

## Where Does Fair Use Go? --- An Insight into Regulating File-Sharing in Research and Education

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### 1. Introduction

Since *Napster*<sup>1</sup> emerged in 1999, file-sharing technology, especially in the form of peer-to-peer (P2P) file sharing, has been met with hostility and panic. As a neutral technology, the issues surrounding file sharing can be considered from a variety of angles, but previous research on the phenomenon has been overly focused on the policy and rules to regulate infringing use of this technology. Disputes over encouraging the lawful applications of file-sharing systems deserve particular attention, as failure to protect the application has a negative impact on the development of the technology, as well as on social interests. Especially so, given the proposition that file sharing use in research and education is presently acknowledged by technicians has led to the development of P2P research and education file sharing models, such as eduCommons<sup>2</sup>, [SETI@home](http://setiathome.berkeley.edu)<sup>3</sup>, Edutella<sup>4</sup>, and LionShare<sup>5</sup> allowing users to share text, audio, and video files stored on computers in support of learning and research.

I will initially outline in this paper how fair use/ fair dealing doctrine has struggled in file-sharing circumstances, particularly in the P2P environment; and thereafter consider how fair use has evolved in respond to these new attacks. Subsequently, by study of relevant legislations and cases, such as *Napster*, *Grokster*, *MP3.com*, *Sony*, *Diamond*, the “who” issue, namely the main body entitled to benefit from fair use defence will be discussed. In relation to these cases, the paper addresses the following questions: if parties who can take advantage of fair use defence in traditional media, as identified in this paper, have been losing their benefits in file-sharing networks, can the existing fair use system be improved on? Is there a solution?

In seeking for solutions, attention is focused on the public levy model and private licensing scheme from entertainment industry, as well as the voluntary model exemplified by the Open Access Movement. Additionally, the impact of these models on fair use practice is highlighted and discussed. Finally, in looking forward to the future, there is reason to anticipate that a “voluntary” system is a possible way to allow copyright works to be used in research and education for the benefit of society while at the same time ensuring that right holders are being rewarded, by all means, fairly for their efforts.

### 2. Background: File-Sharing in Research and Education

#### 2.1 What is file-sharing?

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<sup>1</sup> See *A&M Records, Inc. v. Napster, Inc.*, No. 00-16401, U.S. D.C. No. CV-99-05183-MPH.

<sup>2</sup> “EduCommons” is an open system for creating, sharing, and reusing educational content and discourse to support learning. It is run by OSLO Group in the Department of Instructional Technology at Utah State University. Available at <http://educommons.sourceforge.net/>

<sup>3</sup> [SETI@home](http://setiathome.ssl.berkeley.edu/) is a network system using thousands of Internet-connected personal computers to help in the search for extraterrestrial intelligence. Available at <http://setiathome.ssl.berkeley.edu/>

<sup>4</sup> “Edutella” is developing a P2P network for the exchange of educational resources between German universities, Swedish universities, Stanford University, and others. Available at <http://edutella.jxta.org/>

<sup>5</sup> “Lionshare” is a secure P2P file sharing application for higher education, enabling legal file sharing for Penn State university and beyond. Find and share legal academic content in a secure P2P environment. Available at <http://lionshare.its.psu.edu/>.

It is relevant to clarify the definition of file sharing used in this paper. The phrase “file” can be sub-divided into “the file being shared outside network”, such as paper documents and information stored in a tape, and “the file being shared inside network”, i.e., those digital files only being exchanged in a network, even if in a small local area network. In here the term “file”, as used in almost all of the current books and articles on file-sharing technology<sup>6</sup>, refers to digital files shared on a network. As to the phrase “sharing”, a broad definition claiming that general participation in the network, either downloading or uploading, or both, can be regarded as sharing<sup>7</sup> is adopted. Thus, whether one only posts the information on the network or just downloads files from the network, whether the file is exchanged among thousands of people (e.g., sharing a popular song in the P2P KaZaA network) or shared between two friends through Instant Messaging (IM) services such as MSN Messenger, these are all considered as “file-sharing” in this paper.

## 2.2 Why does academic file-sharing deserve attention?

Most research on file-sharing technology has focused on regulating applications of file-sharing networks to illegal file downloading. In fact, file sharing has been applied much more widely to “many other types of online information, data distribution, grid computing and distributed file system”<sup>8</sup>. This is especially pertinent given the many more propositions related to applying file-sharing technology to research and education, such as LionShare, LOCKSS<sup>9</sup>, eduCommons, Edutella, The Internet Archive Project<sup>10</sup>, are now available.

The incentives towards providing more “hidden”<sup>11</sup> academic content to instructors, scholars, researchers and students suggest that the application of file sharing in academia should not be very surprising. In short, academic file sharing is capable of making the main storehouses of digital academic resources --- the personal computers of students, educators, and researchers --- available to other students, educators, and researchers. Firstly, there are numerous target populations who are interested in and able to benefit from academic file sharing. Let us take the example of academic image sharing: the evidence within the Vision Image User Study (VIUS)<sup>12</sup> reports is very impressive. 75.4 percent of faculty and 55 percent of students admitted that they use images in some digital forms for educational and research purposes. More than 62 percent of faculty and more than 56 percent of students agreed or strongly

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<sup>6</sup> See, e.g., *Web Definition of File Sharing*, “The term file sharing refers to the sharing of computer data or space on a network”. Available at <http://practice.findlaw.com/glossary.html> ; See Stanford University Information Law Center, *Overview of File-Sharing, Copyright Law and the DMCA*, “File-sharing is the process of exchanging files over the Internet”. Available at <http://rescomp.stanford.edu/info/dmca/> ; See *File Sharing*, “is the public or private sharing of computer data or space in a network with various levels of access privilege”. Available at [http://whatis.techtarget.com/definition/0,,sid9\\_gci212119,00.html](http://whatis.techtarget.com/definition/0,,sid9_gci212119,00.html)

<sup>7</sup> See, e.g., *File Sharing*, Wikipedia, the free encyclopedia. Available at [http://en.wikipedia.org/wiki/File\\_sharing](http://en.wikipedia.org/wiki/File_sharing) ; See also, <http://practice.findlaw.com/glossary.html> ; [www.angelfire.com/ny3/diGi8tech/Fglossary.html](http://www.angelfire.com/ny3/diGi8tech/Fglossary.html) ; <http://www.computersandinternet.com/Dictionary/Terms-F.htm>.

