

FAIR USE IN EUROPE?

Lessons from the US and ?s

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A FEW WORDS TO BEGIN

- Thank you for the opportunity to discuss fair use as a limit on copyright worth considering for the EU
- I will not suggest that Germany or any other EU countries should repeal specific exceptions they already have, nor that they should avoid new specific exceptions (e.g., for Internet caching)
- There are, however, some benefits to having fair use to adapt to the unforeseen, unpredictable things, especially as to new technological uses of © works

© THEN & NOW

- The traditional approach to © policy in the int'l arena has been through broad grants of rights, coupled with specific exceptions for particular types of uses or users
- That may have been a fine approach when the world was static, predictable, or slow-to-change
- We are, however, in an era of such rapid and unpredictable technological change that we need some flexibility to be built into © law
- Legislatures can't keep up
- Fair use provided flexibility in US © law
- If Germany & the EU wants to promote innovation and growth in their digital economies, they should consider adopting fair use or some other flexible balancing rule

RULES v. STANDARDS

- Pros & cons of rules v. standards are well-known
 - Rules: predictable, precise, but not adaptable
 - Standards: flexible, adaptable, but not predictable
- © exceptions & limitations (L&Es)
 - Most are rule-like: specify purposes, persons, types of works, &/or context in which use may be exempt
 - Fair use (FU) is canonical standard
- Rules tend to work best when environment is stable and effects are predictable, but standards may be useful in era of rapid change
- Mixture of rules & standards for L&Es may be desirable, so don't repeal existing L&Es

FAIR USE ISN'T THE ONLY WAY

- Gower Commission Report in UK: need for exception for creative transformative uses such as UGC
- Hargraeves Report in UK: proposes an exception to accommodate future technological advances, plus specific one for nonconsumptive research
- Wittem Group proposed EU © code: numerous purpose-based specific exceptions, “or other analogous uses”
- Hugenholtz & Senftleben: adapt 3 step test as flexible exception
- Weatherall Australian Digital Alliance report proposes a series of additional exceptions for online caching, web hosting, UGC & platform, search engine operations, although she also argues for fair use

INT' L INTEREST IN FAIR USE

- Israel has adopted a fair use provision, so has Korea
- Canadian fair dealing provision has been construed fairly broadly in recent years
- Dutch Parliament has endorsed the need for some fair use type of limit on ©
- Irish consultation paper asks for comments about fair use
- Australia law reform commission reconsidering © L&Es, including possible fair use rule
- Japanese © scholars are urging adoption

FAIR USE FOSTERS NEW TECH

- *Sony v. Universal*: fair use to make time-shift copies of broadcast TV programs
 - Important because Betamax VCR had SNIU
- *Galoob v. Nintendo*: lawful to sell Game Genies because this add-on program allowed consumers to make fair uses of Nintendo games
- *Kelly v. Arriba Soft*: fair use for search engine to display thumbnail-sized images of photographs & link to website
- *Field v. Google*: fair use to spider, cache, index open website contents
- *Vanderhye v. iParadigms*: fair use to scan student papers for processing in plagiarism detection software system

NEW TECH W/O LITIGATION

- *Sony* → “rip, mix, burn” music from CDs to hard-drives or iPods is OK as format-shifting, as is:
 - Cloud computing storage of music, photos, etc.
 - Slingbox to watch TV programs remotely
 - Backup services for personal computers
 - User generated content (UGC) on sites such as YouTube
- *Kelly & Field* → Internet Archive’s wayback machine
- *Galoob* → many add-on programs; ClearPlay’s filtering program for “family-friendly” movies
- *iParadigms* → scholarly data-mining in GBS

OTHER PRO-FU CONCERNS

- Avoids battles in very busy legislatures
- More substantive analyses of issues likely in courts
- Allows the interests of newcomers to the © scene to be taken into consideration
 - Those who were not at the bargaining table when deals were cut for legislative solutions
- Way to cure market failures
 - Wendy Gordon proposed as to *Sony v. Universal*: costs of clearing rights to make time-shift copies of TV programs too high to form market, so use should be fair
 - One of Google's best arguments in the *Authors Guild* case: too costly to clear rights on book-by-book basis for purposes of indexing contents & making snippets available

