

## **Session 4: Fair use and fair dealing: a flexibility.**

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# FAIR USE AS A FLEXIBLE BALANCING TOOL FOR THE INTERNET AGE

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APEC Workshop on © Exceptions  
April 2, 2012

## A FEW WORDS TO BEGIN

- Thank you for the opportunity to discuss fair use as a flexible tool for adapting © law in an era of rapid change
- This talk will not suggest that APEC economies should repeal specific exceptions they already have, nor that they should avoid new specific exceptions (e.g., for Internet caching)
- I will suggest there are 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 APEC economies want to promote innovation and growth in their digital economies, they should consider adopting fair use or some other flexible balancing rule

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## 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

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## 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
- Witter 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

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## INT'L INTEREST IN FAIR USE

- Israel has adopted a fair use provision
- 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

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## 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

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## 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

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## 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

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## 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

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## 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

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## 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)

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## U.S. FAIR USE CASE CLUSTERS

1. Free speech/expression uses
2. Authorship-promoting uses
3. Learning-related uses
4. Personal uses
5. Investigative/adjudicative fair uses
6. Access to information promoting uses
7. Competition/innovation promoting uses
8. Technologies for facilitating personal uses

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## APEC L&Es

- Some of what fair use does in the U.S., APEC economies 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

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## 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

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## 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

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## FAIR USE & FREE SPEECH

- SCT has opined that © is compatible with 1<sup>st</sup> A free speech/expression norms in part because of fair use as limit on scope of ©
- Free speech/expression values most evident in cases where plaintiff is trying to suppress critical commentary
  - *Nordstrom v. PARAN*: protestors used photo from ad in criticizing N for racial insensitivity

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## 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

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## AUTHORIAL FAIR USES

- Most cases involve 2<sup>nd</sup> author drawing from 1<sup>st</sup>
  - Category bleed with free speech/expression?
    - Yes, perhaps, but some authorial uses are OK even if not compelled by the 1<sup>st</sup> 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)

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## 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

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## 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 2<sup>nd</sup> 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

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## 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!)

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## 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

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## 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

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## RATIONALES FOR FAIR USE?

- APEC economies 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

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## 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

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## 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 1<sup>st</sup> 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

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## BENEFITS OF CLUSTERS

- Preserves the vaunted flexibility of fair use
- But it also shows that fair use is more predictable & coherent than some have said
- Fair use provides needed flexibility and adaptability in © because policymakers can't anticipate all new uses of ©'d works, let alone craft appropriate rules to regulate those uses
  - Advances in technologies frequently raise questions policymakers couldn't anticipate (e.g., VCR time-shifting, linking, framing, thumbnails)

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## CAN YOU MAKE FAIR USE MORE PREDICTABLE?

- Not suggesting that APEC economies adopt US fair use & all of its precedents
- APEC domestic 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 than in US law
  - Reasonable and customary uses within creative communities  
OK
  - Harm to actual or foreseeable markets, not to any potential one

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## CONCLUSION

- Fair use has been especially valuable tool in past few decades to help U.S. courts adapt © to challenges posed by new technologies
- APEC economies 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
- APEC 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 APEC fair users

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# Fair Use in the United States

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and Limitations



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## Fair Use Under U.S. Law

- Flexible and open-ended doctrine
- Traditional and important component of U.S. copyright law
- Fact specific application
- Codified, but remains an evolving common law doctrine



## Fair Use – 17 U.S.C. § 107

- “Fair Use” is “not an infringement of copyright.”
- Preamble to the four factors lists certain uses:
  - Criticism,
  - Comment,
  - News reporting,
  - Teaching,
  - Scholarship, or
  - Research.

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## Four Factor Test

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.
  - The court may consider additional factors.
  - It is an evolving doctrine.

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## Purpose and Character of the Use

- Commercial/non-commercial distinction
- The new “trend” in fair use analysis -- is the new use “transformative?”

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## Nature of the Work

- More leeway for fact based works
- Has the original work been published
- Probably receives the least amount of attention of the four statutory factors

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## Amount of the Work Used

- Fair use can be found even where the entire work has been copied (Sony Case)

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## The Effect of the Use

- No longer “the most important factor”
- Still generally entails the bulk of a court’s overall analysis
- Courts will examine a range of considerations under this factor (ability to replace the original, readily available licensing mechanisms, how easily available is the new use, etc.)