<sup>8</sup> See OECD Information Technology Outlook 2004, *Chapter 5 Peer-To-Peer Networks in OECD Countries, (October 2004)*, available at, <http://www.oecd.org/dataoecd/55/57/32927686.pdf>. See also, *File-Sharing Goes to the Next Level*, USA Today, (2003).

<sup>9</sup> “LOCKSS (Lots of Copies Keep Stuff Safe)”: The Stanford University Library System's LOCKSS project “creates low-cost, persistent digital ‘caches’ of authoritative versions of http-delivered content” and delivers them via a peer-to-peer network. Available at: <http://lockss.stanford.edu/>

<sup>10</sup> “The Internet Archive Project” seeks to archive the World Wide Web. The project makes thousands of noninfringing Web-based documents available through a peer-to-peer network. Available at: <http://www.archive.org/>.

<sup>11</sup> “Hidden content” was mentioned in LionShare Proposal to describe the content that “is hidden in the sense that other potential users at their own and other institutions have no way to discover these resources”. For instance, the files stored in faculty or students’ personal computers. See, *Connecting and Extending Peer-to-Peer Networks*, A Penn State Proposal to the Andrew W. Mellon Foundation, (September 2003), at 1. Available at, [http://www.lionshare.its.psu.edu/main/info/docspresentation/lionshare\\_mellon.pdf](http://www.lionshare.its.psu.edu/main/info/docspresentation/lionshare_mellon.pdf).

<sup>12</sup> See, The Visual Image User Study (VIUS) Report, available at: <http://www.libraries.psu.edu/VIUS/reports.html>. VIUS Report was based on a survey on “needs for digital image delivery at the Pennsylvania State University through a rigorous process of broad-based and interdisciplinary user study, through prototyping services, and assessing those prototypes”. The survey took a period of 29 months and submitted a series of 27 specific VIUS Reports.

agreed the beneficial effect and efficiency of such file-sharing systems<sup>13</sup>. Moreover, the target populations are expected to increase. According to the VIUS Reports, more than 25 percent of faculty and 33 percent of students plan to increase their use of digital and analog images<sup>14</sup>.

Secondly, the amount of potential academic file sharing content is surprising. A survey conducted by Penn State's Teaching and Learning with Technology unit<sup>15</sup>, which extracted random samplings of 2500 Penn State faculty and teaching assistants, revealed that 51 percent of faculty reported having a personal collection of digital images used for professional purposes. According to the VIUS survey, 44.1 of faculty reported that they "personally maintain or oversee the maintenance of a collection of analog or digital images for professional use"<sup>16</sup>. Additionally, there is a large number of students who keep personal collections of educational content. For instance, 23.9 percent of the students attending the VIUS survey have personal collections of pictures or photographs for "educational or research" use.<sup>17</sup> The VIUS Reports also indicate the desire of people to share individual collections with others. Around 33.5 percent of faculty responded positively to sharing digital images, and even more say that "they would be willing to share" if some conditions are fulfilled<sup>18</sup>. Such holders of personal collections of digital educational and research content are and will be important potential users for academic file-sharing networks.

Thirdly, the application of file-sharing technology in the field of research and education such as the LionShare and the EduCommons, although the academic file-sharing architecture is still in its early stage, provides supporting actions and interfaces to positive academic content exchange by placing some opportunities for end-users to access the content which is inaccessible currently, while retaining control vested in central servers to maintain a legal file-sharing environment as well. Although predicting the future of technology may seem too early, we might reasonably expect the derivation of considerable benefit from applying file sharing in research and education which is able to facilitate both the request for more educational and research information and the possibility for sharing personal educational and research content collections.

### **3. The "Who" Issue: Taking Advantage of Fair Use Defence**

Fair use doctrine is the most well known copyright exception, being an important defence upon which a defendant may reply when sued for copyright infringement via file-sharing technology. The term "fair use" in this paper is described in a broader sense, i.e., it refers to an exception to copyright infringement, no matter whether it is named "fair use" in U.S. Copyright Act or called "fair dealing" in U.K. copyright law. As any court will consider whether the defendant is entitled to benefit from fair use defence at the initial stage of a copyright infringement case, the following analysis is directed to the issue of who can take advantage of fair use defence.

#### **3.1 Who? --- In Traditional Copyright Environment**

##### **A. The Primary Infringer**

In most cases, the person who makes direct use of the copyrighted work, namely, the primary

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<sup>13</sup> See VIUS Reports 2.3 General Survey of Faculty, questions #1, #13, and #14, and VIUS Reports 2.4 General Survey of Students, questions #1 and #14. See also, VIUS Reports 3.1 Faculty Focus Groups on Luna's Insight, Table 1. Available at: <http://www.libraries.psu.edu/vius/2.3.pdf>, <http://www.libraries.psu.edu/vius/2.4.pdf>, <http://www.libraries.psu.edu/vius/3.1.pdf>.

<sup>14</sup> Ibid.

<sup>15</sup> Jim Kerlin, *FACAC Faculty Survey 2002*, available at: <http://tit.its.psu.edu/surveys/spring2002/faculty2002.html>

<sup>16</sup> See VIUS Reports 2.3 General Survey of Faculty, questions #1, #13, and #14, and VIUS Reports 2.4 General Survey of Students, questions #1 and #14. See also, VIUS Reports 3.1 Faculty Focus Groups on Luna's Insight, Table 1. Available at: <http://www.libraries.psu.edu/vius/2.3.pdf>, <http://www.libraries.psu.edu/vius/2.4.pdf>, <http://www.libraries.psu.edu/vius/3.1.pdf>

<sup>17</sup> See VIUS Reports 2.4 General Survey of Students, question #12. Available at: <http://www.libraries.psu.edu/vius/2.4.pdf>.

<sup>18</sup> See *VIUS Executive Summary Report*, available at: <http://www.libraries.psu.edu/vius/Executive%20Summary.pdf>.

infringer, would claim for fair use defence. According to Lionel, as to a fair dealing defence, “it is important to note that all that is meant by dealing is that the defendant has made use of the work”<sup>19</sup>. This principle is also embodied in some statutes. For example, Section 107 of the U.S. Copyright Act of 1976 states that fair use is applied to “the use made of a work”<sup>20</sup>. UK copyright law describes fair dealing as “specif[ie]d acts which may be done in relation to copyright”, as stated in Section 28 (1) of CDPA<sup>21</sup>.