PRO-FAIR USE FACTORS

- Limits potential for “© trolls” to exploit gaps in law
- Lends greater credibility to © law, breeds more respect among the public
 - Specific exceptions make sense when © affects only a small number of players whose uses are stable
 - When © law applies to virtually every type of computer use of content, law has to make sense to those it regulates
 - Fair use is something ordinary people can grasp better than a large number of specific exceptions that might apply to daily life of ordinary people

U.S. FAIR USE

- Judge-made doctrine initially, but codified in © Act of 1976
- Fair use is not infringement—period!
- 4 factors including (but not limited to):
 - Purpose of defendant's use
 - Nature of ©'d work
 - Amount & substantiality of taking
 - Harm to actual or potential markets for the work
- Favored purposes: criticism, comment, news reporting, scholarship, research, teaching

MAIN ARGUMENT vs. FAIR USE

- Focuses on claims that FU is unpredictable
 - Case-by-case adjudication
 - Very fact-specific, so difficult to generalize
 - Litigation is costly way to get to “right” outcome
 - True that some decisions are difficult to reconcile
- But fair use is not as unpredictable as many have suggested, as *Unbundling Fair Uses* shows
 - Empirical study of > 300 fair use opinions
 - Fair uses fall into policy-relevant clusters
- Even where it is unpredictable, that’s not nec’ly a vice
 - © owners face risk of losing so cutting edge uses may be tolerated and become viewed as fair (e.g., UGC)

U.S. FAIR USE CASE CLUSTERS

1. Free speech/expression uses
2. Authorship-promoting uses
3. Learning-related uses
4. Personal uses
9. Investigative/adjudicative fair uses
10. Access to information promoting uses
11. Competition/innovation promoting uses
12. Technologies for facilitating personal uses

L&Es

- Some of what fair use does in the U.S., EU countries do through specific L&Es:
 - Decompilation privilege for SW
 - Parody, satire exceptions
 - Format- and time-shifting exceptions
 - Private study or research
 - Quoting for criticism or review
 - Uses in giving legal advice
- U.S. fair use is more flexible for unforeseen acts
- Yet U.S. also has specific exceptions for educational, library uses, etc. so fair use does not supplant need for specific L&Es

CLUSTERS CLUSTERED

- Those serving six favored purposes:
 - Free speech/expression (criticism, news)
 - Authorial (comment, scholarship)
 - Learning (teaching, research)
- Other foreseen uses
 - Personal uses
 - Litigation/investigation uses
- Unforeseen uses
 - Search engine copying to index
 - Reverse eng'g to achieve interoperability
 - Regulating personal use-facilitating technologies

WHERE CASES FALL

- Overwhelming majority of cases were in the free speech & authorial use clusters
 - Generally these types of uses were fair except when D took too much or invaded core licensing market
- Very few cases have involved research/scholarship/teaching or personal uses
 - Deep splits in the existing cases
- Numerous cases in which FU balanced interests as to uses not foreseen by Congress
- Litigation/investigation cases more common than expected

FREE SPEECH USES

Critical transformations

- *Campbell v. Acuff Rose*: rap parody version of “Pretty Woman” song was fair use as critical commentary
- *Suntrust v. Houghton Mifflin*: Wind Done Gone retold Gone with the Wind story from slave’s perspective

Productive uses in critical commentary

- *New Era v. Carol Pub’g*: critical biography quoted from L. Ron Hubbard’s works to prove points

News reporting

- Favored use but not if systematic appropriations, cut into core licensing market, or wrongful acts

AUTHORIAL FAIR USES

- Most cases involve 2nd author drawing from 1st
 - Category bleed with free speech/expression?
 - Yes, perhaps, but some authorial uses are OK even if not compelled by the 1st A; non-critical uses grouped here
- Transformative adaptations:
 - *Blanch v. Koons*: painting riffed on fashion photo
- Productive uses (often iterative):
 - Quoting to illustrate phenomenon or prove a point
 - Quoting to set historical context
 - Incidental uses (e.g., song captured in background)

OTHER AUTHORIAL USES

- Other (often iterative) copying
 - Research copying to prepare new work
 - Private copying to learn techniques
 - Making an archive or portfolio of author's own work (if assigned © to others)
 - Enter work into design contest
- Other factors:
 - Customary practices in authorial communities should be given deference
 - Attribution may weigh in favor of FU

