

Fair Use Best Practices for Higher Education Institutions: The Israeli Experience

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Introduction	1
1. The Vision	4
A. Educational Use and Access to Knowledge	4
B. Fair Use and Social Norms	6
C. Drafting a Code of Fair Use Best Practices	8
2. The Law.....	10
A. The New Israeli Copyright Act	10
B. Fair Use under Israeli Copyright Law	11
3. The Process	16
A. Consensus Building	16
B. Social Change Agents inside the Organization	18
C. Using Clinical Settings for Law & Social Change	20
4. The Code of Fair Use Best Practices for HEI	21
A. The Israeli Best Practices Code	21
B. Implications	23
5. Conclusions.....	24

Introduction

Copyright law was designed to promote progress by incentivizing the preparation of creative works.¹ There is no doubt that learning is a significant component of the creative process. Acquiring skills, engaging with creative materials, and advancing our understanding of the existing body of knowledge are essential for promoting progress. The use of copyrighted materials in higher education institutions is, therefore, at the heart of copyright goals. In recent years, however, it has become increasingly difficult to make copyrighted works accessible to students for educational purposes.

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¹ The purpose of copyright law as defined by the U.S. Constitution is to “promote the progress of science and the useful arts.” U.S. Const. art. I, § 8, cl. 8. This definition of the objective of copyright law was adopted by the Israeli Supreme Court. See *Interlego A/S v. Exin-Line Bros. S.A*, Civil Appeal 513/89 48 P.D. (4), 133.

A few reasons have combined to create this situation. First, the expansion of copyright in the past few decades has led to the protection of additional works and to broader rights which cover more aspects of a work's exploitation.² At the same time, technological developments are transforming educational processes and introducing new opportunities for educational use: online remote access to course materials; digital availability of teaching materials, including journals and films which allow search and manipulation; podcasting of lectures; and distance learning, for example.³ Exploitation of works through these technologies may, however, trigger copyright liability. Works in digital format involve some level of copying in each and every use. Thus, a strict interpretation of copyright law can easily make every single act of reading, viewing or listening to copyrighted materials an endless stream of copyright infringements.⁴

Copyright legislation often includes some exceptions to and limitations on copyright in order to facilitate access and dissemination of knowledge, thus mitigating some of the harsh implications of copyright for liberty, free speech, competition, and access to knowledge. The new Israeli Copyright Act, which was enacted in 2007,⁵ includes several exceptions related to learning and research in educational institutions and public libraries. A major part of the legal reform introduced by this Act is the introduction of a *fair use* doctrine that follows the American model and that replaced the narrower British *fair dealing* exemption in the old law.⁶ Fair Use defines a legal standard: a set of considerations to be interpreted by the court and applied, retroactively, to any given set of circumstances on a case-by-case basis. To be considered *fair*, the use must be for purposes such as *private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination* by an educational institution.⁷ *Fair dealing*, by contrast, provides a closed list of purposes

² Pamela Samuelson, *Does Copyright Law Need to be Reformed?* 50 COMMUNICATIONS OF THE ACM 19 (2007).

³ Niva Elkin-Koren, *Copyright and Distance Learning in Higher Education*, 10 HAMISHPAT YEAR BOOK 65 (2005) (Hebrew).

⁴ John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, UTAH L.REV.537 (2007); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENTER. L.J. 29 (1994).

⁵ 2007 Copyright Act, LSI 34. An English translation is available at http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=5016

⁶ Copyright Act, 1911, Article 2 (1) (i). Under the old Israeli copyright law, as under the English law on which it was modeled, the "fair dealing" clause was formulated as a closed list. In other words, it did not leave any room for the court to recognize new uses as fair, beyond those already enumerated by the statute.

⁷ Copyright Act of 2007, § 19(a).

that could be considered legitimate under this clause. The courts are further required to determine the *fairness* of each use by applying, at a minimum, the factors listed by section 19(b): the purpose and character of the use; the nature of the copyrighted work used; the scope of the use in relation to the work as a whole; and the impact of the use on the value of the work and the work's potential market.⁸

Needless to say, this legal regime creates a high degree of uncertainty regarding permissible uses. Is it permissible to make a copy of a law review article available to students? Are instructors allowed to prepare copies of an excerpt from Plato and make them available to students in a political science class? What material could be made available in courses, and how? Is it legal to make copies available to the entire student body in a higher education institution? The uncertainty regarding permissible uses is compromising the ability of these institutions to facilitate access to necessary research and teaching materials. This situation is exacerbated by the fact that institutions of higher education are by nature risk averse.

Under these circumstances, the fair use doctrine may no longer facilitate the ultimate goal of copyright law, which is to promote production and dissemination of arts and sciences.⁹ The high degree of uncertainty stemming from the doctrine is creating a chilling effect and causing users to avoid exploiting the work in ways which the law seeks to encourage under fair use. To address this uncertainty and its chilling effect on educational use, we drafted a *Code of Fair Use Best Practices* for the use of copyright materials in Higher Education Institutions (hereinafter – HEI). We formed a coalition of all the higher education institutions in Israel and negotiated a shared understanding of fair use among the partnering institutions.

This paper provides a snapshot of the process of building the coalition and drafting the *Code of Fair Use Best Practices*. This project was initiated through the collaboration between the first, and so far only, Intellectual Property clinics in Israel: The IP Clinic of the University of Haifa, Faculty of Law, and the IP Clinic of the College of Management Academic Studies School of Law.¹⁰ The initiative was inspired by the visionary initiatives of Patricia Aufderheide and Peter Jaszi, who worked with various communities in the U.S. to devise particular codes of Fair Use

⁸ Compare to the U.S. copyright statute, see 17 U.S.C. § 107.

⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 at n. 18 (1994).

¹⁰ These two clinics are carried out under the supervision of Adv. Dalit Ken-Dror and Prof. Niva Elkin-Koren at the University of Haifa, and Adv. Eyal Oren and Prof. Orit Fischman-Afori at the College of Management Academic Studies.

Best Practices.¹¹ We also carefully examined the lessons from the failure of past American projects, such as the CONFU.¹² We thus had ample source material for a comparative analysis of copyright law, fair use, and the different strategies of legal activism for social change.

We begin by describing our vision for the educational use of copyrighted materials; our view of the purpose of copyright and fair use doctrine; and our view of the interaction between law and social norms. In Part II, we analyze the legal regime that pertains to educational use of copyrighted materials in Israel. Part III describes the process of consensus building among the different stakeholders. In Part IV, we present the major principles of the Code and reflect on their implications.

