INTERNATIONALIZING U.S. COPYRIGHT LAW: THE 1976 COPYRIGHT ACT—THE FIRST CRITICAL STEP

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Since 1790, when Congress chose to protect maps and charts under federal copyright law, the United States has consistently maintained a certain exceptionalism in its copyright protections, including the historic U.S. treatment of manufacturing obligations for foreign published works, moral rights, fair use, and even in its international copyright relations. This article does not support a complete rejection of such "exceptionalism." Variations from the norm are the basis on which law develops, but unthinking exceptionalism in today's rapidly evolving global digital environment is unhelpful, at best. With the fiftieth anniversary of the 1976 Copyright Act, we should consider reducing exceptionalism present in U.S. treatment of fair use and text and data mining. Among potential "internationalisms" to consider is modifying "fair use" to reflect international "fair dealing" and "data transparency" principles. These amendments should include necessary guardrails to reduce abuses of text and data mining in violating personal privacy, including to create and distribute harmful deep fakes and child abuse materials (among other works). U.S. exceptionalism can continue to play a role in U.S. copyright law, but it must be tempered by the lessons we have learned about where and how to measure the lines of creativity, authorship, and the public interest with due consideration for those helpful principles developed by other countries, as evidenced by international treaties and developing international practices. This article suggests some guidelines for doing so.

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INTRODUCTION

Fifty years ago, in 1976, the United States rejected a piecemeal approach to dealing with the evolving challenges of such new technologies as photocopying, computer software, satellite communications, videotape and new audio teaching devices, including audiovisual projectors, and the new market players seeking to earn income from them.[2] Stressing the need to consider the potentially adverse impacts of these and other new technological developments on the balances originally struck between authors' rights and public benefits, U.S. Register of Copyrights Abraham Kaminstein warned in 1965:

> [T]he revolution in communications has brought with it a serious challenge to the author's copyright. This challenge comes not only from the ever-growing commercial interests who wish to use the author's works for private gain. An equally serious attack has come from people with a sincere interest in the public welfare . . . seeking to make the author's works widely available by freeing them from copyright restrictions. Accommodation among conflicting demands must be worked out.[3]

In prescient language, he also warned: "A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances."[4]

To reach the required "accommodation," Congress had already opted for a top-down revision of the entire copyright system by 1965. The then–newly established 1976 Copyright Act rewrote nearly every major aspect of copyright law.[5] Notable changes were, among others, an expanded "codification"[6] of the fair use doctrine in Section 107;[7] the extension of copyright protection to previously unprotectable works under the 1909

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[2] STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 6 (Comm. Print 1965).
[3] *Id*.
[4] *Id*. at 18.
[5] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101–810).
[6] Notably, Congress did not use the term "codification," although it did stress that Section 107 was "intended to *restate* the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. NO. 94-1478, at 66 (1976). Congress further emphasized that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." *Id.*; *see also* S. REP. NO. 94-473, at 66 (1975). Given the responses to the creation of this new "fair use" provision both domestically and internationally, Section 107 has raised strong issues about U.S. compliance with international norms. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3 (revised at Paris July 24, 1971) [hereinafter Berne Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; *see* discussion *infra* Part III.
[7] 17 U.S.C. § 107.

Copyright Act, including unpublished ones;[8] a marked extension in copyright protection measured by the life of the author plus fifty years;[9] and the creation of an express work-made-for-hire doctrine.[10] But there is another goal motivating Congress to reconsider the statutory foundations of U.S. copyright law, and this goal is often overlooked, or at least underappreciated. That goal was to more fully align U.S. copyright laws with the international norms of the Berne Convention on the Protection of Literary and Artistic Works ("Berne Convention"),[11] the leading international copyright treaty then and now. Berne Convention provisions continue to be adopted into multilateral treaties as the international standard for copyright protection, including in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement")[12] and in plurilateral trade agreements such as the Regional Comprehensive Economic Partnership Agreement.[13]

According to the Librarian of Congress, the United States had seriously considered membership in the Berne Convention as early as 1924.[14] (This date does not acknowledge U.S. attendance at Berne Convention conferences in 1886 when the Convention was first established.[15]) The major reason for a renewed interest in the Berne Convention in 1976 was economic: the Convention "has . . . established a massive network of international relations underlying dealings in copyrighted material across borders."[16] If the United States was going to assure the protection of its copyrighted works which were part of international trade, it needed to leverage greater power over the international standards being set for their protection. Even today, those standards are being set by the Berne Convention and its related treaties, the WIPO Copyright Treaty,[17] the WIPO Performances and Phonograms Treaty,[18] and the Marrakesh Treaty to Facilitate Access to

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[8] *Id.* § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."). Unlike the 1909 Copyright Act, no obligation of publication or registration of copyright was required under the 1976 Act for protection to attach. *Compare* 17 U.S.C. § 9 (1909), *with* 17 U.S.C. §§ 102(a), 302(a) (1976).

[9] 17 U.S.C. § 302(a); Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (extending the original copyright term of the life of the author plus fifty years to the life of the author plus seventy years).

[10] 17 U.S.C. § 201(b) (establishing authorship in employers in certain instances).

[11] In 1976, the version of the Berne Convention under consideration would have been the Paris Act of 1971.

[12] *See* TRIPS Agreement, *supra* note 6, art. 9 (incorporating by reference all substantive copyright provisions of the Berne Convention, excluding art. 6*bis*, the moral rights provision).

[13] Regional Comprehensive Economic Partnership Agreement art. 11(b), Nov. 15, 2020, https://asean.org/wp-content/uploads/2021/04/All-Chapters.pdf (requiring member states to accede to the Berne Convention).

[14] LIB. OF CONG., ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1978, at 92 (1979).

[15] *See infra* notes 71–72 and accompanying text.

[16] LIB. OF CONG., *supra* note 14, at 92.

[17] WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121.