Current case law, additionally, defines the primary infringer as a main body that can benefit from fair use defence. For instance, in deciding whether a defendant falls within the protection of fair use doctrine, the courts have construed the purpose for which the work is used. As Chadwick LJ pointed out in *Newspaper Licensing Agency v. Marks & Spencer*<sup>22</sup>, “the purpose for which the copying is done ... can be brought within a liberal interpretation of the phrase ‘for the purpose’ of [the infringement]”<sup>23</sup>. In other words, the specific purposes of the dealing should be examined according to the subjective motives of the primary infringer<sup>24</sup>. The decision of *Hyde Park v. Yelland*<sup>25</sup> shows that the court must “judge the fairness by the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the manner”. Thus, the dealing could be regarded as fair dealing as long as the primary infringer can show that “they were acting benevolently or were motivated by some altruistic or noble cause”.<sup>26</sup>

Other factors<sup>27</sup> in deciding a fair use case are also related to the primary infringer’s activities, directly or indirectly. For example, it is less possible to be fair use if the primary infringer obtained the copyrighted work by illegal means such as stealing or leaking.<sup>28</sup> The fact that the primary infringer extracted more than half parts of a work may lead to failure in claiming for fair dealing defence, on the ground that extracting “too many and too long”<sup>29</sup> of the copyrighted work is not supposed to be fair. Any commercial benefits derived from the primary infringer’s use made of a copyrighted work, whether the nature of the work is in favour of fair use, will weigh against the applicability of fair use defence, as embodied in *Basic Books, Inc. v. Kinko’s Graphics Corp.*<sup>30</sup>

Analysis demonstrates that the primary infringer is generally recognized, both in literal statute and in legal practice, as the main body that can take advantage of fair use defence. That is to say, it is generally established that the primary infringer is the one who can claim for and benefit from the fair use defence in a copyright infringement case.

## **B. Copying by Third Parties**

The primary infringer carries out the illegal copying directly. In certain circumstances, however,

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<sup>19</sup> Lionel Bently & Brad Sherman, *Intellectual Property Law*, Oxford University Press Inc., New York, 4ed, (2003), at 194.

<sup>20</sup> See Section 107 of U.S. Copyright Act 1976.

<sup>21</sup> See Section 28(1) of CDPA.

<sup>22</sup> See *Newspaper Licensing Agency v. Marks & Spencer*, [2000] 4 All ER 239, 257

<sup>23</sup> *Ibid.* at 75. See also, *Pro Sieben Media v. Carlton Television*, [1999] FSR 610, 620.

<sup>24</sup> See *Supra* 19, at 195.

<sup>25</sup> See *Hyde Park v. Yelland* [2000] EMLR 363, 379, at 36, (CA).

<sup>26</sup> See *Supra* 19, at 197.

<sup>27</sup> As Lionel explains, these factors influencing the determination whether a dealing is fair include the method by which the copyrighted work has been obtained, the amount and substantiality of the work being taken, the use made of the work, the effect of the use upon the potential market for or value of the copyrighted work, and whether there are other means with less intrusion on copyright owners’ rights provided as well. See *Supra* 19, at 195-198.

<sup>28</sup> The method of obtaining the copyrighted work used by the primary infringer is an element considered by the court in deciding a fair use case. See *Beloff v. Pressdram* [1973] 1 All ER 241.

<sup>29</sup> The amount taken from the copyrighted work is another element which has influence on the court’s decision. See *Hubbard v. Vosper* [1972] 2 QB 84. Lord Denning MR said the court “must consider the number and extent of the extracts” in determining whether a use made of the work is fair.

<sup>30</sup> See *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991). In *Kinko* case, the court held Kinko’s infringed copyrights because the copying was for commercial purposes, which had a direct effect on the market for the books, in spite of the fact that most of the works were for “course packs”—a factor is indeed in favor of fair use.

third parties may be involved in a copyright infringing behavior, i.e., the primary actor may be a person other than the alleged defendant. There might be a case where an agent such as a research assistant or a librarian “makes and supplies a copy of an article in a periodical”<sup>31</sup> for researchers or students. In other words, it is not necessary for the behavior resulting in the copyright infringement to be undertaken by the defendant himself.

At least two factors, where the direct infringing activity is done by a third party, have to be considered for the fair use defence to be applied. The copying activity must be for defendant’s own research or study is the first, as showed in the case *Sillitoe v. McGraw Hill Book Co.*<sup>32</sup>. The *Sillitoe* court suggested that the defendants “could not avail themselves of the exceptions of [fair dealing doctrine] since they were not engaged in private study or research but were merely facilitating this for others”<sup>33</sup>. Secondly, a defendant cannot claim for fair dealing if the person doing the copying knows or has reason to know that more than one copy of the material will be provided.<sup>34</sup> Thus copying by a third party other than a defendant is not a fair dealing if the third party knows or has reason to know that the copying will lead to copies of the same material being provided to more than one person at substantially the same time and for substantially the same purpose. For example, the teacher cannot use fair dealing defence when he makes multiple course packs for his students.

As can be seen from above, it is possible to apply fair use defence to the researcher or student, despite the fact that the alleged infringement is done by a third party, only if the copying is for the researcher or student’s own research or study; and there is no more than one substantial copy being provided at the same time for the same purpose as well.

### **C. Copying for Third Parties**

A special party being involved in fair dealing defence is the library uses. The CDPA 1988 provides librarians of prescribed library with a number of fair dealing defences<sup>35</sup>. Section 38-39 of CDPA allows the librarian of a prescribed, non-profit library to “make and supply a copy of an article in a periodical or parts of published works”, on conditions that: □ for purposes of research or private study<sup>36</sup>; □ no more than one copy of the same material being provided at the same time<sup>37</sup>; □ a cost no less than the actual cost is required<sup>38</sup>.