1. The Vision

A. Educational Use and Access to Knowledge

HEI seek to promote the teaching and research of arts and sciences, and to disseminate the fruits of research to the general public. They generate scholarship, scientific developments and technological innovations. The dissemination of research may take the form of text books, manuscripts, journal papers, computer programs, data, and innovative designs. The dissemination of knowledge also takes the form of teaching and training in various fields. In this capacity, HEI make use of a variety of resources, some of which are often subject to intellectual property constraints. Academic research is primarily motivated by intellectual curiosity and other non-monetary motivations, such as reputation and affiliation with a community of scholars. At the same time, however, the research output of academic activity is often protected by intellectual property, though it is not always fully owned by the researcher or the HEI. The dual role of HEI, as both generators of knowledge and users of knowledge created by others, make them a unique social agent for promoting access to knowledge.

The use of copyrighted materials for educational purposes enjoys a special status under copyright law. Such use serves the fundamental purpose of copyright

¹¹ See the Center for Social Media at American University and the Program for Information Justice at the University law school at http://www.centerforsocialmedia.org/resources/fair_use/

¹² See: “The CONFU Report: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use”, November 1998, Available at: www.uspto.gov/web/offices/dcom/olia/confu/indexx.html.

law: to promote progress in arts and sciences.¹³ This instrumentalist approach requires offering authors sufficient incentives to produce new works. At the same time, promoting progress also requires training new authors, cultivating new artists, and nurturing our natural creative instincts by learning and engaging with works that have already been created. Open access to knowledge is essential for any learning process. Learning and teaching are themselves creative processes: they not only expand our understanding of the world around us but also inspire new understandings of previous findings and insights. This type of use fosters progress no less than monetary incentives to the creator. For this reason, educational use is specifically listed as a legitimate purpose that fair use is designed to promote. It rests at the core of the fair use doctrine.¹⁴ As a general principal, therefore, educational uses of copyrighted materials should be permitted, as these uses serve the fundamental objectives of copyright law. Exceptions arise when a particular use seriously compromises the owners' ability to secure a return on their investment in producing the copyrighted work. A classical case for denying fair use would be massive copying from a college textbook, for which the only market is students. At the same time, however, a couple of pages copied from several reference books or professional sources should be considered fair use.

It is difficult to imagine higher education without access to copyrighted materials. Every type of training involves exposure to previous achievements in arts and science. Higher education requires access to cutting edge technology, scholarship, scientific findings and innovations. Developing independent thinkers and thorough scholars requires ongoing dialectic engagement with current scholarship. The selection of teaching materials should be based purely on academic considerations: the relevance of the materials to the particular course and their significance to the intellectual development of students. The selection of teaching materials should not be based on the ability to acquire a license, the restrictions of a license or the license fee.

¹³ See *supra* note 1.

¹⁴ 17 U.S.C. § 107; 2007 Copyright Act §19(a).

B. Fair Use and Social Norms

The fair use doctrine permits the use of copyrighted works when such use promotes the public interest.¹⁵ What is or is not deemed to be in the “public interest” depends on numerous factors specific to a given culture, and therefore what uses are regarded as “fair” is also specific to each society.¹⁶ Since the notion of “fairness” reflects social and cultural perceptions, it functions as a means for introducing these concerns into copyright law in order to promote different policy goals.¹⁷ Nonetheless, there is an international standard harmonizing the exceptions and limitations to copyright. This standard is known as the “Three Step Test” under which: (1) the exception should be limited to certain special cases; (2) it should not conflict with normal exploitation of the work; and (3) it should not unreasonably prejudice the legitimate interests of the right-holder.¹⁸ This standard is sufficiently broad to allow for significant variation in the rules of different countries.¹⁹ For example, the interpretation given to the second condition of the Three Step Test, referring to “normal exploitation of the work”, is comprised of an empirical component reflecting the current practice in the relevant state, and a normative component reflecting a legal analysis with respect to the appropriate balance of interests. Both factors are equally important.²⁰ Accordingly, the fair use doctrine is also highly influenced by social norms, including professional

¹⁵ See William F. Patry, *PATRY ON COPYRIGHT* (2008), § 10:2.

¹⁶ See Patry, *Id.*, at § 10:4, describing the development of the fair use doctrine in early American common law as a mechanism in which different social concepts were considered.

¹⁷ Such goals may include the encouragement of learning and creation or even distributive concerns. See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 *TEX. L. REV.* 1535 (2005) (discussing distributive concerns of the fair use doctrine). See also: Daniel A. Farber and Brett H. McDonnell, *Why (and How) Fairness Matters at the IP/Antitrust Interface*, 87 *MINN. L. REV.* 1817 (2003), arguing that intellectual property law should also encourage a fair division of the economic surplus, at least as a secondary goal.

¹⁸ See Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, Article 9(2); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Sec. 13.

¹⁹ For an in-depth analysis of the Three Step Test see: M. Senftleben, *COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST* (Kluwer Law International, 2004). For an analysis of the role of the broad international standard in sketching the contours of national exceptions see: P. Bernt Hugenholtz and Ruth L. Okediji, *Conceiving An International Instrument On Limitations And Exceptions to Copyright*, Final Report March 6 2008 (Available at: http://www.ivir.nl/publications/hughholtz/limitations_exceptions_copyright.pdf). The Three Step Test was interpreted by the WTO panel discussing Section 110(5) of the U.S. Copyright Act, see: *World Trade Organization, Report of the Panel: United States – Section 110(5) of The U.S. Copyright Act, WT/DS160/R*. The reasoning of the panel reflects the flexibility of the test, since the open standards were explained with other broad and flex terms. See: Annette Kur, *Of Oceans, Islands, and Inland Water – How Much room for Exceptions and Limitations under the Three Step-Test?*, in *IP IN TRANSITION* (A Kur & M. Levin eds. 2009), 22-31. Available at: <http://ssrn.com/abstract=1317707>.

²⁰ See: WTO panel discussing Section 110(5) of the U.S. Copyright Act, see: *World Trade Organization, Report of the Panel: United States – Section 110(5) of The U.S. Copyright Act, WT/DS160/R*, at par. 6.166, 6.176. See also: Michael Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 *CARDOZO ARTS & ENT. L.J.* 391, 409-10 (2006).

practices, which reflect a society's common understanding of the boundaries of copyright.

Moreover, the notion of fairness incorporates values such as "legitimate expectations", which combines empirical and normative factors as well.²¹ In other words, the expectations of owners and users are learned from past behavior. These expectations are subject to a legal assessment of whether they should be elevated into an acknowledged interest, which may then turn swiftly into a "right".²² Therefore, the use of the "expectations" test as part of the fair use doctrine fosters the mechanism by which common practices are introduced into copyright law.

