie Chaplin character in its campaign. When The Roy Export Establishment Company sued, the state lottery representatives claimed for fair dealing because the purpose in the specific campaign was criticism and the state lottery operated for social and cultural purposes and not for commercial one.

On February 17th, 2000 the Supreme Court delivered its opinion concerning the appeal of the state lottery on the district court decision. In this ruling the Supreme Court continued the Dudu Geva decision and analyzed the fairness of the use according to the four factors of the fair use doctrine. Furthermore the Supreme Court emphasized that what mattered the most was not the purpose of the use (criticism) that should be interpreted in a wide manner, but the fairness of the use. It was held that because the state lottery used the character commercially, that use cannot be recognized as fair dealing.

In its decision the court declared that the fair dealing clause is very important and therefore should be interpreted in the widest manner possible. The Supreme Court explained that the exemption enables cultural and social development, which is based on the achievements of the past. A breakthrough or a development in the use of the public, according to the court ruling, can be achieved from the creative accomplishments of individuals that pave the way stone by stone.

Even though the Supreme Court ruled against the state lottery – its rhetoric about the importance of the users' rights is utmost important.

3. The Case of the Dead Sea Scrolls[52]

Prof. Kimron decoded tatters of the Qumran scrolls. About 40% of his deciphering work was based on his own professional knowledge since the scrolls were torn. After doing so Prof. Kimron wished to receive worldwide scientists' reviews so he sent the decoded text to them. One of those scientists published that decoded Scrolls' text in his own book without Prof. Kimron permission. He claimed that even if the text is to be considered as "work" under the copyright law, his publication was for research and criticism or for journalistic summary and therefore can be seen as a fair dealing and that avoiding the publication was against the public interest. On August 30th, 2000 the Supreme Court, relying on the evidence, ruled that the publication of the book "Facsimile Edition of the Dead Sea Scrolls" didn't merit shelter under any of the fair dealing purposes. Furthermore, regarding the fairness of the use, the Court took into account the fact that the whole work was copied and not just parts of it. It was also mentioned that publishing

[51] C.A. 8393/96 Mifal Ha'Pais v. The Roy Export Establishment, 54(1) P.D. 577 (2000).
[52] C.A. 2790/93 Eisenman v. Qimron, 54(3) P.D. 817 (2000).

with no credit to the author is not to be considered fair dealing and seriously damages Prof. Kimron's right to be the first to publish his life's work.

Even though the Supreme Court ruled that the use was not to be considered fair – its rhetoric is important. The court emphasized that research, learning and teaching with little or no restriction enriches the individual and society. This also enables the realization of the basic human need. This is, according to the Supreme Court, a balance between two diverse interests – the right of the individual in his work and the right of the society to continue flourishing on the fertile land of the past.

4. Ruth Bass Case[53]

Ruth Bass was the widow of a noted artist and caricaturist. The defendant joined together a book that included some of Ruth's deceased husband's works among many works of other artists as well. One of the defendants claims were fair dealing since the book was made for the public interests because it reflected life in Israel in the past. On October 27th, 2002 the Magistrates Court delivered his opinion based on the factors that were considered in the Dudu Geva Case.[54]

In its decision, the court ruled that the purpose of the defendants' book was to be considered as a research or a summary. According to the court, it did not matter if the book had become a best seller. This fact did not change the main purpose of the book. Regarding the fair dealing doctrine – the court mentioned both the commercial characteristic of the book and its social, cultural, educational and historical characteristics. The court found that the commercial factor was less dominant than the others. The court also mentioned that the works were currently not in use and therefore, publishing them inside the book actually benefited the artist and did not cause any damage to him or his estate. Hence the court found the defendant was using the works in a fair dealing.

Prof. Elkin-Koren in her article[55] relates to this ruling as an example for a possible market failure of transaction costs that might accrue when the costs of contacting all the relevant authors and reaching an agreement with them for using their works in such an eclectic book is too high in compare of the expected gain. If the ruling was different there could have been a huge chilling effect on works such as the defendants' book or such as any historical work even on the internet. If the ruling was different there will not be OA to historical pictures and the documentation of history might be limited and harmed.