[18] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.[19]

As we re-examine today's copyright laws in the face of new technologies governing the creation, production, distribution, and use of copyrighted works, we need to examine the new international environment in which copyright operates today. This analysis does not require that we reject U.S. "exceptionalism" in toto. To the contrary, variations from the norm are the basis on which law develops.[20] Nevertheless, unthinking exceptionalism for the sake of being different *is* a problem.

I hope we will use this celebration of the fiftieth anniversary of the 1976 Copyright Act to trigger deeper consideration of reforming U.S. copyright law to meet the new challenges posed by artificial intelligence ("AI"), blockchains, nonfungible tokens, and a constantly evolving global digital environment in which copyrighted works are created, distributed, and used. We should follow the lead of the 1976 Copyright Act and explore the benefits and limits of continuous exceptionalism in the rapidly evolving digital/AI environment of the twenty-first century. There is much about U.S. copyright exceptionalism that should be modified but also much that should be maintained. The challenge is in determining where to strike the balance between author's rights and those of the public as we create an updated version of current U.S. copyright law.

I. U.S. COPYRIGHT EXCEPTIONALISM: A WORKING DEFINITION

In the international order, "exceptionalism" has no single meaning. At the broadest level is the distinction between "exceptionalism" versus "normalization," where one party may accede to a treaty but then insists that its unique needs, features, characteristics, and so on permit the application of exceptions that largely gut the purpose of the provision in question.[21] A U.S. example of such exceptionalism is the history the United States has developed in negotiating international treaties and then ultimately declining to ratify them,[22] such as in connection with the Vienna Convention on the Law of Treaties ("Vienna Convention")[23] or the Trans-Pacific Partnership Agreement ("TPP").[24] The absence of U.S. ratification has prevented neither the Vienna Convention nor the successor to the TPP, the Comprehensive and Progressive Agreement for

[19] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 2888 U.N.T.S. 1.
[20] *See* discussion of fair use and its international variations *infra* Part III.
[21] *See* Liane Schalatek, *When Belief in Exceptionalism Becomes Exemptionalism*, HEINRICH BÖLL STIFTUNG (Oct. 9, 2019), https://us.boell.org/en/2019/10/09/when-belief-exceptionalism-becomes-exemptionalism.
[22] Michael Ignatieff, *Introduction* to AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1 (Michael Ignatieff ed., 2005).
[23] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.
[24] U.N. CONF. ON TRADE & DEV., THE POLITICAL ECONOMY OF THE TRANS-PACIFIC PARTNERSHIP (2016).

Trans-Pacific Partnership,[25] from becoming major international treaty instruments in their respective fields.

Definitions of *American* exceptionalism are equally wide-ranging. They include the version dating from Alex Tocqueville's *Democracy in America* with a focus on U.S. governing processes, actuating principles, and the nature of U.S. social structures.[26] In the copyright arena, exceptionalism in the United States is broadly based on Constitutional and free speech prerogatives.[27] In extreme instances, scholars suggest that U.S. exceptionalism has led to a general belief that the United States should not be required to comply with international rules expressed in treaties because the United States already has such rules as part of its existing Constitutional or federal law obligations.[28] Submitting to international treaties would only raise the risk that these activating principles would no longer be subject to oversight by federal circuit courts but would instead be subject to the control of outside authorities.[29]

For purposes of our analysis regarding the impact of copyright exceptionalism on the internationalization of U.S. copyright law after the adoption of the 1976 Copyright Act, I am not concerned with the purposes behind, or explanations for, U.S. copyright laws' continuous deviation from agreed-upon international standards. I am only concerned about whether the identifiable differences are simply the creatures of continuous habit or remain wise choices today.

II. THE EARLY FOUNDATIONS OF COPYRIGHT "EXCEPTIONALISM"

Since its earliest days as a British colony, the future United States demonstrated a strong streak of independence in connection with its governing laws. Well before the American Revolution, the colonies were creating their own laws, which were undeniably inspired by British law but were not bound by its strictures. One of the most famous examples of U.S. exceptionalism in these early days was embodied in the trial of John Peter Zenger, a colonial newspaper owner charged with seditious libel. This law was frequently used to censor the oft-boisterous colonial press.[30] Alexander Hamilton, Zenger's defense attorney, defended his client by declaring that the latter could not be

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[25] A major impact of the United States's withdrawal from the TPP was the suspension of the stronger intellectual property provisions the United States had supported, followed by their exclusion from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. The suspended provisions included patent term adjustments for delays in marketing and patent approval and stronger protection of undisclosed test data for chemical and biological drugs. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, Annex, art. 7(g)–(h), https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf.

[26] Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. TRANSNAT'L L. 1307 (2008).

[27] Lyombe Eko, *American Exceptionalism, the French Exception, Intellectual Property Law, and Peer-to-Peer File Sharing on the Internet*, 10 J. MARSHALL REV. INTELL. PROP. L. 95, 105 (2010).

[28] *Cf.* Harold Hongjiu Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1483–85 (2003) (defining and describing this type of exceptionalism with examples).

[29] *Id*.

[30] For a general history of the case and its impact on colonial laws, see JACOB MCHANGAMA, FREE SPEECH: A HISTORY FROM SOCRATES TO SOCIAL MEDIA 155–57 (2022).

guilty because everyone knew the allegations were true. Under British law, truth was no defense to a seditious libel charge, but the jury acquitted Zenger anyway. Not all colonies recognized jury nullification to a sedition charge, but nullification was frequently used in cases involving alleged colonial merchants' violations of British Navigation Acts, which prohibited trade with non-British merchants. Ships impounded by the British were routinely released in these cases.[31]

With this history of rejecting unthinking acceptance of the application of British laws to govern the colonies,[32] it is not surprising that the United States, upon its independence, did *not* follow the general tradition of adopting laws largely reflective of those of the Mother Country. Even the "transplantation" of British copyright law was incomplete, to say the least.