This inquiry into the mechanism of the fair use doctrine may highlight the well-known reality in which the conventions and practices of a community or a particular sector shape the expectations of the copyright owners. These conventions, therefore, may have a significant impact on a court's finding of fact with regard to the fairness of a certain practice. In effect, conduct creates the legal standard. This has certainly been the case when the overabundance of caution by fair users has resulted in new legal requirements for acquiring licenses.²³ Therefore, it should also work the other way, i.e., a practice of permitted use should be recognized as creating a *non-requirement* for a license. This is not to say that courts will approve just any existing practice as being necessarily "fair", but rather that such practice should be taken into consideration while assessing the legality of a specific use.

²¹ Similar to the "normal exploitation of the work" included in the Three Step Test, as explained above. Ricketson has proposed to inspect the "normal exploitation" test through the copyright owner *expectations*, see: Sam Ricketson, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886 – 1986*, (London, 1987), 483. This proposal was adopted by the WTO panel discussing Section 110(5) of the U.S. Copyright Act, see: *World Trade Organization, Report of the Panel: United States – Section 110(5) of The U.S. Copyright Act, WT/DS160/R*, at par. 6.176.

²² For example, see *American Geophysical Union v. Texaco Inc.*, 60 F. 3d 913, 929-31 (1994)..Court proposed to inspect the fourth factor of the fair use doctrine, considering the economic effect upon the potential market, according to the question whether the use at stake has captured a market segment which is common, reasonable or expected that the owner would wish to develop by himself.

²³ See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882 (2007), arguing that fair users frequently request licenses simply to avoid litigation, which in turn enlarges the scope of the right expected by copyright holders. See also Patricia Aufderheide and Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, Center for Social Media/Project on Intellectual Property and the Public Interest Report, 35 (Nov. 8, 2004) http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf.

C. Drafting a Code of Fair Use Best Practices

Why draft a Fair Use Best Practices Code? Our purpose was to implement the theoretical insights regarding the operation of the fair use doctrine by establishing a shared understanding of fair use for higher education. Such a shared understanding, we believe, would serve several major goals. One goal is to help reduce the chilling effect caused by the uncertainty related to fair use.²⁴ Creating a higher level of certainty regarding the permissible uses may facilitate the exercise of fair use rights by higher education institutions and would therefore help them fulfill their public mission.

Another goal is to overcome the circularity of fair use.²⁵ The fair use legal analysis requires the court to examine the economic effect on the market and on potential markets. In this context the courts are directed by the Act to examine actual practices (i.e., the existence of a licensing market) before they determine the legitimacy of the use. When risk-averse users, such as educational institutions, are acquiring a license (even when the use is fair and therefore does not warrant a license), they, in fact, narrow the scope of fair use.²⁶ The courts will assume that if some institutions are paying a fee for the use while others are not, those who fail to acquire a license are causing a market harm, measured by the amount of royalties that could have been collected should they have opted for a license. This circularity can be overcome by unifying the copyright policy of all the educational institutions, thus preventing the consequences of risk-averse conduct.

We further aimed at establishing an organizational structure that would facilitate the implementation of fair use by HEI. The fair use analysis requires the use of discretion in each and every case of using a copyrighted work. The high-level legal analysis that is exercised by courts cannot be applied by each librarian or academic instructor for each and every material that might become available to students in a teaching setting. The volume of copyrighted materials which needs to be handled is large, and the time and effort required by skilled personnel to apply the analysis make the process prohibitively costly. The high level of uncertainty regarding the legality of

²⁴ One of the reasons identified by Fisher & McGeeveran, for caution and risk-averse behavior among educational personnel is the lack of consensus regarding the legitimate scope of educational use. See William W. Fisher & Willaim McGeeveran, "The Digital Learning Challenge: Obstacles to Educational Users of Copyrighted Materials in the Digital Age", BERKMAN CENTER RESEARCH PUBLICATION NO. 2006-09, <http://cyber.law.harvard.edu/media/files/copyrightandeducation.html>

²⁵ Gibson, *supra note* __, *at* __.

²⁶ Gibson, *supra note* __, *at* __.

mundane practices creates a chilling effect, as instructors and libraries are unable to bear the risk of liability for copyright infringement and therefore avoid permissible uses. The purpose of the Code is to "translate" some of the high level fair use principles developed by courts into practical rules tailored for educational settings. It also aims at creating an organizational structure that can assist in identifying and addressing hard cases.

A major objection to the conversion of high level principles into particular rules is that such a conversion may limit the scope of fair use. The concern is that the minimal standard of fair use will eventually become a ceiling, and uses which do not fall under the particular rules will be considered an infringement.²⁷ Our Code seeks to overcome this by using two strategies. One way to limit the ceiling effect is to explicitly state in the preamble and code itself that the Code does not intend to define fair use in its entirety and that it only provides some guidelines for what is obviously a clear-cut fair use. The second strategy is to offer a two-tier analysis, therefore creating a mechanism for deliberating on fair use principles in cases which go beyond the minimal standard. Thus, the Code enables employees of HEI to efficiently identify the cases which are clearly fair use and to exercise fair use rights in these instances. For more complex situations where an elaborated fair use analysis is required, the Code suggests a consultation process and provides the framework for fair use analysis.

Finally, an ancillary goal of drafting Fair Use Best Practices is to voice the norms of a particular community of copyright authors and users: the academic community. The shared understanding of fair use principles reflects the social responsibility of HEI to promote higher education and research by disseminating knowledge through teaching and through facilitating access to academic publications. The significance of these norms is further discussed below. In fact, the formation of a coalition of social-change agents inside HEI may have far reaching implications beyond clarifying the limits of the fair use doctrine.

²⁷ U.S. Courts have cited the existence of licensing practices in rejecting fair use claims related to the photocopying of copyrighted materials for educational and research purposes. See *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 1385-88 (6th Cir. 1996) rejecting a fair use defense of a photocopying service which prepared course materials for students, due to an industry licensing practice; *American Geophysical Union v. Taxco*, 60 F.3d 913 930-31 (2nd Cir. 1994) rejecting a fair use defense regarding the copying of journal articles by defendant's scientists since other corporations acquired a license for similar copying, and payment for a license was made by the defendant in the past.

As neither the publishers nor the HEI were organized at the time, with formal representatives who reflect the views of all the relevant constituencies, the more realistic choice was to launch the process only with the academic community. Since the academic community is not monolithic and there are significant differences of opinion regarding the relevant interests at stake, we decided to start by creating a consensus on the appropriate boundaries of the fair use doctrine within the HEI themselves. The plan was that the group would be enlarged at a later stage by inviting local publishers to join the discussions. HEI representatives felt that this two-stage format was the most efficient way to reach the final goal of a code of best practices, taking into account the characteristics of both the academic community and the publishers. Moreover, the CONFU experience illustrated the advantages of a two-stage format, since one of the possible reasons for the failure of the CONFU discussions was that they attempted to negotiate with both HEI and copyright owners simultaneously. During the HEI discussions, two publishers challenged the use of copyrighted works for teaching purposes by filing a lawsuit against Hebrew University.²⁸ This lawsuit had considerable impact on the process; it naturally changed the plans to have a two-stage discussion that included the publishers, and it clarified the urgent need of the academic community to agree upon a code of best practices. In that respect, the lawsuit served to energize the initiative, demonstrating to the parties its relevance.