The fair dealing defence available to the librarian deserves particular attention, given that special role of the librarian who, as a primary actor carrying out the alleged infringement for a third party, is similar to an intermediary. That means the librarian is entitled to apply for fair dealing defence, although he indeed provides a platform for the alleged infringement with his direct copying activities.

### **3.2 Who? --- In File-Sharing Circumstances**

In contrast to traditional copyright situations, the parties to which fair use doctrine has been applied in the file-sharing field are mainly divided into two parts: the primary infringer, namely, the end-users of file-sharing networks who are uploading, downloading, distributing copyrighted works without copyright owners’ permission, and the file-sharing intermediaries, namely, the file-sharing tool providers.

Applying fair use defence to the primary infringer in file-sharing networks is similar to that in traditional copyright environment. The issues surrounding whether the primary infringer is

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<sup>31</sup> See Section 37-38 of CDPA 1988.

<sup>32</sup> See *Sillitoe v. McGraw Hill Book Co.* [1983] FSR 545.

<sup>33</sup> *Ibid.* at 546. See also, *Longman Group v. Carrington Technical Institute* [1991] 2 NZLR 574 (CANZ).

<sup>34</sup> See Section 29(3)(b) of CDPA 1988, “in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose”, the copying is not fair dealing.

<sup>35</sup> See Section 37-39 of CDPA 1988.

<sup>36</sup> See Section 38 (2)(a), and Section 39(2)(a).

<sup>37</sup> See Section 38 (2)(b), and Section 39(2)(b).

<sup>38</sup> See Section 38 (2)(c), and Section 39(2)(c).

entitled to benefit from fair use doctrine can be considered from several aspects, such as the purpose of the use, the amount taken from the copyrighted works, and the market effect resulting from the primary infringing activities.

The role of the file-sharing intermediaries in applying fair use defence deserves particular attention as their special function creates a different nature between file-sharing providers and traditional copying intermediaries. This is especially so, given that the current cases such as *Napster*, *Grokster*, *MP3.com* at present recognize it is necessary to apply fair use defence to file-sharing providers. The traditional copying intermediaries, such as the agent copying for researchers and students or the librarian copying for a third party, provide the alleged infringer with direct copying activities. In contrast, what the file-sharing intermediaries offer the primary infringer is a technical platform, which is not involved in any direct infringing conduct. Thus the problem emerges as to whether and how a party who is neither the primary infringer nor the primary actor of the alleged infringement is supposed to exercise fair use rights on behalf of others. Current case law has made it even harder for these defendants to take advantage of the fair use doctrine in the context of file-sharing.

#### 4. Case Studies

##### A. *Napster*:

*Napster*<sup>39</sup> was the first case examining fair use doctrine in P2P networks which was eventually heard by the U.S. Ninth Circuit Court of Appeal in 2001. In this case, neither the end-users nor the P2P technology provider applied the fair use doctrine successfully. On the one hand, the primary infringer is not entitled to use fair use defence, given that a majority of *Napster* end-users were found by the Court as “copying, downloading, uploading, transmitting, or distributing plaintiffs’ copyrighted musical compositions and sound recordings protected by either federal or state law, without express permission of the rights owner”,<sup>40</sup> which constitutes direct infringement of copyright owners’ rights.

On the other hand, the P2P technology provider, namely, the *Napster* technical intermediary, failed to claim fair use defence for its end-users, based on the commercial benefit derived from the technology, and the technical contribution to the primary infringement as well. In concrete, the Court rejected *Napster*’s argument that its users’ activity of using plaintiff’s copyrighted works is fair use of the material for “at least” two reasons.<sup>41</sup> First of all, the use of the *Napster* network harmed the market, given the data provided by the Jay Report which states “evidence of lost sales attributable to college use to be probative of irreparable harm for purposes of the preliminary injunction motion”.<sup>42</sup> Additionally, the Court considered that *Napster* commercially used the entire copyrighted works to enjoy a financial benefit as “financial benefit exists where the availability of infringing material ‘act as a draw’ for customers ... [whereas] *Napster*’s future revenue is directly dependent upon increases in user base’.<sup>43</sup> Being a technical intermediary who derives a commercial benefit from the primary infringement excluded *Napster* from its capability of claiming fair use defence for its end-users.

The other factor discussed regarding the applicability of applying fair use defence to *Napster* is whether the *Napster* P2P technology is a “space-shifting”. The *Napster* court did not follow the “staple article of commercial doctrine”, but read the P2P network technically to be operating in a very restrictive manner differentiating between the *Napster* P2P technology and the “shifting” analyses of *Sony*<sup>44</sup> and *Diamond*<sup>45</sup>. According to the Court, the *Napster* P2P

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<sup>39</sup> See *Napster*, 114 F.Supp. 2d, at 919, 920.

<sup>40</sup> See *Napster*, at 4222.

<sup>41</sup> See *Napster*, at 4229.

<sup>42</sup> See *Napster*, at 4234.

<sup>43</sup> *Ibid.* at 919, 920, 1021.

<sup>44</sup> See *Sony*, (In this case, a video tape recorder machine Betamax, which is regarded as a “time-shifting” machine, was held as a fair use).

<sup>45</sup> See *Recording Indus. Ass’n of Am. V. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072,1079 (9<sup>th</sup> Cir. 1999). In this case, a portable MP3 player Rio was regarded as “space-shifting” on the ground that it only makes copies in order to render portable. This “space-shifting” technology was held by the Court as a paradigmatic noncommercial personal use, so that “space-shifting” is a fair use.

technology is not a fair use because “the methods of shifting [in P2P networks] ... simultaneously involve distribution of the copyrighted material to the general public; ...[rather than] only to the original user”.<sup>46</sup> In other words, the method of shifting the copyrighted material in *Napster* networks is not regarded as within the definition of fair, so that the *Napster* end-users’ infringing activities cannot be fair use.

## **B. *Grokster*:**

In December of 2004, the Ninth Circuit Court of Appeals held that *Grokster*<sup>47</sup> was not liable for contributory or vicarious copyright infringement because of its decentralized technical design. This case focuses on the use of *Grokster* network to facilitate authorized sharing and sharing of public domain works, rather than concerning end-users’ private copying activities. For the first time, file-sharing technology is regarded as an intermediary with “substantial non-infringing”<sup>48</sup> use.