The 1710 English Statute of Anne[33] was undeniably a source for the 1790 U.S. Copyright Act.[34] Both statutes recognized that copyright laws are established "for the encouragement of learning,"[35] addressing the hotly debated issue of the purposes behind the protection of copyright that roiled the establishment of international norms for decades.[36] But the scope of works to be protected was markedly distinct between the two statutes. The Statute of Anne focused on protecting owners' rights in "printed books and other writings."[37] By contrast, the 1790 Copyright Act protected *not only* "printed books" *but also* "maps" and "charts."[38] The latter set of works was expressly *excluded* from coverage under the Statute of Anne. Instead, these works were ultimately covered in Britain through a special statute, The Engravers Act.[39] Established in 1735, this Act recognized copyright protection for engravings, which included maps, given the technology of the day.[40]

British law similarly had a small impact on colonial copyright laws. In fact, no colonial copyright statute was officially enacted until 1783 with the establishment of an "Act to Encourage Learning and Genius" in Connecticut.[41] As the title illustrates, Connecticut shared Britain's public-interest purpose behind enacting copyright law. However, similar to its sister colonies, Connecticut usually treated copyright issues

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[31] Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, L. & CONTEMP. PROBS., Autumn 1980, at 57.

[32] The issue of whether British laws even applied to the colonies remains a hotly debated issue. What matters for the purpose of our analysis is whether attempted transplantation of British law was generally accepted. As these and the other examples in this section illustrate, it was not.

[33] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned 1710, 8 Ann. c. 19 (Eng.) [hereinafter Statute of Anne].

[34] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[35] Statute of Anne, *supra* note 33, § 1.

[36] *See infra* note 48 and accompanying text.

[37] Statute of Anne, *supra* note 33, § 1.

[38] Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124.

[39] Engravers' Copyright Act 1735, 8 Geo. 2 c. 13 (Eng.).

[40] *Id*.

[41] *See generally* WILLIAM PATRY, COPYRIGHT LAW AND PRACTICE ch. 1 (2000); Tyler Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 919 n.57 (2002).

through the issuance of Letters of Patent for the printing and distribution of specified works, including a hymnal and a spelling book.[42]

Although scholars debate the nature of this "transplantation" [43] of British copyright law into the United States, I believe the U.S. "version" of this transplant clearly illustrates that the United States made changes reflecting its perceived needs, making this a much more effective legal transplant.[44] Part of the reason for these differences, I believe, rose from the critical need for the United States to encourage the exploration and subsequent creation of maps of the vast amounts of unexplored territory ceded under the treaty ending the Revolutionary War.

III. U.S. EXCEPTIONALISM IN INTERNATIONAL RELATIONS

As a multilateral treaty that strengthened authors' rights during a time when book piracy was notorious, the Berne Convention represented a radical change from the handful of bilateral trade agreements and diverse domestic laws that served as the basis for international copyright protection.[45] Those earlier agreements focused primarily on methods for controlling trade in unauthorized foreign reprints of home country authors that would then make their way to home country shores.[46] The presence of imported cheap copies and the economic challenge they created for local printers[47] gave rise to a sharp philosophical debate regarding the *purpose* of copyright law: Was the protection of an author's efforts based on natural rights, given the nature of individual inspiration of such works? If so, such work was to be strongly protected. Or was such work instead a work of property that could be regulated as needed in the interest of a potential higher public purpose—promoting the encouragement of learning? [48] As these domestic battles raged—in many instances, including in the United States—the outcome frequently turned on the economic power and interest of local publishers.[49] It was becoming rapidly apparent that the present bilateral efforts to control the international trade in "pirated" works was not working. A different solution was required.

To say that the Berne Convention rewrote international copyright law is an understatement. It continued the necessary prohibition against trade in pirated works, but

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[42] PATRY, *supra* note 41, ch. 1.
[43] *See, e.g.*, Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427 (2010).
[44] *See* Peter K. Yu, *Customizing Fair Use Transplants*, LAWS, Mar. 2018, no. 9, at 11 ("[R]egardless of whether a legal transplant is widely supported by the local populace or forced upon them from abroad, *the transplanted law needs to be customized* to local conditions if it is to be effective and if it is to receive wide public support." (emphasis added)).
[45] Berne Convention, *supra* note 6.
[46] *See generally* CATHERINE SEVILLE, THE INTERNATIONALIZATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY 3–45 (2006).
[47] *Id*. at 29–30.
[48] Carla Hesse, *The Rise of Intellectual Property, 700 B.C.–A.D. 2000: An Idea in the Balance*, DAEDALUS, Spring 2002, at 26.
[49] *Id*. at 40–41.

it also established minimum substantive rights for authors.[50] The covered rights in the 1886 original text included the right to protect against unauthorized uses of "literary and artistic" works,[51] which were broadly defined to include "every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of printing or reproduction."[52] Additional rights are the right to make and authorize translations,[53] to create certain derivative works,[54] and to perform and translate "dramatic" and "dramatic-musical" works.[55] The Convention allowed the application of national formalities[56] in the country of origin (or first publication[57]) to establish the protectable nature of a work.

The Berne Convention has been revised five times, with the last substantive revision occurring in 1971 in Paris. During these revisions, a diversity of new obligations have been added. These obligations included, in the 1908 Berlin Revision Act, a minimum term of copyright for the life of the author plus fifty years[58] and the exclusion of any formalities, such as registration.[59] Mandatory protection of moral rights was established in Rome in 1928.[60]

There were other changes to the Berne Convention that would strengthen its emphasis on copyright as an author-centric right, including the early reversal on the acceptable reliance on registration and other formalities that lie at the heart of registration-based systems such as the one in the United States. In the 1908 Revision Act, the Berne Convention, in Article 4, rejected any formalities in securing granted rights: "The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work."[61]

Most critically for purposes of our analysis of U.S. exceptionalism in copyright law was the increasing breadth of unauthorized, uncompensated uses allowed under the evolving Berne Convention. As early as 1886, member states could allow the reproduction of "articles of political discussion"[62] and "news of the day"[63] without