2. The Law

A. *The New Israeli Copyright Act*

On November 19, 2007, the Israeli Parliament (the Knesset) passed a new copyright legislation: the Copyright Act of 2007 (hereinafter, "the 2007 Act").²⁹ This new copyright legislation replaced the old British Copyright Act of 1911 which had been

²⁸C.C. __ Schocken Publishing House LTD. v. The Hebrew University of Jerusalem.

²⁹ 2007 Copyright Act, LSI 34. The Act commenced on May 25, 2008. See §77. Pursuant to the transitional provisions of the 2007 Act, the new copyright legislation shall apply to works made prior to the commencement of the law, subject to certain exceptions. Acts which were performed in relation to a work before the commencement of the 2007 Copyright Act, are governed by the former law. Yet, an act which is not an infringement of copyright or of moral rights under the 2007 Act, shall not be actionable according to the provisions of the former copyright law. This means that the exemptions listed by the new 2007 Copyright Act, including fair use, apply to acts which were done in relation to a work before the commencement of the new law. See the 2007 Copyright Act , §78(c).

the law since the establishment of the State of Israel in 1948,³⁰ alongside the copyright ordinance. Both were amended several times over the years.

A copyright infringement is defined by the 2007 Act as follows:

A person who does in relation to a work, any of the acts specified in section 11, or who authorizes another person to perform any such act, without the consent of the copyright owner, infringes the copyright, unless such act is permitted pursuant to the provisions of Chapter IV.³¹

Accordingly, any act with respect to a copyrighted work which falls under copyright exclusive rights may constitute infringement, provided that it was not authorized by the copyright owner and that none of the exemptions listed by Chapter IV apply. The exclusive rights include reproduction, publication of a work which was not yet published, public performance, broadcasting, making the work available to the public, making a derivative work, or the rental of physical copies to the public for a commercial purpose (if it is a computer program, provided the program is not only ancillary to the primary rental object).³² The Israeli law further extends moral rights (the right of attribution and the right of integrity) to the authors of creative works (with the exception of computer programs).³³

B. Fair Use under Israeli Copyright Law

The new 2007 Copyright Act dedicates an entire chapter to permissible uses, defining the circumstances under which the exploitation or use of a copyrighted work would be permissible by law even in the absence of a license from the copyright owner. An unauthorized act with respect to a copyrighted work is not considered an infringement if it is permitted pursuant to the provisions of Chapter IV of the 2007 Act.³⁴ Chapter IV of the Act, entitled "Permissible Uses", offers a new legal framework for conceptualizing users' rights. Thus, it marks a significant shift away from the old copyright regime which primarily focused on the exclusive rights of the right holders.

³⁰ The transitional provisions of the 2007 provides that the Copyright Act of 1911 (3 Hukey Eretz Israel 2475) and the Copyright Ordinance of 1924 (Hukey Eretz Israel 389) continue to apply to certain matters (see 2007 Copyright Act , §78).

³¹ 2007 Copyright Act, § 47.

³² 2007 Copyright Act of 2007, § 11.

³³ 2007 Copyright Act, §45(A).

³⁴ 2007 Copyright Act of 2007, §18.

The 2007 Act provides a privileged status to permissible uses, enabling one to interpret a permissible use as a *right* of users rather than merely an exception or a legal defense, and thereby recognizing users' rights as an integral part of the copyright regime and as an essential means for achieving its goals.³⁵

The permitted uses listed by Chapter IV include several exemptions which may apply to educational use. One exemption that is specifically tailored for educational purposes is Section 29, which exempts Public Performance in an Educational Institution, provided that it is made to an audience composed strictly of students and employees of the educational institution, the students' relatives or others directly connected to the educational activity of the institution. A more limited exemption applies to the public performance of films where performance is permitted for teaching or examination purposes only.³⁶

Sections 30-31 exempt certain uses in libraries and archives of the type prescribed by the Minister of Justice and the Minister of Education, including those of HEI, for the purpose of preservation.³⁷ A new provision further permits the preparation of a copy of a copyrighted work for a person who is permitted to make the copy himself.³⁸

Finally, a new exemption permits transitional copies. This exemption should be understood in the context of the broad definition of the exclusive right to reproduce works provided by the 2007 Act, which covers, among other things, the storage of a copyrighted work by any technological means, and the making of a temporary copy of a work.³⁹ The exemption permits the transient copying, including incidental copying, of a work if it is an integral part of a communication by an intermediary network, or when copying is necessary to enable a lawful use of the work, and provided that the

³⁵ Elkin-Koren, *Users' Rights* in READINGS IN THE NEW COPYRIGHT ACT (Michael Birnhack and Guy Pessach, eds.) (2009). This view of fair use as a *right* was recently pronounced by the district court in C. C. 1636/08 The Football Association Premier League Ltd. v. John Doe (Unpublished). Compare to the decision of the Canadian court in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, (holding that users' rights are an integral part of copyright law).

³⁶ 2007 Copyright Act, §29.

³⁷ The minister responsible for prescribing such regulations for the implementation of the law is the Minister of Justice subject to approval by the Minister of Education. See 2007 Copyright Act, § 67(b).

³⁸ 2007 Copyright Act § 30(b); "Copying of a work, a copy of which is held in a library or archive as prescribed in subparagraph (a), for a person requesting such copy, is permitted, provided that the request for such reproduction is made by a person, who, if he had made the copy himself, would be permitted by law to do so; The Minister may prescribe an application form for use by libraries or archives for purposes of this subparagraph."

³⁹ 2007 Copyright Act, § 12.

said copy does not have significant economic value in itself.⁴⁰ This exemption might be relevant for digital reserves and distance learning.