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[53] C.C. (Mag. T.A.) 24595/97 Bass v. Keter Publishing, Ltd. (2002).
[54] See text accompany supra note 50.
[55] Niva Elkin-Koren, *Users' Rights*, supra note 2, at 329-330.

Once again we can see the important role of the fair dealing clause as the door keeper of the public interests and hence – the door keeper of the users' rights and OA. Even though it is the Magistrates Court – it shows the tendency of the ruling.

5. Zoom 77 Case[56]

Zoom 77 was the plaintiff. It is a photograph company that takes, inter alia, documentary pictures. The defendant, a newspaper in Israel, used some of Zoom 77's pictures without permission, claiming that the photos were used to criticize the news and therefore should be considered fair dealing. On March 18th, 2003 the Magistrates Court examined, among other things, the fairness of the use.

First of all, it was declared that the more the commercial was the character of the use the more that it would likely not to be considered as a fair dealing; accordingly, the more the social purposes was the aim of the use the more it would most likely be considered as fair dealing. Nevertheless, most of the works these days have an inherent financial factor; it does not automatically mean that it is not a fair dealing. From that description we can realize that the Magistrates Court took into considerations also the public interests and not just the creator's interests.

Secondly, the Magistrates Court ruled that if the use was for social purposes, the court must still check the relevancy of the use of the work to the criticism itself.

Thirdly, Judge Agmon-Gonen recognized the fourth factor as a dominant one according to previous verdicts, and examined whether the use of the protected work became a substitute for it in the market in terms of the consumer demand and therefore harmed it and its market value or potential market. Based on those questions, the court found only one of the pictures to lay under the fair dealing defense mainly because, in its opinion, no harm to the relevant market had been accrued.

The court found that one of the pictures was needed to make the criticism whereas the other picture was at no added value for the criticism itself. In doing so the court repeats the early rhetoric about the creators' rights and the social interests such as freedom of speech.

6. Dr. Assaf Yaakov Case[57]

One of the students of Dr. Assaf Yaakov, a lecturer of tort law, compiled all of his lectures without permission into a commercial law book. The student claimed "fair dealing". On January 16th, 2006 the Supreme Court rejected that claim saying that a commercial book which was published for pure financial gain had the potential of

[56] C.C. (Mag. Jer.) 8107/01 Zoom Tikshoret (1992) Ltd. v. Haaretz Newspaper Publishing, Ltd. (2003).
[57] C. A. 8117/03 Inbar v. Yaakov (2006).

harming the value of the work, and its potential market, if the lecturer would ever like to publish his lectures. Furthermore, no credit was given to the lecturer for his lectures. Therefore, the use could not be considered as fair dealing.

Although the book could have a great social benefit in organizing the material in one place, the Supreme Court decided that the creator's right was more important. Nevertheless, the rhetoric and analysis of the fair dealing clause was much the same as in the previous rulings.

7. The Legal Rulings since 1993

As we can notice – the legal rhetoric built since the Dudu Geva Case[58] is always about the balancing between public interests and the creators' interests, based on the four factors of the fair use doctrine, even though existing law already had a fair dealing clause. In this manner the new act did not make an enormous revolution. The major change in the new act is the fact that the closed list of certain allowed purposes of fair dealing was omitted. Now, under the new act, more activities can be recognized as fair use.

We examine these particular rulings because they were considered as mile-stones in Israel Copyright law and all of them have important aspects on OA. The Supreme Court decisions in the case of Dudu Geva and the Charlie Chaplin case are important in establishing new precedents and rhetoric about the importance of the fair dealing doctrine to enable cultural and social development. This cannot be done without some access to former works.

The Dead Sea Scrolls case emphasized the importance of fair dealing in research, learning and teaching in any field in order to enrich the individual and the society as a whole. This ruling set up the important role that OA has in research.

The Ruth Bass case introduces us to the court's view about OA to documentation and historical research.