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[50] Berne Convention for the Protection of Literary and Artistic Works arts. 11–12, Sept. 9, 1886, https://global.oup.com/booksites/content/9780198259466/15550015 [hereinafter Berne Convention 1886].
[51] *Id*. art. 4.
[52] *Id*.
[53] *Id*. art. 6.
[54] *Id*. art. 10 (stating that such right did not extend to derivative works that had "the character of a new original work").
[55] *Id*. art. 9.
[56] *Id*. art. 2(2).
[57] *Id*. art. 2(3).
[58] Berne Convention for the Protection of Literary and Artistic Works art. 7, Sept. 9, 1886, 1 L.N.T.S. 217 (revised at Berlin Nov. 13, 1908) [hereinafter Berne Convention 1908].
[59] *Id*. art. 4(2).
[60] Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, 123 L.N.T.S. 233 (revised at Rome June 2, 1928) [hereinafter Berne Convention 1928].
[61] Berne Convention 1908, *supra* note 58, art. 4.
[62] Berne Convention 1886, *supra* note 50, art. 7.
[63] *Id*.

compensation or permission. Given the earlier philosophical concerns about balancing authors' rights with the public interest,[64] it was readily predictable that the scope of these "fair uses," to use the common U.S. term, would grow. Over time, various revisions were added, recognizing rights to "use quotations" and "excerpts" from scientific and educational journals until the 1948 Brussels Revision Act. Article 10 of the Berne Convention provided the fundamental building blocks to today's well-recognized, and popular, limitation and exception known as "fair dealing":

> (1) It shall be permissible in all the countries of the Union to make short quotations from newspaper articles and periodicals, as well as to include them in press summaries.
> (2) The right to include excerpts from literary or artistic works in educational or scientific publications, or in chrestomathies,[65] to the extent justified by the purpose, shall be a matter for legislation in the countries of the Union . . . .
> (3) Quotations and excerpts shall be accompanied by a mention of the source and of the name of the author, if it appears thereon.[66]

The most critical element of the "fair dealing" approach in Article 10 is the obligation to use only so much of the work at issue that is *justified* by the particular purpose for which the use is allowed. This provides the basis for the searching analysis of a defendant's use that is a common feature in fair dealing cases generally.[67]

The final critical revision to the Berne Convention, for purposes of our analysis, was the adoption of the three-step test in Article 9(2) in Stockholm in 1967: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[68] This test is used for ascertaining whether an unauthorized reproduction could be excused from copyright liability.

The three steps in Article 9(2)—the limitation of this exception to liability to (1) certain special cases; (2) so long as the use in question does not conflict with the normal exploitation (uses) of the work; and (3) does not *unreasonably* prejudice the *legitimate* interests of the author—have become the gold standard internationally for determining whether an acceptable fair use is being made of the work. Although the Berne Convention specifically limited this test to instances of unauthorized *reproduction*

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[64] *See* Hesse, *supra* note 48.
[65] "Chrestomathies" were generally defined as samplers for educational purposes. During this period, chrestomathies were generally used for studying language or the works of a given author or period.
[66] Berne Convention for the Protection of Literary and Artistic Works art. 10, Sept. 9, 1886, 331 U.N.T.S. 217 (revised at Brussels June 26, 1948).
[67] *See infra* notes 112–118 and accompanying text.
[68] Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Stockholm July 14, 1967).

of a work, Article 13 of the TRIPS Agreement[69] applies this three-step test to determine the acceptability of the exercise of *any* right under copyright.[70]

Given the lengthy time the United States had remained outside the Berne Union, and the many substantive amendments made during this timeframe without the country's input regarding the nature and scope of these amendments, the United States would need to make more revisions to its own copyright laws when it finally decided to cross the Rubicon to join the largely author-centric copyright system of Berne.

It is easy to forget that the United States was once a "developing country," but when the early conferences regarding the establishment of the Berne Convention were held, the United States attended as an observer.[71] The country was present when the final version of the 1886 Convention was opened for signature, but it declined to sign the instrument.[72] Given that it took over a century for the United States to finally accede to the Berne Convention in 1988,[73] it is pretty clear that the country was not wholly impressed with the new international treaty. That does not mean that the United States was not influenced by these early efforts to establish a multinational substantive copyright treaty. To the contrary, the International Copyright Act of 1891,[74] informally referred to as "The Chace Act," actually granted copyright protection to foreign authors for the first time in U.S. history but only so long as the work in question was not only registered in the United States,[75] but copies of the work were also sold in the United States and printed *in the* country *using* U.S.-created plates.[76]

The United States's rejection of the Berne Convention was so complete in the mid-twentieth century that the country backed the creation, through the auspices of the United Nations Educational, Scientific and Cultural Organization, of a multilateral copyright treaty entitled the Universal Copyright Convention ("UCC"), which was quite frankly "anti-Berne."[77] In simple terms, in lieu of the author-centric copyright system the Berne Convention created with its grant of automatic protections over formalities[78] and relatively lengthy terms of protection (the life of the author plus fifty years[79]), the UCC imposed a relatively straightforward formalities-based system. Although the UCC

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[69] TRIPS Agreement, *supra* note 6, art. 13.
[70] *See, e.g.*, Panel Report, *United States—Section 110(5) of the US Copyright Act*, WTO Doc. WT/DS160/R (adopted June 15, 2000) (concerning the exception to the public performance right in Section 110(5) of the 1976 Copyright Act).
[71] Orrin Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 173–74 (1989).
[72] SEVILLE, *supra* note 46, at 72.
[73] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. Although the implementation legislation was enacted in 1988, the U.S. accession did not take effect until March 1, 1989.
[74] International Copyright Act of 1891, ch. 565, 26 Stat. 1106.
[75] *Id.* § 3.
[76] *Id*.
[77] Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731. This is the version the United States signed, not the 1971 Revision Act, which included the Berne safeguard clause to prevent Berne members from relying on the UCC after withdrawing from the Berne Convention.
[78] Berne Convention, *supra* note 6, art. 5(2).
[79] *Id*. art. 7(1).