Aside from some updates of the exemptions listed under the previous Act, the major change introduced by the 2007 Act was the enactment of the fair use doctrine, modeled after the U.S. copyright law.⁴¹ The enactment of fair use into the new law made Israel the third country after the U.S. and the Philippines to include fair use exemption in their intellectual property laws.⁴² The enactment of a statutory *fair use* exemption finalized a process that had been initiated by the judiciary, of moving away from the *fair dealing* doctrine to *fair use*. *Fair dealing* permitted the use of a copyrighted work for a purpose strictly defined by law, as long as the scope of use was fair. In 1993's seminal *Geva v. Disney* decision, the Supreme Court introduced the U.S. fair use doctrine into Israeli law, holding that under the fair dealing doctrine, the fairness of the use should be examined by applying the four factors listed by the U.S. law.⁴³ Nevertheless, the list of purposes that could legitimize and exempt use remained closed. *Fair use*, by contrast, defines an open-ended standard. Under Section 19, fair use of copyrighted works is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution. The court may consider similar purposes even if they are not explicitly listed in this section. In determining whether a use is fair, the court shall consider the following four factors: (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; and (4) the impact of the use on the value of the work and its potential market.⁴⁴

Following the *Geva* decision, the Israeli courts consistently applied these four factors. However, the courts also added an original twist to the examination of fairness: the requirement of attribution to the original author. Accordingly, some courts held that a use could not be considered fair when the user did not give appropriate credit to the original author.⁴⁵ Although Israeli courts have discussed the

⁴⁰ 2007 Copyright Act § 26.

⁴¹ 17 U.S.C. § 107. The fair use provision under the Israeli Copyright Act is similar, but not identical, to the U.S. provision.

⁴² Intellectual Property Code of the Philippines, Republic Act No. 8293, Section 185, enacted June 6, 1997, effective January 1, 1998.

⁴³ C. A. 2687/92, *Geva v. Disney Inc.*, 48 (1) 251.

⁴⁴ Copyright Act of 2007, Section 19.

⁴⁵ See C. A. 2790/93, 2811/93, *Eisenman v. Qimron*, 54(3) P.D. 817. See also: Elkin-Koren, Users Rights, *supra* note 33_.

fair dealing doctrine extensively, they have had almost no opportunity to address the issue of fair use in an academic context.⁴⁶ The one significant exception is *Eisenman v. Qimron*,⁴⁷ a case relating to the Dead Sea Scrolls. In *Eisenman*, a biblical scholar pieced together fragments of an ancient scroll, effectively reassembling the original. A second scholar published the work without permission or attribution. After acknowledging the copyrightability of the reconstructed work, the Supreme Court discussed whether the publication of the work by another scholar, without permission and without attribution, falls within the fair dealing clause. The Court found an infringement of the moral right of attribution and therefore refused to apply the fair dealing doctrine in the case.

Israeli courts recognized the significance of transformative use for furthering the goals of copyright law.⁴⁸ The Supreme Court defined some values that should be balanced against the proprietary interest of the copyright owner within the framework of the fair use analysis. The Geva decision -- the earlier seminal decision interpreting the fair dealing clause -- addressed a satirical work that made use of the character of Donald Duck.⁴⁹ The fair dealing clause enumerated a closed list of purposes for using a work, such as criticism or research, and the doctrine could have been applied only if the use at stake fell within one of these purposes. The Supreme Court, therefore, had to discuss whether satire could be regarded as criticism. The Court stretched the boundaries of criticism to include all different opinions from different points of view, thus including satire. It then turned to examine the fairness of the use. The Court applied the four factor test of the American law within the framework of the English fair dealing. Based on this analysis, the fair use claim was rejected due to the economic effect of the use on the Walt Disney Company. Nevertheless, the Israeli Supreme Court held that freedom of speech, including the need to use prior works in current arts, should be balanced against the proprietary interests of the owner within the framework of the fair dealing doctrine.

⁴⁶ A single case of strictly educational use that ended up in court is a District Court case where the court examined the use of an excerpt from an article written by a senior in high school, describing his experience on a trip to the U.S. The article, which was published in a magazine, was used by the Ministry of Education as part of a matriculation examination in Hebrew composition. The court held that even though there was no economic harm and the nature and character of the use was naïve and legitimate, since the use was made for an educational cause, it was not considered fair dealing since teaching and education was not listed as one of the purposes deemed legitimate under the old Act. ⁴⁶

⁴⁷ C. A. 2790/93, 2811/93, *Eisenman v. Qimron*, 54(3) P.D. 817.

⁴⁸ *Interlego A/S v. Exin-Line Bros. S.A., Civil Appeal* 513/89 48 P.D. (4), 133, 163

⁴⁹ C. A. 2687/92, *Geva v. Disney Inc.*, 48 (1) 251.

At the same time, however, the courts also acknowledged access to knowledge – the ability of the public to use copyrighted materials by reading books, listening to music and watching films – as achieving the ultimate goal of copyright law.⁵⁰ A District Court recently interpreted the fair use provision in the new Act. The significance of this decision is that it acknowledged “users' rights” and “cultural rights” as interests that are worthy of protection and should be taken seriously in applying copyright law.⁵¹ The case, which is currently under appeal to the Supreme Court, involved the streaming over the internet of live broadcasts of British Premier League football matches.⁵² In a lengthy decision, the District Court held that the streaming could be regarded as fair use since the purpose of the fair use doctrine is to provide a safeguard for human rights and to ensure that users can enjoy and fully participate in cultural life and activities, including a right to watch sports events. The Court also held that appropriate weight should be given to users' rights in the framework of copyright doctrines, and in particular fair use.

There has been a growing discussion in academic writing over the past several years about how to reduce the uncertainty stemming from the American fair use standard. One interesting proposal is to establish a special tribunal to which a potential user can appeal for a declarative decision approving certain acts as fair use.⁵³ Another much discussed proposal was to create “safe harbors” through regulations.⁵⁴ This idea was in fact adopted in Israel, as the new 2007 Act authorizes the Minister to “make regulations prescribing conditions under which a use shall be deemed a fair use.”⁵⁵ Such regulations, however, have not yet been enacted.

⁵⁰ C. A. 326/00 *City Hall Holon v. N.M.C Musics LTD*. P.D. 57(3). 658 (2003).

⁵¹ See Orit Fischman Afori, *Cultural Rights and Human Rights: A Proposal For A Balanced Way To Develop Israeli Copyright Law*, 37 MISHPATIM 499 (Hebrew University Law Review) (2007). (Hebrew)

⁵² C. C. 1636/08 *The Football Association Premier League Ltd. v. John Doe*, (as yet unpublished).

⁵³ See Jason Mazzone, *Administrating Fair Use*, 51 WILLIAM & MARY L. REV., 395 (2009).

⁵⁴ See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483 (2007).

⁵⁵ Copyright Act of 2007, §19 (c). During the parliamentary debate on the copyright bill, it was agreed that, in order to increase certainty, the Minister of Justice would be authorized under the law to publish regulations clarifying which acts are regarded as fair.

3. The Process

A. *Consensus Building*

The strategy we selected for promoting access to knowledge and overcoming the drawbacks of the fair use doctrine in higher education was to build a coalition. The HEI in Israel are not homogenous; there are publicly funded institutions and private enterprises, research universities and colleges, institutions that focus on natural science and engineering, and institutions that focus on the humanities. The idea was to create a collaborative forum of all HEI, in order to reach a shared understanding regarding the application of fair use in academic settings.