The Zoom 77 case introduced us to the significant value of criticism of former works in order to preserve freedom of speech – a goal that also justifies OA to works.

The final case we dealt with was the Assaf Yaakov case which we examined because even though the Supreme Court decided that the creator's right was on the upper hand, it did neither change the rhetoric nor narrow the fair dealing exemption. Therefore, although the result was in favor of the original author – the claims that support OA and fair dealing were not changed.

We now turn to discuss the decision of the District Court based on the new Act of 2007. The new ruling on September 2009 set advance rhetoric by recognizing the public

[58] See text near supra note 50.

interests also as users' rights. This decision was appealed to the Supreme Court and is pending decision. Even if the Supreme Court decides to overrule the District Court, we believe that based on the earlier verdicts, as discussed above, the legal rhetoric will not change. In other words, the Courts' rhetoric that supports OA will not change.

E. The Premier League District Court Decision

The website "livefooty"[59] is a privately owned website which features streaming live sports events including the soccer games of the England Football Association Premier League Ltd. (hereafter: "Premier League").

In the website it is declared:

> "Hi all! I have created this site, as my personal aim, to be able to watch LIVE football/soccer/world cup, basketball matches etc, without having to pay a cent! Now you can enjoy this too, With LiveFooty, you can watch all the interesting sporting events for FREE!"[60]

Premier League approached the court asking to reveal the identity of the website's owner in order to sue him/her under the Copyright Act for making their sport games broadcasting available online using the streaming technology and therefore infringing their copyright. Premier League wanted the owner to stop streaming their soccer games. In order to decide either to reveal the name of the owner or not, the court had to discuss if there was a copyright infringement. In other words, the court had to decide whether live filming of the sport event was protected under the Copyright Act.

The court could have used previous decisions from the Israeli Supreme Court concluding that copyright protection applied for broadcasting live sport games,[61] even though a new act came into force. That was also the legal position of the Attorney General in this case.[62] Instead the district court held that the new act did not include the streaming technique as an infringement – i.e. it is neither broadcasting nor making available to the public (and likely not a reproduction of the work).[63]

Moreover, even though the court decided that there was no infringement of Copyright Act of 2007, the court decided to analyze the new fair use clause. In its decision the court expressed its opinion that the new copyright act stabilized a new and significant balance between the users' rights to the creators' rights.

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[59] livefooty.doctor-serv.com.
[60] Id.
[61] C. A. 2173/94 Tele Event Ltd v. Gold Lines and Co., P.D 55(5) 529 (2001).
[62] The attorney general position paper *in* Misc. Civ. App. 11646/08 The Football Association Premier League Ltd v. Anonymous (2.9.2009) [a copy in Hebrew is available with the authors].
[63] The Football Association Premier League Ltd v. Anonymous, supra note 5.

1. Is There a New Legal Status of Users' Right in the New Act?

In her decision, Judge Michal Agmon-Gonen based her ruling on the assumption that in democratic regime the copyright balance between creators' rights and users' rights must be carried out from a certain point of view – in which users' rights are treated as a right and not a mere defense. Under this assumption of the new balance between two opposite rights, the court interpreted the new law's criteria which led to the ruling that under the new Copyright Act, the defendant did not infringe the rights of Premier League, if it was decided that they had a copyright in the streaming of the soccer games.[64]

In her preliminary decision in the case, Judge Agmon-Gonen quoted articles of legal scholars and foreign court decisions concerning the question – are there rights infringement in streaming live a sport game or not. Among other things, Judge Agmon-Gonen emphasized the importance of the right of the users to be able to watch major sport events freely. The latter argument is based on Article 9 of the European Convention on Transfrontier Television (Strasbourg 5.V. 1989).[65] By citing the convention the court actually sees the right of the audience to be involved in the culture life of a democratic country and the right for freedom of information. Then the court mentions for the first time the new balance between the creators' rights and the users' rights as equal rights. Judge Agmon-Gonen emphasizes that the new balance had been created by the regulator and that the court had to reconsider the copyright laws in light of that.[66]

In the final decision on September 2nd 2009, Judge Agmon-Gonen referred to the fair use clause as a balance between the creators' rights that created to hearten creation to the benefit of the public and between the users' rights that embodied the rights of free

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[64] Id.