LEARNING & PERSONAL USES

- Research, teaching & scholarship are favored uses, even when they do not immediately yield new works of authorship
- Very little litigation in this area in the U.S.
- Caselaw is deeply split, so difficult to generalize
 - Williams & Wilkins (4-3 in CAFC, 4-4 US SCT)
 - AGPU v. Texaco (2-1 in 2nd Cir.)
 - Unsurprising given that deep divides on this for 50 yrs; Congress & courts unable to resolve
 - Publishers' suit vs. Ga State over course reserves
- Deep split also as to personal uses

RESEARCH PHOTOCOPYING

NIH & Texaco argued:

- + research; customary
- + technical/factual
- + small # of articles;
small % of journals
- 0 already buy multiple
copies of journals
(implicitly paying for);
- Publishers making \$\$\$
- Authors would favor

W&W & AGPU argued:

- Consumptive, non-
transformative use;
proliferation of copies
- + technical/factual
- Whole work
- New licensing
markets possible
(mkt failure cured!)

TIME-SHIFT COPYING

Sony majority (5-4):

+private/noncommercial

+ shown for free on
broadcast TV

0 time-shift copies
typically erased

+ no harm to date; harm
in future speculative

Sony dissent:

- Consumptive;
nonproductive
- Creative expression
- Whole works
- Presume harm
- Market for licensing
will develop; levy on
VCRs for © owners

TRANSFORMATIVE USES

- *Campbell v. Acuff Rose*: parody likely to qualify as fair use because of transformative purpose
- Second work is transformative if “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message”
- 3 types:
 - Transforming expression (e.g., parody, UGC)
 - Productive use (e.g., quoting to support thesis)
 - Orthogonal uses (e.g., search engine thumbnails)
- © owners are not entitled to control all transformative use markets

RATIONALES FOR FAIR USE?

- EU nations will have to think about this if they move forward with fair use for its © law
- Latman study in U.S. in mid-1950' s:
 - Implied consent of author (e.g., quote to review)
 - Reasonable authors would consent to use
 - Bargain theory
 - In exchange for ©, authors have to allow FU
 - Reasonable & customary uses lawful
 - FU promotes constitutional purpose
 - Necessary to promote progress of science...
- All but the latter have fallen out of fashion in US

OTHER FU RATIONALES

- Appropriate way to address market failure
- Promotes semiotic democracy, social dialogue among works, authors, and the public
- Necessary limit to ensure that © does not stifle the very progress it was designed to promote
- Necessary for compatibility with free speech
- Necessary to promote ongoing innovation
- These seem right but incomplete to me
 - May explain some parts of FU, but not the whole

MY THEORY OF FAIR USE

- US constitutional purpose of © is to promote progress of science for the benefit of public
 - Exclusive rights granted to authors are primarily intended to promote public access to and use of original works of authorship
- Public should be free to access, interact, and reuse ©'d works unless those uses pose a meaningful likelihood of harm to authorial incentives to create works in 1st place
- This conception of fair use encompasses all flavors of fair use, not just those affecting free speech or authorial reuses of parts of older works in creating new works
- Fair use is essential to a well-functioning copyright system that serves this constitutional purpose

ADAPTING FAIR USE TO EU

- Purpose of the use, amount of taking, & harm to the market for the work seem appropriate factors to balance in any flexible limit on ©
- EU might want to give more weight to other factors, especially whether the second comer provides attribution to the author of the underlying work or has expressed a willingness to pay a license fee
- What are customary uses in different authorial communities?

MAKING FAIR USE MORE PREDICTABLE?

- Not suggesting that Germany or other nations adopt US fair use & all of its precedents
- National policymakers could provide examples of types of uses that should be fair or unfair
- Best practices guidelines could be developed for specific creative communities
- Fair use opinion letters or low cost fair use adjudication proceedings can help
- Propose more or different factors

CONCLUSION

- Fair use has been especially valuable tool in past few decades to help U.S. courts adapt © to challenges posed by new technologies
- Germany & other EU nations need something like fair use to adapt their © laws in era of rapid change too
- It would not be an outlier in int'l © if it adopted fair use or similar flexible doctrinal tool
- EU digital economies are more likely to grow if local entrepreneurs know it is possible to make a case that their new uses are fair
- We Americans (except USTR) would welcome the competition from EU fair users