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## The Benefits of a Flexible and Evolving Doctrine

- “[P]ermits courts to avoid rigid application of the statute when, on occasion, it would stifle the very creativity . . . [fair use] is designed to foster.”
- Domestically, the fair use doctrine also reduces the need for the political branches of our government to weigh in on the fair use or exceptions/limitations controversies du jour.
- Properly implemented, a fair use mechanism can produce a somewhat consistent, but still flexible system for addressing disputes that may lie at the outer edges of copyright protection

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## Recent Fair Use Jurisprudence in the Digital Environment

- Search engine indexing (accepted)
- File Sharing Defense (rejected)
- Plagiarism Detection Services (accepted)
- The Authors Guild v. Google (perhaps a major pronouncement on fair use if the court ever addresses the underlying merits of the lawsuit)

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## Conclusion

**THANK YOU FOR YOUR TIME AND  
ATTENTION!**



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# Fair Dealing in Chile: New Approach to Copyright

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APEC Workshop on Copyright Exceptions and Limitations

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**April 2, 2012**

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## Initial Comments

- **Presentation of Professor Samuelson**
  - Fully agree with statement on fair use. Digital and information age: balance between specific exceptions and limitations and a broader fair use exception
  - New technologies arrive every day (search engine, cloud computing). Congress cannot keep up the pace. Then? Will we not allow nor embrace new technologies because of their threat to copyright?
  - What about freedom of expression? Parody, satire?
  - Importance of reverse engineering for the development of new technologies.
  - Internet, new technologies, new ways to develop and distribute content.

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## Copyright Law In Chile

- May 2010, Chile Copyright Law Mayor Amendment
  - Implement Trips, WIPO Treaties and US-Chile FTA (Trip Plus). Enforcement, E&L, arbitration royalty panel and ISP limitation of liability
  - Bill submitted in 2007. No agreement on having more E&L nor (for sure) on having a general fair use exception.
  - Copyright meant protection for copyright owners only. Only one industry, the copyright industry. Unthinkable of having a fair use industry or having a public domain approach.
  - *Berne Convention: 3 Steps Rules: 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*

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## Copyright Amendment In Chile

- Against the Berne Convention 3 Step Rule interpretation (special cases, no conflict with normal exploitation and no unreasonable harm)
  - WIPO Copyright Treaty (agreed statement concerning article 10) and US Chile FTA (footnote 17 related to Article 17.7(3))
    - To permit to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.
    - To permit to devise new exceptions and limitations that are appropriate in the digital network environment.
  - Plus freedom of expression. Extreme protection could affect freedom of expression.

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## Copyright Amendment In Chile

- New vision in a law, where there were only a couple of E&L: (a) right to quote; (b) demo exception (TV & radio); (c) Architectural works and (d) family private use.
- Civil society and non profit groups heavily involved during the review of the bill.
- Great oppositions from traditional sectors such as performance right organization, IFPI and others.
- Finally, agreement among the government, the industry and civil society, good balance between copyright protection and access to information and works.

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## Chile: Exceptions and Limitations

- Exceptions and Limitations (Rules + Flexibility)
  - Rules:
    - Quote exception,
    - Impaired people,
    - Non profit libraries and archives and education, and
    - Non profit use by family group and non profit entities.
  - Flexibility:
    - Reverse engineering and interoperability,
    - Incidental temporary reproduction,
    - Parody and satire exception, and
    - Incidental use exception

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## Chile: Exceptions and Limitations

- Software Exceptions (article 71 ñ)
  - Adaptation and back up copy (already in the law)
  - Reverse engineering on a legally obtained copy for the sole purposes of (i) achieving interoperability or (b) for research and development purposes.
    - The information thus obtained cannot be used to develop or sell a similar computer program in infringement to the law.
  - Security Testing
- Incidental temporary reproduction (Article 71 O), which are integral and essential part of a technological process to enable lawful transmission in a network, without economic significance
- Parody or Satire (71 P), when the parody or satire constitute an artistic contribution different from the work subject to parody and satire

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## Incidental or Fair Use Exception

- Article 71 Q. *“The incidental and exceptional use of a protected work for criticism, commentary, caricature, teaching, academic or research interests is lawful, as long as such use does not constitute an exploitation of the work.”*
- Influence: Section 107 of the Copyright Act and the Berne Convention 3 step rule.
- Meaning of incidental? Quantity or quality?
- Meaning of exceptional use?
- Meaning of exploitation? For profit only?

FINAL COMMENTS

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Limitations

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