required the use of a specific notice to secure protection under its provisions,[80] it granted individual countries greater flexibility in establishing domestic formalities, subject to the obligation of national treatment.[81] Terms of required protection were markedly lower than those of the Berne Convention and other international treaties: the life of the author plus twenty-five years.[82]

When the United States finally acceded to the Berne Convention, President Reagan touted the economic and political benefits Berne membership would provide: "Our membership will automatically grant the United States copyright relations with 24 new countries and will secure the highest available level of international copyright protection of U.S. artists, authors, and copyright holders."[83] Accession to the Berne Convention theoretically ended one area of U.S. exceptionalism, but it has not ended the most critical one, in my opinion. Continuing U.S. exceptionalism in certain aspects of copyright protection may no longer be in U.S. interests.

IV. U.S. EXCEPTIONALISM IN DOMESTIC COPYRIGHT LAW: TIME FOR A CHANGE?

Despite its early role as a developing country observer to the original Berne Convention[84] and its subsequent accession to that Convention in 1988,[85] the United States has frequently established norms that are not quite in step with those of other countries. I have no problem with defensible exceptionalism, but I want to focus on two instances of U.S. exceptionalism because I believe exceptionalism in these cases has not served the country's best interests in protecting authors and users of copyrighted works, despite the positive efforts reflected by the 1976 Copyright Act. These areas are fair use and its close relative in today's tech environment, exceptions and limitations for text and data mining. Of these, the most critical is the question of the exceptional application of Section 107 to issues of "fair uses" of copyrighted works by third parties.[86]

One of the most notable developments in the diverse revisions of the Berne Convention through the years was the addition of new bases for limiting a copyright owner's ability to prevent otherwise unauthorized uses of their works. From the "fair dealing" example of Article 10[87] to the factor-intensive balancing of the three-step test in Article 9,[88] the Berne Convention has provided a selection of analytical tools for determining whether a particular use should be permitted for the public interest. Yet a review of diverse domestic copyright laws indicates that, by far, the most popular approach to dealing with fair use issues today appears to be fair dealing.

Of the diversity of changes made by Congress in the 1976 Copyright Act, the four-factor statutory test for fair use established in Section 107 has proven to be not only

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[80] Universal Copyright Convention, *supra* note 77, art. III(1).
[81] *Id*. art. III(2).
[82] *Id*. art. IV(2).
[83] Berne Convention 1928, *supra* note 60, art. 9.
[84] *See supra* note 71.
[85] *See supra* note 73.
[86] 17 U.S.C. § 107.
[87] Berne Convention, *supra* note 6, art. 10.
[88] *Id*. art. 9.

one of the most useful but also one of the most controversial additions to U.S. copyright law. When Congress assures you that a provision you have not seen before is a "restatement" of existing law,[89] you know to be wary. There is no question that the vagaries of Section 107 leave courts "free to adapt the doctrine to particular situations on a case-by-case basis,"[90] but that freedom is not exactly predictable or necessarily in accordance with international norms.

Section 107 provides four non-exclusive factors for consideration in determining whether a particular use is "fair":

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[91]

Compare fair use with the two-factor test that the Berne Convention suggests should be applied under Article 10 for fair dealing issues in connection with quotations: (1) whether the use is "compatible with fair practice" and (2) if the extent of such use "does not exceed that justified by the purpose."[92]

As Peter Yu recognized in his article *Customizing Fair Use Transplants*,[93] transplantation of the U.S. fair use doctrine embodied in Section 107 has been a slow process.[94] But one of the present difficulties in its broader adoption, I believe, is the judicial gloss courts have added regarding the "transformative" nature of a defendant's particular use. In *Campbell v. Acuff-Rose Music, Inc*.,[95] which involved the use of plaintiff's romantic ballad to create a raunchy rap parody, Justice Souter defined the "central purpose" of a fair use investigation as "to see . . . whether the new work merely 'supersede[s]' the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"[96] Yet as the Supreme Court recently acknowledged in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*: "The statute defines derivative works, which the copyright owner has 'the exclusive righ[t]' to prepare . . . to include 'any other form in which a work may be recast, *transformed*, or adapted' . . . . In other words, the owner has a right to *derivative transformations* of her work."[97] Thus, "transformation" per se cannot sustain a claim of fair use if the transformation in question relates to the

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[89] *See supra* note 6.
[90] *Id*.
[91] 17 U.S.C. § 107.
[92] *See* Berne Convention, *supra* note 6, art. 10.
[93] Yu, *supra* note 44.
[94] *Id*. at 11–15.
[95] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[96] *Id*. at 579.
[97] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 529 (2023).

creation of a derivative work alone.

I believe that fair dealing analyses, exemplified by Article 10 of the Berne Convention[98] and the copyright statutes of diverse countries, including Australia,[99] Canada,[100] and the United Kingdom,[101] could provide a much-needed remedy to the excesses caused by our current open-ended fair use analysis under Section 107. That the outcome of most fair use cases in the United States is largely unpredictable due to the heavy thumb on the balance that "transformation" can have, combined with recent acknowledgements that lines must be drawn between fair use "transformation" and "derivative works transformation," underscores the need for a more searching, helpful inquiry into the elements that make an unauthorized use fair.