These institutions represent diverse interests and hold differing views; therefore, a consensus building mechanism was needed. Consensus building is a process of seeking unanimous agreement that involves a good-faith effort to meet the interests of all participants. Participants in the process have the right to expect that their interests will be respected and that there will be a mutual responsibility to propose solutions that will meet other participants' interests as well as their own.⁵⁶

The consensus building process is primarily used to settle complex, multiparty disputes, such as in the environmental contexts. The process allows input from a variety of people, who gain a better understanding of the wide range of perspectives possible on a single topic. Participants are able to establish a common understanding as to how to develop solutions that meet the needs of all participants. The consensus building approach seeks to transform adversarial interactions into a cooperative search for better know-how and a wider range of solutions. Models of consensus building may vary, yet they all address a core set of fundamental issues, such as problem identification, participants' identification and recruitment, problem definition and analysis, identification and evaluation of alternative solutions, decision making, and, finally, achieving unanimous approval.⁵⁷

The first stage in initiating the coalition was identifying the key players. It was clear at the outset that the invitation to join the initiative should address the highest

⁵⁶ See: Lawrence Susskind, Sarah McKernan, Jennifer Thomas Larmer, *THE CONSENSUS BUILDING HAND BOOK* (1999); Roger Fisher, William Uri, Bruce Patton, *GETTING TO YES: NEGOTIATION WITHOUT GIVING IN* (1991); Robert H. Mnookin and Lawrence Susskind, *NEGOTIATION ON BEHALF OF OTHERS* (1999); Gary Friedman and Jack Himmelstein, *CHALLENGING CONFLICT-MEDIATION THROUGH UNDERSTANDING* (2008).

⁵⁷ *Id.*

authority in the organization, since the purpose of the coalition was twofold: first, to develop a shared vision of fair use in academic settings, and second, to institutionalize a change in higher education policies for promoting access to knowledge. Therefore, invitations were sent to the presidents of all academic institutions, inviting them to join the process and asking them to nominate appropriate representatives. At this first stage, the group was limited to representatives of HEI only; representatives from other communities (such as commercial publishers) were not yet invited.

There were several challenges to establishing a working team. One challenge was to facilitate the dual role of HEI as both users of copyrighted materials and as generators and publishers of original works. This dual role emphasized the need to accommodate the multiple interests of teachers, students, authors, publishers, academic units and the institution as a whole. The group was thus comprised of various interest groups that had to negotiate meanings and goals.

Another challenge was the need to create a common language that would link different professional concepts and attitudes. In fact, three "languages" were present throughout the process: the legal terminology; the knowledge of the librarians in the group; and the conceptual framework of consensus building through mediation. During the process, two mechanisms promoted respect for and accept of the non-familiar "languages". The first was *modeling*, where the group leaders modeled open-minded and respectful leadership. The second mechanism was *containing*, where comments made by the participants were not judged by others, and where there was a sincere attempt to understand the intentions and interests of all the group members. The result was a strengthening of the participants' commitment to the process, and a willingness to take a leadership role in implementing the outcome in their home institutions.

The main challenge in the process was negotiating the norms and reaching agreement on the fair use doctrine in academic settings. Participants needed to be liberated from professional biases and old practices and fears, and encouraged to take a proactive, innovative approach. Yet any personal change in attitude achieved throughout the process had only limited significance. After all, the participants were all employees of academic institutions and therefore had to represent the official policy of their home institutions.

Finally, in order to establish a collaborative team, differences in personal and conceptual factors, self esteem, prestige, status and positioning had to be overcome.

Personal differences are a given in any mediation process, and the fact that participants represented their institutions amplified some of these differences. There were also differences in attitude: some participants demonstrated a high level of commitment; others, skepticism regarding the process. Methods of mediation and conflict resolution such as commitment, active participation, transparency, honesty and mutual respect enabled us to build a sense of group identity, a sense of belonging, and a commitment to collaborative work.

There were two corresponding paradigms in play during the meetings: the discussion over the subject matter, namely the limits of fair use, and the discussion over the process itself, namely the social norms of the consensus building process. The professional principles we used in the process were those of mediation, such as secrecy, and were firmly enforced through the process. We established Chatham house rules: open dialogue with no pre-conditions or judgments, understanding the implications of the different points of view, open discussion, and figuring out a written decision. The process is built on trust; respect for ideas and thinking; developing positive curiosity; modeling; paying maximum attention to different dynamics; identifying and dealing with obstacles; transparency; and ethics. The outcome is a serious, committed group with "group pride" enriched by the know-how that the demanding process created.

B. Social Change Agents inside the Organization

The Code of Fair Use Best Practices aimed at initiating an institutional change, and therefore required transforming the way copyright is handled by HEI at various levels. One shift was in attitude, moving from a *defensive approach* seeking to avoid liability by either avoiding some uses or keeping use practices secretive, to a *proactive approach* where HEI take a leadership role in promoting access to knowledge. The representatives of all the partnering institutions took an active part in the process of drafting the Code over a period of a couple of months. Therefore they "owned" the output and were committed to implementing it.

Another change sought by the process was organizational: creating an organizational infrastructure that would facilitate fair use and open access policy. Here the challenge we faced was twofold: how to facilitate organizational change in

remote institutions, and how to empower the particular agents within their institutions so they can implement the change. Institutional theory in organizational scholarship shows that "organizational catalysts", individuals and groups who act as key agents, may play a significant role in institutional change.⁵⁸ Earlier works on institutional transformation focused on changes triggered by external factors, such as economic crisis, new technology, laws and regulations. More recent works introduced the concept of "institutional entrepreneurs",⁵⁹ namely agents who critique the institution and propose an alternative, modifying the current practices from within. Educational institutions typically have particularly powerful mechanisms of stability and conformity, thus making it a more challenging environment for initiating an internal change.⁶⁰ This is why the coalition was established by inviting the presidents of the partnering institutions to nominate official representatives. Such nomination provided the representatives with an official authority within the institution to lead necessary changes. Ironically, the two types of agents least likely to initiate radical change were overwhelmingly nominated to serve as "change agents" based on their area of expertise: the chief librarians and legal counsels of the academic institutions. The librarians are the service providers who face the most risk by not abiding the law. The role of the legal counsels is defensive by nature, seeking to minimize legal exposure for the institution, and therefore they often tend to support conservative, low-risk practices. However, because the legal counsels were involved in the process early on (and not only when the Code was final), they were encouraged to undertake a proactive approach and develop innovative solutions to some of the legal dilemmas we were facing. The involvement of librarians enabled a realistic process of mapping the needs of the academic community and providing workable solutions that could fit the working environment of academic settings.