Compared to the centralised indexing architecture to catalogue the music files applied in *Napster*, the FastTrack supernode technology in *Grokster* “closed [the] door and deactivated all computers within [its] control, [so that] users of [its] products could continue sharing files with little or no interruption.”<sup>49</sup> As a result, the court held that the defendant did not have “reasonable knowledge of specific infringing files and”, neither did they “fail to act on that knowledge to prevent infringement”<sup>50</sup>. Additionally, the Ninth Circuit Court noted *Grokster* should be free of vicarious liability, given the fact that “the Software Distributors d[id] not provide the ‘site and facilities’ for infringement, and d[id] not otherwise materially contribute to direct infringement”.<sup>51</sup> As addressed in the *Grokster* decision, “[I]n the context of this case, the software design is of great import”.<sup>52</sup>

It is interesting, however, to note that the fair use defence indeed was not embodied in *Grokster* in spite of the fact that *Grokster* can be used for both substantial infringing and non-infringing activities. On the one hand, just as in *Napster*, “at least some of”<sup>53</sup> *Grokster* users upload, download, or distribute copyrighted media files, which have established direct infringement of copyrighted works. As a result, fair use defence cannot be used to justify those users’ activities. Importantly the “inducement” theory announced by the *Grokster* Appeal Court<sup>54</sup>, on the other hand, denied the possibility of applying fair use doctrine to *Grokster*’s decentralized P2P technology. In *Napster*, the court presented that the *Napster* centralized indexing P2P architecture, an “integrated service” which is designed to provide the “site and facilities”<sup>55</sup> for direct infringement, was not a fair use. As an architecture which does not provide any direct technical support for infringement, in contrast, *Grokster* was also held indirectly liable for the infringement on the ground that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device’s lawful uses”.<sup>56</sup> In other words, *Groskter* infringes copyright contributorily “by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it”<sup>57</sup>.

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<sup>46</sup> See *Napster*, at 4239.

<sup>47</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1162-1166, (9<sup>th</sup> Cir. 2004), vacated, 125 S.Ct. 2764 (2005).

<sup>48</sup> *Ibid.*

<sup>49</sup> See *Grokster*, at 1163.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

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

<sup>53</sup> See *Grokster*, at 8.

<sup>54</sup> The *Grokster* borrowed the inducement theory from U.S. patent law, which states that “Whoever actively induces infringement of a patent shall be liable as an infringer”. See S 271(b) U.S.C.A. 35.

<sup>55</sup> See *Grokster*, at 1163.

<sup>56</sup> See *Grokster*, certiorari to the United States court of appeals for the ninth circuit, No. 04-480. (June 27, 2005). at 486,10-24.

<sup>57</sup> *Ibid.* at 486, 10-13.

### C. UMG Recordings v. MP3.com: A “Real” Fair Use Case

Compared to *Napster* or *Grokster* which exercises fair use rights for its end-users, *MP3.com* is a “real” fair use case, given that the fair use defense is claimed by the *MP3.COM* provider for himself. In other words, *MP3.COM* is not only the primary actor of the copyright infringement for its end-users, but also the one who argues that such infringing is protected by the affirmative defense of fair use.

*MP3.com* argued its service as a “functional equivalent” of storing its subscribers’ CDs, given that a subscriber had to “prove” he had already owned the CD before accessing to the *MP3.com* service, and then alleged that its actions were fair use. The Court made the decision in favor of the plaintiffs for the following reasons: first of all, the *MP3.com*’s aim showed that although subscribers to the service were not charged a fee, the *MP3.com* Company was trying to “attract as many subscribers as possible as to draw advertising”. As to the portion copied, it was definitely to note that the defendant had copied the replayed entire works without “transforming”. In addition, *MP3.com*’s service was asserted to have invaded the plaintiffs’ right to license their sound recordings to others for reproduction. The potential function of *MP3.com*’s service to add positive impact on the plaintiffs’ market did not enable the defendant any exclusion from its copyright liability.

As to the transformative “space shift” argument recited by *MP3.COM*, the Court found the fact that this is simply another way of “repackage[ing] the copyrighted works to facilitate their transmission through another medium”<sup>58</sup>, with no “new aesthetics, new insights and understandings”<sup>59</sup> to the original works. Unlike the portable MP3 player discussed in *Diamond*<sup>60</sup>, *MP3.com* services are not transformative, considering the fact that they made the copies for its own commercial purpose with knowledge of the direct infringement.

### 5. Analysis: Fair Use Shrinks as File Sharing Grows

Taken together, the case law above indicates that fair use doctrine has been applied in the file-sharing field in two principal ways. The first is to ascertain whether there is a reasonable relationship between the fair use defence, namely, the legal excuses that could be protected through the fair use doctrine, and the primary copyright infringers, namely, the end-users of file-sharing networks who are uploading, downloading, distributing copyrighted works without copyright owners’ permission. In the discussed cases, it was clear that the Court did not consider there might be an appropriate relationship between the end-users’ conducts and the statute excuse that could be secured through the fair use doctrine. For instance, P2P network can be used by faculty, researchers and students to share research materials, classroom teaching notes and even their own thesis, which may be done notwithstanding the subsistence of copyright on the basis of fair use/fair dealing doctrine. What the Court suggested, nevertheless, was that copyright owners “have established direct infringement of their copyrighted works by *some* end-users of [P2P technology providers’] software”<sup>61</sup>. The relationship between “*some other* end-users” whose conducts are within copyright limitations and the fair use doctrine has been, more or less, ignored.

Secondly, the relationship between the file-sharing intermediaries, i.e., the file-sharing tool provider, and the fair use doctrine also posed a dilemma for the Court. On the one hand, the intermediaries exercising fair use defence for the end-users, like *Napster* or *Grokster*, encountered difficulties with this defence. In this matter, the *Napster* court found that, compared to “time-shifting” or “space-shifting” technology, the *Napster* P2P network is not a fair use because “the methods of shifting [in P2P networks] ... simultaneously involve distribution of the copyrighted material to the general public; ...[rather than] only to the original user”.<sup>62</sup> The *Grokster*’s defendants did not embrace a fair use defense in their claim. The principle embodied in *Grokster* shows that the file-sharing technology does not benefit from

<sup>58</sup> See *UMG Recordings, Inc. v. MP3.COM, Inc.* 92 F. Supp. 2d 349 (S.D.N.Y. 2000), at 3.