One of the benefits of fair dealing is that it allows for a categorical approach to identifying the *types of purposes* that should generally be considered permissible—subject, of course, to the consideration of the fairness in their *actual use* of the copyrighted work at issue. For example, in Australia, among the fair dealing *purposes* recognized by statute are fair dealing for purpose of research or study,[102] fair dealing for purpose of criticism or review,[103] fair dealing for purpose of parody or satire,[104] and fair dealing for the purpose of reporting news.[105]

By contrast, the United Kingdom does not use the term "fair dealing" in the headings of its copyright provisions but instead groups them under "acts permitted in relation to copyrighted works."[106] The covered provisions include exceptions for research and private study;[107] criticism, review, quotation and news report;[108] and caricature, parody, or pastiche.[109] This list is not intended as a complete list of all purposes that could be recognized as fair dealing, but it provides a handy basis for compiling statutory fair dealing purposes.[110]

Such a categorical approach makes the determination of fair dealing easier by removing debates over what qualifies as an acceptable *purpose* in a limitation and exception. Fitting within the category of an acceptable purpose, however, does *not* end the inquiry. To the contrary, as Article 10[111] of the Berne Convention underscores, once an acceptable fair dealing purpose has been identified, the issue of whether the use of the copyrighted work at issue fits within "fair practices" for that purpose must be addressed. It is this second inquiry that can be extensive, as the court considers whether what was published truly complies *with fair practices for the purpose at issue.*

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[98] Berne Convention, *supra* note 6, art. 10.
[99] *Copyright Act 1968* (Cth) (Austl.).
[100] Copyright Act, R.S.C. 1985, c 42 (Can.).
[101] Copyright, Designs and Patents Act 1988, c. 48 (UK).
[102] *Copyright Act 1968* (Cth) s 40 (Austl.).
[103] *Id*. s 41.
[104] *Id.* s 42.
[105] *Id*. s 43. The statute specifically labels the listed provisions "fair dealing." Australia has many other permissible activities that are labelled "not infringing."
[106] Copyright, Designs and Patents Act 1988, c. 48 (UK).
[107] *Id*. § 29.
[108] *Id*. § 30.
[109] *Id*. § 30A.
[110] *See also* Copyright Act, R.S.C. 1985, c 42, pt. 3 (Can.) (covering exceptions to infringement).
[111] Berne Convention, *supra* note 6, art. 10.

In the UK case *Hyde Park Residence Ltd v. Yelland*,[112] the court faced a challenge to the publication of private security photos of Princess Diana and Dodi Fayed in an elevator on the evening of the car crash that killed them both. The photos were private in nature and had been published in a UK newspaper two years after the accident. The newspaper alleged that its use of the photos qualified as fair dealing because the story qualified as "news of the day." It further alleged that the publication of the photos was required to rebut claims by Fayed's father that the two had spent considerable time together the evening of their deaths and were engaged to be married.

The court engaged in a searching analysis of the uses of the photos. It examined not only the context in which they appeared in the paper but also the publisher's motives for using them. The publisher argued that fair dealing was established so long as he had a sincere belief that the paper was reporting on a current affair. The court disagreed:

> [T]he intentions and motives of the user of another's material . . . are most highly relevant on the issue of fair dealing . . . . This court should not in my view give any encouragement to the notion that . . . all that is required is for the user to have sincere belief, however[] misguided, that he or she is criticising a work or reporting current affairs. To do so would provide an undesirable incentive for journalists, for whom facts should be sacred, to give implausible evidence as to their intentions.[113]

Ultimately, the judge decided that the use in question did *not* qualify as fair dealing. He found that the number of pictures used was "excessive," since only the images establishing the time of the couples' arrival and departure were relevant to the purposes for which the photos were being used—to establish the amount of time the couple had spent together that evening. More problematic, the court found that the photos were not even *required* to establish the arrival and departure times of the couple. Instead, the publisher "stating that he had seen the photographs which proved the Princess and Mr Dodi Fayed only stayed at the Villa Windsor for 28 minutes" would have been sufficient.[114]

In *HRH The Duchess of Sussex v. Associated Newspapers Ltd*,[115] another British court applied a similarly searching review of the motives and purposes for the publication in a newspaper of a private letter written by the Duchess of Sussex (Megan Markle) to her father after her wedding to Prince Harry. The court found that the publication of such a private letter not only violated the Duchess's privacy rights but also failed to qualify as fair dealing under copyright law:

> Essentially, whilst it might have been proportionate to disclose and publish a very small part of the Letter to rebut inaccuracies in [an earlier published article about her relationship with her father,] it was not necessary to deploy half the contents of the Letter as Associated Newspapers did. As the Articles themselves demonstrate, and as the judge found, the primary purpose of the Articles was not to publish Mr Markle's responses to

[112] [2000] RPC 604.
[113] *Id.* [21] (quoting Pro Sieben AG v. Carlton U.K. Television Ltd [1999] 1 W.L.R. 605).
[114] *Id*. [40].
[115] [2021] EWCA (Civ) 1810 (Eng.).

> the inaccurate allegations against him in the [prior] Article. The true purpose of the publication was, as the first 4 lines of the Articles said: to reveal for the first time [to the world] . . . "[t]he full content of a sensational letter written by [the Duchess] to her estranged father shortly after her wedding".[116]

Such actions did *not* qualify as fair dealing.[117]

These focused, but searching, analyses, of the publisher's motives and uses of the copyrighted materials at issue are admittedly uncomfortable for those of us used to the strong press freedoms enshrined in the U.S. Constitution.[118] But where private copyright interests collide with public access interests, such inspections provide the opportunity for a more balanced outcome, as all relevant factors are considered in detail with no presumptions to tip the balance.

The greatest challenge to the creation of an effective fair dealing approach, however, is the need to consider a purpose that is *not* covered in the existing statutory list of acceptable purposes. For example, when *Compagnie Generale des Etablissements Michelin—Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)* was tried,[119] Canada had a statutory fair dealing exception for criticism and review[120] but not an exception for parodies or satires. When a local union at the Michelin tire plant used a parody of the well-known Michelin Man logo in their publicly circulated brochures and posters, the only defense they could raise to a charge of copyright infringement was the fair dealing defense for criticism. The court rejected the defense outright: "In the Canadian and Commonwealth courts, parody has never been held to figure as criticism. . . . I cannot accept that I should give the word 'criticism' such a large meaning that it includes parody. In doing so, I would be creating a new exception to the copyright infringement, a step that only Parliament would have the jurisdiction to do."[121]

The solution to this problem is to adopt Section 107,[122] modified as a catch-all provision, to cover acceptable purposes for fair dealing that are not covered by direct statutory provisions. In such a modified version, the problematic "transformation" factor the Supreme Court has added as a judicial gloss on the statute[123] should be carefully circumscribed with guardrails that ensure that "adaptations" are not permitted solely due to their derivative nature.[124] These guardrails should also ensure that any uses of the work are circumscribed by fair practices, strictly applied, including limitations on the amount and types of the work being used as circumscribed by the *legitimate* fair dealing purposes at issue.