[65] "**Article 9 – Access of the public to information**

Each Party shall examine and, where necessary, take legal measures such as introducing the right to short reporting on events of high interest for the public to avoid the right of the public to information being undermined due to the exercise by a broadcaster within its jurisdiction of exclusive rights for the transmission or retransmission, within the meaning of Article 3, of such an event.

Article 9*bis* – Access of the public to events of major importance

1. Each Party retains the right to take measures to ensure that a broadcaster within its jurisdiction does not broadcast on an exclusive basis events which are regarded by that Party as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Party of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Party concerned may have recourse to the drafting of a list of designated events which it considers to be of major importance for society.

…"

European Convention on Transfrontier Television (Strasbourg 5.V. 1989) available at: conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=132&CM=1&CL=ENG

[66] Preliminary decision in the case of Misc. Civ. App. 11646/08 The Football Association Premier League Ltd v. Anonymous [in Hebrew].

speech, cultural rights, freedom of information and freedom of creation.[67] This claim is based on various articles of legal scholars, some of them referred to the clauses' change as a change that narrowed the scope of the creators' rights.[68]

Judge Agmon-Gonen emphasized that users' rights are derived from the basic right to human dignity as set in the Basic Law: Human Dignity and Liberty, which, in her opinion, is "the most important right in the basic laws of Israel".[69]

Judge Agmon-Gonen dedicated an entire section of her ruling to the issue which she named "Fair Use as a Right". Here the Court analyzed the fair use doctrine as a separate and independent right. Among other things the court referred to article 27 of the Universal Declaration of Human Rights of 1948[70] and to the International Covenant on Economic, Social and Cultural Rights of 1966[71] as a basis for the interpretation of fair use as a balance test according to which the court decides what right should have the upper hand.[72] In other words – the fair use clause is interpreted by the court as a balance

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[67] The Football Association Premier League Ltd v. Anonymous, supra note 5. Judge Agmon-Gonen strengthened her claim by quoting scholars on the importance of the balance between copyrights and the public interest in a democratic regime – Steven J. Horowitz, *Designing the Public Domain*, 122 HARV. L. REV 1489 (2009); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283 (1996); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?*, 17 UCLA L. Rev. 1180 (1970).

[68] See Joshua Weisman, *Comparative Reading: The Copyright Act,2007, Continental Law and Common Law*, *in* AUTHORING RIGHTS : READINGS IN COPYRIGHT LAW 69, 79-80 (Michael Birnhack and Guy Pessach Ed., 2009). See also a discussion on the change of clauses Orit Fishman-Afori, *An Open Standard 'Fair Use' Doctrine: A Welcome Israeli Initiative*, 30 EIPR 85 (2008).

[69] The Football Association Premier League Ltd v. Anonymous, supra note 5. In this matter the court diverts to the article of Orit Fischman-Afori, *Judicial Discretion in Granting Injunctive Relief: The Silent Revolution*, *in* AUTHORING RIGHTS : READINGS IN COPYRIGHT LAW 529 (Michael Birnhack & Guy Pessach ed. 2009) [in Hebrew].

[70] Available at: www.un.org/en/documents/udhr/index.shtml. Article 27 of the Declaration states as follows:

> "(1) 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.
>
> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

[71] Available at: www2.ohchr.org/english/law/cescr.htm. We assume that the court referred to article 15 of the convention:

> " 1. The States Parties to the present Covenant recognize the right of everyone:
>
> (a) To take part in cultural life;
>
> (b) To enjoy the benefits of scientific progress and its applications;
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
>
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
>
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields".

[72] The Football Association Premier League Ltd v. Anonymous, supra note 5.

test between two basic rights with the same legal stand – users' rights and creators' rights.