<sup>59</sup> See *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F. 3d (2d Cir. 1998), at 132, 142.

<sup>60</sup> See supra note 45.

<sup>61</sup> See *Grokster*, at 10.

<sup>62</sup> See *Napster*, at 4239.

the fair use doctrine no matter whether the file-sharing network is a centralised or decentralised one.

On the other hand, the file-sharing intermediaries those who appeal to fair use for the primary infringing behavior on behalf of others, like *MP3.com*, have encountered difficulties. The *MP3.com* makes it more plausible that file-sharing service providers can claim fair use protection. Detailing the reasons leading to such problems in file-sharing environment, Professor Stacey L. Dogan noted that some differences between home recorders and P2P file sharers, such as nature of the works<sup>63</sup>, nature and scale of the copying<sup>64</sup>, privacy concerns<sup>65</sup>, and potential market harm<sup>66</sup> as well, matter “in evaluating file sharers’ fair use claims”<sup>67</sup>.

As such, the chances of taking shelter under the advantage of fair use defence for both end-users and file-sharing providers have shrunk with the growth of file-sharing technology. The traditional conditions on which the fair use doctrine was utilized have withered away in the file-sharing environment. Imagine a community where the public garden is largely surrounded by private land. How could people get to the garden and enjoy flowers “without some means of access the public right to use the [garden]”<sup>68</sup>?

## 6. Solutions

### 6.1 From Entertainment Industry Practice

Since *Napster* emerged in 1999, the entertainment industry has been struggling to deal with the copyright infringement problem caused by file-sharing technology. Scholars and politicians have put forward a number of possible solutions to the file-sharing conflict. It is noteworthy to examine some typical proposals deployed in entertainment industry.

#### A. The Public Model: Levies, Taxes or Tariffs

One of the solutions that have been applied in entertainment file sharing practice is the “public model”, known as the levy or tax scheme, which refers to those approaches involving government control<sup>69</sup>. Such a scheme grants a government-mandated tax or levy on purchases of recordable media, in exchange for legally copying copyright protected works. The levy and tax scheme on file-sharing equipment and services has been readily adopted in continental European law countries. The German experience presents an example of the public levy model. The German scheme was initially rooted in two cases, where the German

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<sup>63</sup> Stacey L. Dogan, *Comment: Sony, Fair Use and File Sharing*, Case Western Reserve Law Review, Vol.55:4, (2005), available at: [http://law.case.edu/student\\_life/journals/law\\_review/55-4/dogan.pdf](http://law.case.edu/student_life/journals/law_review/55-4/dogan.pdf). According to Stacey, unlike *Sony*, works shared on file-sharing networks “are not works being picked up from a public broadcast, for watching at a later time”.

<sup>64</sup> *Ibid.* Stacey pointed out that *Sony* technology supports individuals’ ability to make single copies for their own personal use, while file sharing “involves a global, collaboration copying and distribution process among individuals who rarely know one another”.

<sup>65</sup> *Ibid.* Stacey stated that *Sony* technology is used in people’s home, while P2P file-sharing is being used among a large number of public facilities.

<sup>66</sup> *Ibid.* The *Sony* Court did not prove that *Betamax* harmed the copyright owners’ market, in contrast, the *Napster* was found to harm both existing and potential copyright markets.

<sup>67</sup> Stacey L. Dogan, *Comment: Sony, Fair Use and File Sharing*, Case Western Reserve Law Review, Vol.55:4, (2005), available at: [http://law.case.edu/student\\_life/journals/law\\_review/55-4/dogan.pdf](http://law.case.edu/student_life/journals/law_review/55-4/dogan.pdf).

<sup>68</sup> James Boyle, *The Enclosure Movement and the Construction of the Public Domain*, 66 *Law & Contemporary Problems*, (2003), at 33.

<sup>69</sup> To date, the government-involved approach has been discussed in different jurisdictions. For example, Jörg Reinbothe, *Compensation for Private Taping Under Sec 53(5) of the German Copyright Act*, 12 *International Review of Industrial Property and Copyright Law*, (1981), at 36. See also, Ernest A. Seemann, *Sound and Video-Recording and the Copyright Law: The German Approach*, 2 *Cardozo Arts and Entertainment Law Journal*, (1983), at 225. Thomas Dreier, *Copyright Law and Digital Exploitation of Works: The Current Copyright Landscape in the Age of the Internet and Multimedia*, (1997), available at, <http://library.fes.de/fulltext/stabsabteilung/00218toc.htm>. Don E Tomlinson and Timothy Nielander, *Red Apples and Green Persimons: A Comparative Analysis of Audio Home-Recording Royalty Laws in the United States and Abroad*, *Mississippi College Law Review*, (1999), at 5. Rightscom and Business Software Alliance, *Economic Impact Study: Private Copying Levies on Digital Equipment and Media in Europe*, (Sep 2003), available at, <http://global.bsa.org/eupolicy/LeviesEconomicImpactAna.pdf>.

Collecting Society for Musical Performing and Mechanical Reproduction Rights (GEMA) commended lawsuits against the manufacturers and retailers of tape recorder machines. *GEMA (1954 and 1964)*<sup>70</sup> introduced the statutory licence and levy “as a matter of law”<sup>71</sup> in 1965 new Copyright Act, the Urheberrechtsgesetz (UrhG), which, with various amendments, is still in force today. The current German private copying levies require the payment of a levy on digital media, including blank audio and audiovisual recording media and devices, such as blank CDs and DVDs, CD burners, as well as personal computers (PCs). The detailed rates of levies currently applied has been listed as follows:

Media	Cost/Data	Cost/Time
Data CD-R		€0.088 per 74min
Data CD-RW		€0.088 per 74 min
Audio CD-R RW		€0.088 per 74 min
DVD-R		€0.174 per 120 min
DVD+R		€0.174 per 120 min
DVD-RW		€0.174 per 120 min
DVD+RW		€0.174 per 120 min
Equipment	Cost	
Integrated CD-R RW Writers	€7.50 per unit	
Combo Drives	€7.50 per unit	
Audio CD Recorders	€1.28 per unit	
Integrated DVD R RW Writers	€9.21 per unit (From January 2003)	
Scanners		
Up to 12 copies per minute	€10.23 per unit	
From 13-35 copies per minute	€31.96 per unit	
From 36 to 70 copies per minute	€47.93 per unit	
More 70 copies per minute	€255.65 per unit	

Figure 1. Detailed Rate on Digital Media and Equipment in German<sup>72</sup>

### B. The Private Model: Business Licensing Agreements

The other model adopted in entertainment industry practice is a private contract system, known as the “private model”. Compared to the public levy system, “private contract model” refers to collecting compensation for copyright owners by agreements or contracts, while safeguarding copyright limitations and exceptions. The selling contract exemplified by Apple’s iTunes Music Store is a typical proposal the entertainment industry has put forward to address the unauthorized private copying problem.