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[116] *Id.* [106].
[117] *Id*. [101]–[103].
[118] U.S. CONST. amend. I (providing for freedom of the press).
[119] [1997] 2 F.C. 306, ¶¶ 1–2.
[120] Copyright Act, R.S.C. 1985, c 42, s 29(1) (Can.).
[121] *Michelin*, [1997] 2 F.C. 306, ¶ 65. Subsequently, Canada adopted a fair dealing provision, specifically allowing for "[f]air dealing for the purpose of research, private study, education, *parody or satire*." Copyright Act, R.S.C. 1985, c 42, s 29 (Can.) (emphasis added).
[122] 17 U.S.C. § 107.
[123] *See supra* note 96 and accompanying text.
[124] *See supra* note 97 and accompanying text.

V. U.S. EXCEPTIONALISM AND TEXT AND DATA MINING: AN ADAPTED FUTURE?

The limits of text and data mining of copyrighted materials are being sorely tested in this AI era. No one doubts the foundational role that databases play in the development and use of AI. Internationally, there is a cornucopia of choices for how to encourage the required data mining. They range from current efforts to employ the wide-ranging "transformative use" doctrine of Section 107[125] to those permitting the data scraping and use of millions of copyrighted works in databases for AI training in the United States[126] to the more regulated approach of the European Union, with its reliance on opt-out permission systems embodied in Article 4 of the EU Directive on Copyright and Related Rights in the Digital Single Market ("DSM Directive").[127]

In the United States, among the more interesting debates before the courts are those regarding the extent to which the application of fair use defenses under Section 107 is impacted by the potential illegality of the scraping techniques employed by AI companies to secure access to millions of bits of copyrighted data for use in such databases. In early briefing in *Bartz v. Anthropic PBC*,[128] which involved claims regarding the alleged copyright infringement arising from Anthropic's use of data secured from diverse internet sites to train its AI model, the court held that scraping data from pirate sites would prevent any finding of fair use connected with the use of such data: "This order doubts that any accused infringer could ever meet its burden of explaining why downloading source copies from pirate sites *that it could have purchased or otherwise accessed lawfully* was itself reasonably necessary to any subsequent fair use."[129]

By contrast, the court in *Kadrey v. Meta Platforms, Inc.*,[130] held that the issue of illegal access to copyrighted works used in AI training was *not* relevant to the court's fair use considerations:

> The plaintiffs are wrong that the fact that Meta downloaded the books from shadow

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[125] 17 U.S.C. § 107. *See, e.g.*, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 528–29, 541–42 (2023) (requiring that protected transformation "go beyond that required to qualify as a derivative" while also recognizing that "commercial purpose" can overcome the protection provided to such transformation); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (establishing the critical role of "transformation" and defining it as "whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

[126] *Compare* Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007, 1022 (N.D. Cal. 2025) (finding Anthropic's use of copyrighted books to train Claude to be fair use where output was "spectacularly" different), *with* Thomson Reuters Enter. Ctr. GMBH v. Ross Intel. Inc., 765 F. Supp. 3d 382, 399 (D. Del. 2025) (finding the copying of Westlaw headnotes as a shortcut to create a competing legal research tool not fair use).

[127] Directive 2019/790, 2019 O.J. (L 130) 92 (EU) [hereinafter DSM Directive]; *see infra* notes 134–138 and accompanying text.

[128] No. 3:24-cv-05417 (N.D. Cal. Aug. 19, 2024), ECF No. 1, https://storage.courtlistener.com/recap/gov.uscourts.cand.434709/gov.uscourts.cand.434709.1.0.pdf.

[129] Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007, 1025 (N.D. Cal. 2025).

[130] Kadrey v. Meta Platforms, Inc., 788 F. Supp. 3d 1026 (N.D. Cal. 2025).

> libraries and did not start with an "authorized copy" of each book gives them an automatic win [with regard to the lack of a viable fair use defense for the defendant's activities]. To say that Meta's downloading was "piracy" and thus cannot be fair use begs the question because the whole point of fair use analysis is to determine whether a given act of copying was unlawful.[131]

Apparently, there is no need to consider "equity" when we are exploring "fairness." This question of equitable purposes would have a direct impact on the scope of the privilege granted for AI training if the fair dealing guardrails I advocate for[132] were included in Section 107.

The European Union has chosen a wholly different approach to the fights over the fairness of text and data mining of copyrighted materials. Article 4 of the DSM Directive[133] requires EU member states to provide "exceptions" to enumerated provisions in earlier directives governing the exclusive rights granted to copyright holders for the extraction, reproduction, and utilization of their protected databases,[134] for diverse uses of their protected copyrighted works in the digital environment,[135] and for the "reproductions and extractions of lawfully accessible [computer programs] for the purposes of text and data mining" granted in this Article.[136] Article 4 even modifies the rights granted to press publishers under Article 15 of the DSM Directive so that press publications can also be mined.[137]

Such strong protection for data mining rights, however, is circumscribed by the express right granted in Article 4 for copyright holders to opt out "in an appropriate manner" from any such data-mining activity.[138] I anticipate that most of the early battles under Article 4 will focus on what qualifies as an "appropriate method" for opting out, as opposed to determining the boundaries of permitted uses that are triggered by fair use and fair dealing analyses.