During the process we asked each representative to establish a working team within the organization to reach out and connect with other circles not represented in our forum (such as students and academic and administrative staff) in order to facilitate a better impact and smooth the implementation of necessary changes in handling copyrighted materials.

⁵⁸ Elizabeth S. Clemens & James M. Cook, *Politics and Institutions: Explaining Durability and Change*, 25 ANN. REV. SOC. 441 (1999).

⁵⁹ For additional information: THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Paul J. DiMaggio & Walter W. Powell, eds. 1991)

⁶⁰ See Larry Cuban, *THE BLACKBOARD AND THE BOTTOM LINE: WHY SCHOOLS CAN'T BE BUSINESSES* (2004).

Our initiating team acted as the "external catalysts", seeking to empower and support the institutional representatives throughout the process. The fact that we were all embedded in multiple institutional environments within the academic environment enabled us to gain legitimacy and facilitate the adoption of new guidelines by the partnering institutions.⁶¹

C. Using Clinical Settings for Law & Social Change

The process for establishing a Code of Fair Use Best Practices was initiated by the Intellectual Property Legal Clinics in the University of Haifa's Faculty of Law and in The College of Management School of Law. Legal clinics offer a natural platform for legal advocacy. Whereas the traditional clinic model was based on individual representation,⁶² thus emphasizing the role of the student as a litigator, emerging models for clinical work offer new frameworks for promoting policy and social change.⁶³ Israeli clinics tend to follow the role of Civil Rights NGO's, and many of them deal with the rights of weakened populations at the national sphere.⁶⁴

The novelty of using the clinical setting for promoting the Code of Fair Use Best Practices raised a few difficulties. Since the legal clinics in Israel are perceived either as service providers for the poor or as advocates for weakened populations, it was necessary to highlight the public interest involved in promoting access to knowledge and removing barriers to educational use by all educational institutions. Another pedagogical obstacle was designing the role of the students in a consensus building process. Unlike students in more conventional clinical settings, who are often

⁶¹ This analysis is based on Debra Meyerson and Meagan Tompkins, *Tempered Radicals as Institutional Change Agents: The Case of Advancing Gender Equity at the University of Michigan*, 30 HARV.J. OF LAW & GENDER, 303 (2007). This preliminary analysis may account for the fact that the home institutions of both of the Academic Initiators of the projects were the first to incorporate the suggested guidelines.

⁶² Unlike the legal situation in the U.S., Israeli law does not permit students to undertake legal representation in court. Furthermore, there is a mandatory internship which requires all law students to acquire practical experience before they are eligible to take the bar exams.

⁶³ Lucie E. White, *The Transformative Potential of Clinical Legal Education*, 35 OSGOODE HALL L. J. ___, 603-611 (1997); Louise G. Trbuek, *Embedded Practices: Lawyers, Clients and Social Change*, __ HARV. C.R.- C.L.L REV. 415 (1996); Karin L. Loewy, *Lawyering for Social Change*, 27 FORDHAM URB. L.J. 1869 (2000).

⁶⁴ For more information on Israeli Clinics see: Yuval Elbashan, *Teaching Justice, Creating Law – The Legal Clinic as a Laboratory*, UCLA/IALS Sixth International Clinical Conference, 27-30 October, 2005, available at: <http://cdn.law.ucla.edu/SiteCollectionDocuments/workshops%20and%20colloquia/clinical%20programs/yuval%20elbashan.pdf>

the leading "change agents",⁶⁵ the students involved in the current process were mainly engaged in complimentary research.

Finally, the clinical setting raised a potential conflict of interest: the legal clinics, as an integral part of the academic institutions, are involved in advocacy for a "social good" of which their home institutions are the main beneficiaries (i.e., the reduction of licensing costs). This potential conflict is partly illusory due to the dual nature of academic institutions. Universities are not merely users of copyrighted materials but also major publishers of scholarship and research. Thus, the initiative had a wide scope. The purpose of the initiative was defined as removing copyright impediments on access to knowledge in HEI, reflecting the universities' role as both users and producers of copyrighted material. In this context, the initiative incorporated a commitment by HEI to promote the accessibility of knowledge, scholarship and research output generated by the partnering institutions. The fact that the HEI play a dual role was realized, finally, as a means of promoting the process in that it enabled the participants to engage in the complex negotiations necessary to elaborate a final outcome, rather than engage in a simplistic conflict of interest.

4. The Code of Fair Use Best Practices for HEI

A. The Israeli Best Practices Code

The Code of Best Practices is the result of a year's worth of work by the coalition. This Code reflects the HEI's shared understanding of fair use in academic settings and could serve as a recommended norm. The Code is comprised of two parts. The first part is explanatory and provides a brief review of the process and its goals, and the fundamentals of the fair use doctrine. The second part consists of the guidelines themselves. The significance of the first part is that, like preambles of treaties, it can be used as a source for interpreting the guidelines in order to maintain the flexibility of fair use.

The Code applies to copyrighted materials that are being used strictly for teaching purposes and which are made available either in hardcopy or in a digital format via the internet, computers, cellular phones or any other technology. The use

⁶⁵ See supra notes ___- and accompanying text.

of copyrighted works in both formats, as mentioned above, was recently challenged in court in a lawsuit filed by two publishers.⁶⁶

The guidelines permit teaching materials to be made available by any electronic means, provided that the materials are necessary for teaching and provided that the scope of access to such materials is tailored to the teaching needs. The guidelines further recommend that each academic institution establish procedures for determining access to copyrighted material which goes beyond the practical rules defined by the guidelines. Such procedures could involve, for instance, appointing an in-house copyright officer whose job would be to determine whether permission to use copyrighted works should be granted in a particular situation, in compliance with the institution's copyright policies. In difficult cases the copyright officer would be assisted by a copyright committee.

Any decision regarding permissible use involves the following considerations: whether the work was requested by the teacher of the course (e.g., by being listed on the course syllabus); whether there is an open-access alternative for the materials (for example, if the material is already available on the author's personal website); whether electronic access is limited to the students in the course and to academic and administrative personnel for the duration of the course only (including the exam period); and whether the institution's library has lawful access to at least one copy of the copyrighted work.

The Code does not provide an arithmetical algorithm for determining what constitutes "fair use". Instead, it emphasizes that the fair use principle implies use that is proportionate to the purposes of research and teaching, based on the integration of different considerations. The guidelines do provide a rule of thumb for fast decisions about everyday uses. This rule of thumb does not define a maximum of permitted use. In many cases, a more extensive use could be permitted as well provided that it satisfies the standards established by law and that it was deliberated by the institution's copyright authority.

In deciding the scope of fair use, the following considerations should be taken into account:

⁶⁶C.C. __ Schocken Publishing House LTD. v. The Hebrew University of Jerusalem.