The iTunes business model relies upon the contract between Apple Company and the consumer effectively reallocating copyright entitlements. In other words, Apple uses two legal strategies to set up consumers’ rights and reliability from iTunes Music Store: agreements through contract and limitations from copyright laws. On the one hand, the Apple’s clickwrap contract enables change in distribution of copyrights in certain circumstance. For instance, §9(b) of iTunes Music Store Terms of Service permits users to copy a downloaded music file on up to three computers, to burn an audio playlist up to seven times, and so on.<sup>73</sup> In other circumstances, however, the agreement requires consumers to forgo certain rights and defences under copyright law in exchange for access to the iTunes’ music. For example, §8(b) of the iTunes Music Service Terms requires iTunes users “not to attempt to, or to assist another person to, circumvent, reverse-engineer, decompile, disassemble, or otherwise tamper with any of the security components ... for any reason whatsoever”<sup>74</sup>. This term waives any right related to reverse-engineer the software consumers may have under copyright law<sup>75</sup>.

<sup>70</sup> See *GEMA v. Grundig*, 1 ZR 8/54, 17 BGHZ 266, 271,272, [1955] GRUR 492.

<sup>71</sup> See Andrew F. Christie, *Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches*, Legal Studies Research Paper, No. 116, Melbourne Law School, (March 2004), available at, <http://ssrn.com/abstract=690521>. at 6.

<sup>72</sup> See *Economic Impact Study: Private Copying Levies on Digital Equipment and Media in Europe*, Report Commissioned by Business Software Alliance, (2003), at 17.

<sup>73</sup> See §9(b) of iTunes Music Store Terms of Service, see Appendix 2.

<sup>74</sup> See §8(b) and 9(b) of iTunes Music Service Terms, see Appendix 2.

<sup>75</sup> See e.g., §1201(f) of 17 United States Copyright Act.

### **C. In order to save fair use, we must NOT kill it**

Both the public levy and the business licensing strategies are economically and legally essential. *Economically*, the schemes have opened up an opportunity of copyright holders to receive compensation. *Legally*, allowing private copying in certain circumstances will improve the clarity of copyright law system. What deserves particular attention is, nevertheless, that both models potentially curtail “fair use” privileges in the context of research and education.

As we all know, fair use is non-remunerated — the copyright owner is not rewarded while the fair user is not charged directly. Within the public levy model, every user pays taxes or levies. Certain users “who rarely use networks”<sup>76</sup>, namely, low-volume users, even need to subsidise high-volume users. If everyone is charged for this access to information, where can we see the application of fair use doctrine?

The private contract model may also limit the use of fair use doctrine. For instance, iTunes Terms of Service in US include language which could preclude fair use of downloaded music. §13(a) requires consumers agree that “the service [of the iTunes Music Store], including but not limited to graphics, audio clips, and editorial content, contains proprietary information and material that is owned by Apple and/or its licensors ... and that [they] will not use such proprietary information or materials in anyway whatsoever except for use of the Service in compliance with the terms of this Agreement [the iTunes Service Terms].” According to this provision, the iTunes music is not supposed to be “in anyway whatsoever”, including for fair use purposes.

There is a movement in academia against enforcing public levies or private licensing system in research and education. Massachusetts Institute of Technology (MIT) declaring, “As an educational institution providing its community of users with Internet access, we do not monitor or bar access to use of the Internet. This policy is consistent with MIT’s educational mission and our deeply held values of academic freedom.”<sup>77</sup> Further, Harvard’s Daniel Moriarty, Assistant Provost for Information Technology states, “The resources available through the Internet are an integral part of the academic and extra-curricular activities of students and faculty. Like other universities, Harvard provides network services that allow our community access to these resources. We do not monitor or regulate users’ choices of sites to visit, nor their activities at given sites. A selective ban on access to particular sites based on the content of those sites would be inconsistent with the values of broad inquiry and the exploration of ideas that Harvard, like other universities, has traditionally sought to protect.”<sup>78</sup>

## **6.2 From Open Access Movement**

### ***The Voluntary Model: “Give it Away”***

Another proposal deserving of particular attention suggests to the effect that authors could give away their copyright content for free and make monetary remedy by selling “ancillary services that are not easily duplicated by digital copyists”,<sup>79</sup> also known as the “voluntary model”. Based on the theoretical premises that not all the writers devote themselves fully to money as well as users do “cooperate, self-sacrifice, and provide charitable donations, .... [as well as] pay for products that available free-of-charge”,<sup>80</sup> scholars and researchers worldwide have set up a movement known as Open Access (OA), in order to minimize the limitations presented by traditional licensing in the context of the digital world. A variety of OA policies

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<sup>76</sup> See Neil Weinstock Natenel, *Impose a Noncommercial Use Levy to Allow Free P2P File-Swapping and Remixing*, (Nov. 2002), available at, [http://www.utdallas.edu/~liebowit/knowledge\\_goods/netanal%20levy.pdf](http://www.utdallas.edu/~liebowit/knowledge_goods/netanal%20levy.pdf)

<sup>77</sup> See Trevor Merriden, *Irresistible Forces: the Business Legacy of Napster and the Growth of the Underground Internet*, Capstone Publishing Ltd., Oxford, (2001), at 16-20.

<sup>78</sup> *Ibid.*

<sup>79</sup> See Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DePaul Law Review, (2003), at 1121. See also, Esther Dyson, *Intellectual Property on the Net*, available at, [http://www.eff.org/Publications/Esther\\_Dyson/ip\\_on\\_the\\_net.article](http://www.eff.org/Publications/Esther_Dyson/ip_on_the_net.article).