Judge Agmon-Gonen further explained the ramifications of declaring fair use as a right in contrast to a mere defense. For example – a user can approach the court and ask for a declaratory relief in order to declare a certain use as a fair use, which cannot be done if fair use is seen as a mere defense. The court referred in this part to some legal articles as well as to a court decision in Canada.[73]

In the following parts we shall examine if the court and the scholars meant the same and what are the ramifications of classifying fair use as a Hohfeldian right (claim) and fair use as a Hohfeldian privilege and of classifying fair use as a right in contrast to a mere defense in light of the tendency in the court decisions since 1993 and the new act. Finally we shall try to answer the question – is changing the legal regime of users' rights from a defense into a right supports OA.

2. What is Fair Use or Fair Dealing – A Privilege or a Right According to Israel Copyright Law?

Since 1993 and the Dudu Geva Case[74] until the new act came into force – all of the rulings in which the fair dealing doctrine was discussed examined the doctrine as it was defending public interest – such as freedom of speech, freedom of creation and so on. In some of the cases as we could see in the discussion above, the importance of an active doctrine that will preserve the public domain and the progress of our social and cultural life based on past works and creation, was emphasized. However the doctrine was considered as a Hohfeldian privilege. We assume this, based on the verdicts, because of the following reasons – the doctrine could only be brought as a defense and not be subject to an independent claim for action; based on the doctrine one could not ask the court to compel the creator to give OA to his work in order that one can use it in a fair dealing sense.

Therefore, untill the new act came into force – the fair dealing clause was treated as a privilege, a privilege that did not put a duty on any one to enable it – but a no-right to prevent it.[75]

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[73] Id.

[74] Supra note 50.

[75] Even if it is just a privilege – it should be a question whether the legislator or contracts can narrow this privilege like the prohibition of reverse engineering. See, for example, Digital Millennium Copyright Act (DMCA) – 17 U.S.C § 1201(f). See also MARK A. LEMLEY, PETER S. MENELL, ROBERT P. MERGES AND PAMELA SAMUELSON, SOFTWARE AND INTERNET LAW 141-142 (3rd ed., 2006). In addition other articles considered the permitted uses as privilege as well. See for example L. Ashley Aull, The *Costs of Privilege: Defining Price in the Market for Educational Copyright Use*, 9 Minn. J.L. Sci. & Tech. 573 (2008).

Nevertheless, the courts' rhetoric about the importance of the active doctrine as a defender of public interest and the early comparison between the right of the author and the right of the public (which is actually the users) has spread the seeds to the question whether that legal status of the fair dealing clause as a privilege did not reach the level of an Hohfeldian right (claim) once the fair use doctrine was adopted in the new act or should it remain as a wider privilege than before.

In the Premier League District Court decision Judge Agmon-Gonen goes the extra step, declaring users' rights as a basic human right founded on the notion that a human being has a basic right to participate in the cultural life of the community, to enjoy the scientific advancement, as it announced in various international conventions as mentioned above.[76] Moreover, the Judge wrote it loud and clear – the fair use defense is an independent right and not a mere defense with all the ramifications of this new legal status. According to Judge Agmon-Gonen, a person now can ask for a declaratory relief based on the fair use right in order to declare that a certain use should be considered as fair use.[77] The latter announcement actually says that the fair use doctrine in the new act established a Hohfeldian right and not a mere privilege – because users now have a basis for action ax-ante and not just ax-post. According to this declaration not only that the user can approach the court to ask for a declaratory relief, but now, according to Judge Agmon-Gonen new legal specification of the doctrine if we take the decision a bit further – the user can now ask the court to enable his right for fair use, by asking for OA to the work.

The Judge relies on the opinion of several scholars. However as we will clarify we believe Judge Agmon-Gonen interprets those opinions in a wider sense than the original authors really meant. For instance, she cites a recent paper by Prof. Niva Elkin-Koren, for the proposition that users' rights should be treated as a right (in the strong sense) and not simply as a privilege, based on the language of the new act and its prospective legislative intent. This reference, however, is inaccurate.

Elkin-Koren does not argue unequivocally that fair use should be treated as a right (claim) and not just as a privilege. Prof. Elkin Koren believes that in most of the cases having fair use as a privilege is good enough while the only possible exception for that concerns the software field.[78]

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[76] See supra notes 70-71.