In Japan, the approach to legal text and data mining of copyrighted works in Article 30-4 of the Copyright Act allows extractions so long as "it [was] not a person's purpose to personally enjoy or cause another person to enjoy the thoughts or sentiments expressed

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[131] *Id*. at 1046.
[132] *See supra* note 124 and accompanying text.
[133] DSM Directive, *supra* note 127, art. 4 (enumerating numerous articles subject to such exceptions to allow the permitted text and data mining to occur, including in prior directives).
[134] Directive 96/9/EC, arts. 5(a), 7(1), 1996 O.J. (L 77) 20 (EC) (granting authors of covered databases the exclusive right to authorize reproductions and to prevent extractions and reutilization, respectively).
[135] Directive 2001/29, art. 2, 2001 O.J. (L 167) 10 (EC) (granting authors, performers, phonogram producers, producers of first fixations of films, and broadcasting organizations the right to authorize direct, indirect, temporary, or permanent reproductions of their works, performances, phonograms, films, and broadcasts, respectively).
[136] Directive 2009/24, art. 4(1)(a)–(b), 2009 O.J. (L 111) 16 (EC) (granting holders of copyright in a computer program the right to authorize the permanent or temporary reproduction of the program, or its translation for purposes of loading, displaying, running, transmission, or storage of the program to achieve such acts).
[137] *Id.* art. 15(1) (granting publishers of press publications the same rights granted to authors in the EU Information Society Directive and therefore subjecting these rights to the same obligations to permit text and data mining).
[138] *Id.* art. 4.

in that work."[139] Article 30-4 provides, in pertinent part:

> It is permissible to exploit a work, in any way and to the extent considered necessary, in any of the following cases, *or in any other case in which it is not a person's purpose to personally enjoy or cause another person to enjoy the thoughts or sentiments expressed in that work[:]* . . . (ii) if it is done for use in data analysis (meaning the extraction, comparison, classification, or other statistical analysis of the constituent language, sounds, images, or other elemental data from a large number of works or a large volume of other such data[)] . . . .[140]

I like the recognition that text and data mining of copyrighted works, along with their original expressions, potentially requires a more sensitive approach to ensure that such mining does not become an easy path to the creation and distribution of infringing works. Such a requirement has become necessary as we find that text and data mining combined with deep fakes and related AI-driven technologies has unleashed a spate of fake pornographic images and fraudulent vocal clones using data from copyrighted works in manners that harm the public interest. The issue has become so severe that the recently signed United Nations Convention Against Cybercrime[141] contains an express provision criminalizing the nonconsensual dissemination of intimate images.[142]

We will have to wait and see what impact, if any, the "personal enjoyment purpose" has on the scope of text and data mining allowed for works with more artistic or literary expression under Japanese law, but it is an interesting development, to say the least.

In contrast to Japan, Singapore has created one of the broadest text and data mining statutes to date with no limitations with regard to the types of works being mined or data being collected. In simple terms, Section 244 of the Singapore Copyright Act[143] provides a safe harbor for those engaged in "computational data analysis." "Computational data analysis" can be used in connection to a copyrighted "work" or "recording"[144] and is broadly defined as "using a computer program to identify, extract and analyze information or data from the work or recording"[145] and then "using the work or recording as an example of a type of information or data to improve the functioning of a computer program in relation to that type of information or data." [146] Per the statutory illustration, using "images to train a computer program to recognize images"[147] is sufficient. There are few guardrails regarding the types of works you can use to create an AI training database under the statute. Copies can be made of the relevant work or recording in question but only for purposes of computational data analysis, or for verifying the results of those analyses.[148] The copy used is supposed to be a "first copy"—no use of copies retrieved by

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[139] Chosakukenhō [Copyright Act], Law No. 48 of 1970, art. 30-4 (Japan).
[140] *Id*.
[141] G.A. Res. 79/243, Annex, United Nations Convention Against Cybercrime (Dec. 24, 2024).
[142] *Id*. art. 16.
[143] Copyright Act 2021 (2020 Rev Ed) s 243 (Sing.).
[144] *Id.*
[145] *Id*.
[146] *Id*.
[147] *Id*.
[148] *Id*. s 244.

circumventing paywalls or violating the terms of the database from which it was retrieved and no knowing use of infringing copies.[149] No other conditions are imposed. Nor are there limitations on the types of works that can be used or the purposes for which they can be used.

Similar to the safe harbor created by the Digital Millenium Copyright Act for internet websites posting copyrighted content that was designed to encourage the development of the internet,[150] there is little doubt that Section 244 will provide a similar boost to the creation of AI models. But without any effective guardrails, it could also leave Singapore with a dearth of new works to use to create the databases to be mined for future endeavors.

This is one area where a little U.S. exceptionalism in the form of a modified Section 107 analysis could pay dividends. Adding the necessary guardrails developed from fair dealing comparisons to craft a more tailored response that focuses on purposes as well as fair practices to the existing four-factor statutory test could place U.S. exceptionalism in the proper framework to encourage both continuous creativity based on proper text and data mining, but limited by a strict fair dealing review to ensure the necessary guardrails to control the explosion of piracy and of pornographic deep fakes and vocal clones in fraud schemes we are experiencing today. At a minimum, this issue needs to be placed at the top of any list of topics to be addressed in our next round of copyright law reform—through, perhaps, a Copyright Law Revision Act of 2030.

CONCLUSION

The 1976 Copyright Act paved the way for a revised U.S. copyright system that ensured that copyright in the new digital age would maintain the same author–public interest balance that had fueled American creativity since the 1790 Copyright Act. On the fiftieth anniversary of that Great Experiment, it is time to move forward with a new Copyright Act to deal with the technological challenges of the global digital AI environment. U.S. exceptionalism can continue to play a role in U.S. copyright law, but it must be tempered by the lessons we have learned about where and how to measure the lines of creativity, authorship, and the public interest.

[149] *Id*.
[150] 17 U.S.C. § 512.