<sup>80</sup> See Glynn S. Lunney Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 Virginia Law Review, (2003), at 813.

have been endorsed by organisations all over the world. For instance, in the United Kingdom, the Digital Repositories development program<sup>81</sup> consists of 25 projects, aiming to help academic researchers share their work. In Australia, the Australian Partnership<sup>82</sup> project seeks to enhance the operation and development of digital repositories.

Notwithstanding the challenges and concerns presented by the OA licensing model<sup>83</sup>, this voluntary model has some features which are able to serve the application of fair use doctrine. First of all, Open access to scholarly research is beneficial to public interest. Free online availability of information may enhance academic communications, speed scientific discoveries, and promote social progress. Given open access to knowledge, researchers and scholars can reach any article on the website, rather than merely those provided in the particular journal accessible within certain libraries. Research funding agencies have long endeavoured to promote open access to the research they fund and support. For instance, the *U.S. National Institute of Health's Public Access Policy*<sup>84</sup> was put into practice in 2005, which requested medical researchers provide an open access version online. In June 2005, the *Research Council UK's (RCUK's)* published a statement on *Access to Research Outputs policy*,<sup>85</sup> requiring immediate self-archiving through their institutional repositories. In April 2006, the Recommendation A1 of European Commission "*Study on the Economic and Technical Evolution of the Scientific Publication Markets in Europe*"<sup>86</sup> suggested that "Research funding agencies ... should establish a European policy mandating published articles arising from EC-funded research to be available after a given time period in open access archives".

Second, open access benefits users by opening up more information sources. Lack of funds and space makes it impossible for any library to subscribe to every scientific journal, a situation known as "the series crisis"<sup>87</sup>. Open access helps researchers and scholars obtain access to articles or journals that their libraries do not subscribe to. In addition, open access extends the domain of research "beyond academic"<sup>88</sup>. The readers of an open access article can be anyone: a professional in the field, a student, a writer, or anyone who is interested in exploring the topic. For example, I can easily read the scholarly literature about brain tumour research on open access archives, rather than searching hundreds of books in a medical library.

Third, open access helps authors to enhance their research impact. In 2004, Eysenbach compared citations to individual articles published in the journal "*Proceedings of the National Academy of Sciences*" (PNAS) with the ones published on the open access archives. The

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<sup>81</sup> See Digital Repositories Development Program, available at, <http://digbid.com/4fyve>.

<sup>82</sup> See Australian Partnership, available at, <http://www.aprs.edu.au/>

<sup>83</sup> See e.g., some people criticise that the open access license fails to set standard for its terms. (For instance, the CC ReCombo license allows for commercial and non-commercial sampling but prohibits verbatim distribution, while another CC license allows broader freedom but only if it is used in developing countries), while some others question the "commonalty" basis of the OA licensing. (e.g, David M. Berry and Giles Moss, *On the "Creative Commons": a critique of the commons without commonalty*, Free Software Magazine, Issue 5, (June 2005), available at, <http://www.freesoftwaremagazine.com/files/nodes/1155/1155.pdf>. Additionally, some others worry about that the OA licensing will undermine copyright. A license musician, Larry Rosen, complained, "I'm not bothered as much by 'too many notes' as I am by the fact that the notes aren't always in the same key. License proliferation has become an important problem because software under those different licenses cannot always be played consistently and compatibly everywhere. Perhaps ... we should throw out the off-key notes? (Quoted from Nimmer, *Open Source License Proliferation, a broader view*, see supra note 188).

<sup>84</sup> See the *U.S. National Institute of Health's Public Access Policy*, (May 2005), available at, <http://publicaccess.nih.gov/>. (last accessed at 14/02/2007).

<sup>85</sup> See *Access to Research Outputs*, the Research Council UK, (June 2006), available at, <http://www.rcuk.ac.uk/research/outputs/access/2005.htm>. (last accessed at 14/02/2007).

<sup>86</sup> See *Study on the Economic and Technical Evolution of the Scientific Publication Markets in Europe*, European Commission Research Paper, available at, [http://ec.europa.eu/research/science-society/pdf/scientific-publication-study\\_en.pdf](http://ec.europa.eu/research/science-society/pdf/scientific-publication-study_en.pdf). (last accessed at 14/02/2007).

<sup>87</sup> See Lee C.Van Orsdel and Kathleen Born, *Choosing Sides: Periodical Price Survey 2005*, LibraryJournal.com, available at, <http://www.libraryjournal.com/article/CA516819.html>.

<sup>88</sup> See Open Access, Wikipedia, available at, [http://en.wikipedia.org/wiki/Open\\_access](http://en.wikipedia.org/wiki/Open_access).

research showed that between June 2004 and December 2004, open access articles were three times as likely to be cited as non-open access articles.<sup>89</sup>

Compared to business models listed above, the OA licensing system reflects the thought that copyright owners should grant some of their exclusive rights to the public, which substantially promotes public interest by ensuring basic human right of accessing knowledge, and benefits authors as well by allowing wider distribution of their works. Although it is far too early to affirm that open access is the way to solve the fair use problem in file-sharing environment, the voluntary model is worthy of further research, given the fact that the OA system is a potential way to regain balance between social benefits and authors' private interests.

## **7. Conclusion**

As has been outlined in the earliest sections here, it is becoming increasingly problematic to apply fair use doctrine within file-sharing practice. This paper then moves on to examine the public levy model and the private licensing scheme deployed in entertainment industry practice; and explores the side-effects of these two business mechanisms towards negating the application of fair use doctrine. Then, by way of contrast, the voluntary model exemplified by the Open Access Movement is examined, with its potential positive impact on fair use practice. There is no attempt to offer any perfect theory or model for such would surely be premature at this stage given the rapidity of advances in file-sharing technology. Rather, it is suggested that the current direction of relevant case law might be seen as eroding the extent of the "right" to fair use defence, and that the voluntary model might provide a basis for discussion towards restoring an appropriate equilibrium to this doctrine.

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<sup>89</sup> See Gunther Eysenbach, *Citation Advantage of Open Access Articles*, PLoS Biology, (2006), available at, <http://biology.plosjournals.org/perlserv/?request=get-document&doi=10.1371%2Fjournal.pbio.0040157>.