[77] The Football Association Premier League Ltd v. Anonymous, supra note 5.

[78] Niva Elkin-Koren, *Users' Rights*, supra note 2, at 346-347. The need of recognizing fair use as a right in the software field cannot be used as an induction for other copyright fields since the copyright defense is not the optimal one for software in general. Prof. Elkin Koren actually suggests other regimes that might force the works' owners to allow his/her users access as would have been accomplished by the right of fair use.

Another source cited in the ruling is Dr. Yuval Karniel article.[79] Karniel comments on a verdict in which the court ordered to black out foreign channels that broadcasted the Wimbledon Tennis Event on a copyright merit.[80] Karniel analyzes the Copyright Act of 1911. He discusses the goals behind the act and reminds the readers that the act has not only to worry about the creators' incentive to create but also to be concerned of public interests such as freedom of speech, freedom of information and the clear public interest of optimal use of the work including the ability to expose the work to as much people as possible in order to enjoy it. Thus, Karniel argues that the fair dealing clause is one of the means to enable OA and fair use of the works.[81]

This does not necessarily support the claim that fair dealing should be interpreted as users' right in the strong Hofeldian sense, as held by Judge Agmon-Gonen. Karniel is talking about a new balance, a balance that should widen the privilege of the users in light of the extension of the creator's rights including his new abilities to control his work with technological means.[82] In the article there is no indication that the author suggests to see fair dealing as an independent right (claim), but he suggested as was also the tendency in the courts' rulings – to widen the privilege of the users in order to keep the delicate balance. The author discuss OA to works as a balance that should be kept in order to be able to create on the past – however this does not necessarily mean that fair dealing should be treated as a right (claim) and not as a privilege.

Judge Agmon-Gonen also mentions what the scholars Wendy J. Gordon & Daniel Bahls call as a "right" – "it is an existing liberty, to which the public has an enduring entitlement, and which deserves significant weight".[83] However as they mentioned it in their article – by that they mean a stronger and existing liberty – a stronger privilege that is recognized by the law and cannot be overdue by contracts for example (a cogent privilege) and not a Hohfeldian right (claim).[84]

As for a famous ruling of the Canadian Supreme Court – CCH Canadian Ltd. V. Law Society of Upper Canada[85] (that also interpreted a "fair dealing" clause that is very similar to the one that was in the old Israeli Copyright Act of 1911) – the recognition of "fair dealing" as a "right" in that verdict actually meant, in our opinion, to see it as a Hohfeldian privilege and not as a Hohfeldian right (claim):

> "Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act

[79] Yuval Karniel, *Broadcasting Sporting Events on the Foreign Cable Channels – Is a Copyright Black Out Really Necessary?*, 6 Alei Mishpat 259 (2007) [in Hebrew].
[80] C. F. H. 6407/01 Golden Lines & Co. v. Tele Event Ltd. P.D 58(6) 6 (2004).
[81] Yuval Karniel, supra note 79, at 265.
[82] Id., at 264-266.
[83] Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 to Avoid the 'Fared Use' Fallacy*, 2007 Utah L. Rev. 619, 626 (2007).
[84] Id., at 624-626.
[85] [2004] 1 S.C.R. 339.

> falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver […] has explained, […] : 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation'."[86]

The court analyzed the fair dealing clause as a stronger inherent defense and did not mention the ability to use the fair dealing as a basis for a lawsuit. Therefore we have reason to believe that the court in its decision aimed for a stronger privilege, as was mentioned by the scholars Wendy J. Gordon & Daniel Bahls in their article.[87]

As we can see – the new ruling of Judge Agmon-Gonen had taken a stand by declaring fair use as a Hohfeldian right. Maybe it was not what the Judge meant but it was the outcome of the ruling. We are not sure that the court took into consideration the whole ramifications – such as the ability to hand a law suit in order to gain access to a work and to establish the right (claim) for fair use. We are not sure that this was the outcome the Judge saw in her vision. Nevertheless, even if the Supreme Court will overcome the District Court ruling, we still believe that in light of the court's tendency to widen the privilege of the users and the change from a narrow "fair dealing" clause to a wider "fair use" clause will be good enough to preserve a balanced demand for OA, as was explained earlier in this paper.

