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 & Senflteben: 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. Hougton 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