- The use of *roughly one fifth* of a work is considered fair use. The determination should not be made simply on a quantitative basis but on a qualitative one as well.
- The use of an entire article taken from a periodical or an anthology of articles is a fair use.
- The use of an entire indivisible work, such as a picture, photograph, drawing, table, etc., is a fair use.

In addition to providing students with electronic access to materials, there is still considerable scope for more traditional methods of disseminating teaching materials in hardcopy (readers, course packs, etc.).

The principles guiding the provision of hardcopy course materials are basically the same; the major additions are that the price of the printed materials should reflect only production costs, and hard copies should be made only for the students in the course.

B. Implications

The best practices code for Israeli academic institutions is an attempt to implement theoretical understandings regarding the operation of the fair use doctrine. The achievements of the coalition are many and varied, from the agreement upon the code itself to ancillary long-term consequences.

The organization of a coalition of HEI in Israel was an attempt to unify the common practice of use of copyrighted works in academic teaching, as such practice affects the finding of fact by courts as to the fairness of the use of copyrighted works. Therefore, we believed that clear and unified common practices with respect to such activity would stand a good chance of shaping the overall legal standard. It remains to be seen whether the best practices code will have an impact on Israeli copyright law.

In order to achieve the purposes of the best practices code, there is an urgent need to implement the guidelines and turn them into a *de facto* common practice that would affect the legal standard. As we discussed earlier, the mechanism by which behavior shapes the norm includes the building of notions such as "normal exploitation", "legitimate expectations" and "reasonableness". The actual legal content of all these concepts is determined on the basis of common practices. For example, a continuous publicly known use of a work which takes place in all academic

institutions, could be reasonably seen as creating a legitimate expectation for future permission to use that work. Therefore, the forum's challenge is to leverage its role into a leadership position inside the institutions in order to promote not only official adoption of the guidelines but also their *de facto* implementation. Gaining such a position is complicated, especially in light of the fact that academic institutions are usually rigidly hierarchical. Thus, the task of the representatives to act as agents for social change inside their institutions is not an easy one. The forum, therefore, should guide them through the complicated process of full implementation of the guidelines.

The agreement on the Code was also important in that it brought together representatives from major institutions of higher education to discuss copyright issues in an open and candid manner. Copyright dilemmas should not be concealed; the legal issues involved are complex, and a joint effort to resolve them is a welcome development. In that sense, the process of consensus building is a goal in itself. Individually, the representatives encounter difficulties in functioning as agents of social change inside their respective institutions. The existence of the forum empowers the representatives and improves their ability to function within their institutions. In that regard, the project may have far-reaching consequences beyond the introduction of a balanced copyright policy into academia, since the forum can serve as a model for future academic institutional collaboration. In fact, a powerful professional network was created that can promote other joint reforms in Israeli academia.

The representatives who participated in the project are legal counsels and librarians in their institutions; in other words, they are the persons who are responsible for compliance with copyright law. The discussions thus served another goal of promoting the rule of copyright law: by enabling these key players to take part in an in-depth analysis of the fair use doctrine, they better understand the legal norm and how to apply it correctly. In that sense, the consensus-building process not only clarifies the limits of the fair use doctrine but also encourages prevention of copyright infringement in all other academic activities.

5. Conclusions

The Association of Israeli Universities took an active part in the public campaign that led to the enactment of the fair use provision in the 2007 Copyright Act. But the new

provision is only a first step in the cultural reform from a "Clearance Culture"⁶⁷ (so called by Patricia Aufderheide and Peter Jaszi) where it is expected that each and every use will be cleared, to a culture of fair access to educational use.

The legal rights to make fair use of copyrighted material for learning and educational purposes are insufficient for securing the public interest in promoting learning, and thereby progress, for the benefit of society as a whole. To secure the ability to make use of copyright materials for teaching and learning, it is necessary to put these legal rights to work and to exercise the full scope of fair use privileges accorded by the law.

The Code of Fair Use Best Practices intended to limit the chilling effect created by the high level of uncertainty in applying the fair use provisions to particular educational uses, and the high risk it entails. Its success depends on the commitment of academic institutions to adopting the Code, further developing it, and implementing it in their daily practices. The success of the Code also depends on the willingness of the courts to pay attention to the unique role of the academic community in promoting the goals of copyright law and to the normative stands it takes, as reflected by the Code.

Aside from the question of whether the Code will achieve its goals, the mere existence of a committed group of representatives from almost all HEI in Israel is an achievement in itself, and a step towards transforming the general fair use doctrine into a more workable concept. It enables the "subjects" of the fair use doctrine to share information, and thus to adjust their conduct in order to counteract the doctrine's chilling effect.

Finally, the ongoing debate regarding the appropriate mechanism for defining permissible uses is often phrased as a choice between rules and standards. While specific exemptions would provide a high level of certainty, they may prove to be too narrow and rigid and would not facilitate adaption to changes in the economic, social and technological environments. Standard would provide flexibility but too little certainty, as courts would have sole discretion in holding, retroactively, whether a use was fair. The emerging communities that deliberate on fair use in a contextual manner offer a third way. Fair use, like ethical dilemmas, involves deliberation. If we develop social institutions to facilitate such deliberation, we may bridge a gap between legal

⁶⁷ Aufderheide & Jaszi, *supra* note ___ at 22.

standards and social norms, and may enrich the fair use analysis with the contextual meaning it deserves. A process of consensus building fits well with this insight, since consensus building reflects an attempt to create a community with shared language that will be able to develop an ethical praxis, step by step.

This outcome of a consensus building process may further affect the way courts should treat Fair Use Codes of Best Practices in prospective litigation.⁶⁸ Obviously courts should not automatically enforce social norms as legal rights. Even if many Internet users believe that unauthorized downloading of music is right, it does not make it legal. At the same time, courts should be attentive to social norms that have developed in particular cultures, especially when these norms are the product of reasoned deliberation made by HEI engaged in promoting the public interest in the broadest meaning of the term.

⁶⁸ Rotman is criticizing the incorporation of what she dubbed “IP custom” into IP law, arguing that the primary justifications for incorporating custom into law do not apply to the IP context. See Jenifer E. Rothman, *The Questionable use of Custom in Intellectual Property* 93 VIRGINIA L. REV. 1899, 1946-1980. (2007) The analysis of custom as a single category, however, might be misleading. It covers different instances of private ordering, licenses, social norms and self help that lack an integral link which could turn them into a unified notion. Treating Fair Use Best Practices as custom, in that sense, might be confusing. Moreover, the identity of the custom creators is highly relevant for the assessment of the custom's legal force: sea-pirates serving no public goal should not be compared with non-profitable academic institutions.