F. Conclusions

Although the new Israeli Copyright Act of 2007 changed the fair dealing doctrine into a fair use it did not make a revolution but an evolution. As we could see during the years since 1993 to 2008 (the year in which the new act came into force), there is a strong tendency toward a wider interpretation of the fair dealing clause. The courts treaded the term "fair" as it was like the four factors of the "fair use" doctrine. The new act omitted the closed list of the allowed fair dealing purposes and adopted the four factors into the act itself, the four factors that the court adopted years before. By doing so the legislator adopted the fair use doctrine into the Israeli Copyright law.

During the years since 1993 we saw the tendency to define a wider user "right" of fair dealing. This wide interpretation reflects a tendency toward OA as can be shown in the aforementioned verdicts through the rhetoric of the courts. However till 2008 it was clear that "fair dealing" was a users' "right" in daily usage – but considered as a Hohfeldian privilege.

We tried to explore whether the new act defined the fair use "right" as a Hohfeldian right (claim). As we showed the District Court Judge Agmon-Gonen in her ruling

[86] Id., at paragraph 48.
[87] Supra note 83.

regarding the Premier League Case referred to the fair use clause in that manner. If that is true, a user can file a lawsuit in demanding OA to works in order to be able to fulfill his fair use right. However as we showed in our paper – OA can be achieved even if the fair use clause is defined as a Hohfeldian strong and wide privilege. We claimed that the tendency to widen the users' rights of fair dealing is the right way to preserve OA in the copyright regime in light of the three dominant approaches towards fair use: The Economic Approach, The Aim Approach and The Balance Approach. Therefore we believe that treating the fair use doctrine as a users' "right" but as Hohfeldian strong privilege as it was before – will preserve both OA and the basics of the copyright law.

These conclusions are not limited to Israeli law – but it can be relevant in other jurisdictions as well.

In addition, it does not really matter if the Supreme Court overrules the District Court decision as long as it keeps the tendency to widen the fair use privilege as a users' "right" (Hohfeldian privilege).

It is true – if the fair use clause is a mere Hohfeldian privilege – there is no duty what so ever on the creator to give OA to his work. But the creator has no-right to prevent the users from using his work once published in a fair use manner. As for literary works – if they are published – they are reachable most of the times in libraries around the world. Therefore the access to the work may not be as easy as it would be on the internet – but still the common user will be able to access the work either free of charge or with a fee. A fair OA can be achieved in projects as "fair use guidelines",[88] initiatives as Access to Knowledge (A2K),[89] Open Courseware[90] and so on. These notions are strong and we assume they will be given a strong tailwind by the extension of the fair dealing privilege to a wider privilege of fair use. In this way, in our opinion the delicate balance will be preserved, the notion of OA will be assimilated and future works will be built – "dwarfs standing on the shoulders of giants".

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[88] Niva Elkin-Koren, Orit Fischman Afori, Ronit Haramati-Alpern and Amira Dotan, *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience* (2010). Forthcoming in Journal of the Copyright Society. Available at: ssrn.com/abstract=1648408.

[89] Access to Knowledge (A2K) represent a collection of principles that shared by various social initiatives both private and public, with sometimes opposite interests, that are responsible to economical and social change in society. The basic common presumption of all is that open access to knowledge is necessary in order to achieve justice, economic evolution and human rights. See J. Balkin, *What is Access to Knowledge?* Presented at Yale A2K Conference (2006). balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html

[90] For example see: MIT OpenCourseWare project ocw.mit.edu/index.htm; the Israeli Project MAOR in cooperation with MERLOT (Multimedia Educational Resource for Learning and Online Teaching), ISOC-IL, Ministry of Education and IUCC (The Inter University Computation Center) maor.iucc.ac.il.