Copyright in the Digital Age:
Access to Information and Knowledge

Fair Use For All and the
Blurred Lines of Copyright

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Overview

• Fair Use and Fair Dealing - What they are, their popularity, and their utility

• Civil Law and Common Law - their alleged differences and actual similarities

• Blurred lines - the ways that civil and common law systems are similar, especially for copyright

• Fair Use is predictable and useful for people, commerce and libraries
Fair Use, Fair Dealing, and Open Norms in Copyright

- Open norms: flexible standards for use without permission in situations not limited by particular purpose, context, portion, number of copies, etc.

- Contrast to a closed list of exceptions for specific purposes such as library preservation.

- Fair dealing: for certain purposes (research, private study, teaching, quotation, etc.)

- Fair use: Not a “closed list” of purposes — law says purposes “such as criticism, comment,” etc., leaving open possibility of other uses qualifying
Growing Enthusiasm

• More and more countries are adopting open norms, or using more flexible interpretations of existing provisions

• 40 countries, over 1/3 of the world’s population, have flexible norms in their law

• This includes countries like Taiwan and Korea, with so-called “civil law” or “Roman law” traditions
Fair Use and Fair Dealing Around the World

Based on Band & Gerafi, The Fair Use/Fair Dealing Handbook; map prepared by Amy Bulgrien.
The Utility of Open Norms

- Adapt to new technology - the VCR, the Internet
- Adapt to new cultural practices - mash-ups, blogs
- Not beholden to particular negotiated political deals - narrow exceptions extracted from powerful interests
- Weighs the interests of the public
Civil Law and Common Law

• Common law traditions (UK and former colonies) give independent legal authority to judicial decisions ("precedent"). Lower courts are bound by prior decisions of higher courts.

• Civil law traditions give primacy to the written law, or Code. Judges explain decisions by reference to the Code, and are not bound by decisions of other courts.

• Stereotypes:
  • civil law systems are highly formalized and codified in detail
  • common law systems are more broad and general; authority is delegated to judges to develop the law over time
Civil Law and Common Law

• In reality:
  • Civil law judges read each other’s opinions (and the opinions of courts in other countries) and are often persuaded/influenced by them
  • Civil law judges apply broad laws to specific facts all the time
Blurred Lines

• Copyright protects expression, but not ideas - in civil and common law countries

• Line between these is notoriously obscure - Judge Learned Hand:

  • “Nobody has ever been able to fix that boundary, and nobody ever can.”

• BUT civil law judges must do this ALL THE TIME!
Blurred Lines

• Beyond copyright:
  • Negligence - unreasonable risk of harm, etc.
  • Unfair competition
  • Even “very small text fragments” in German law - how many words? Seven?
Blurred Lines

• Many civil law countries already have flexible factors in their exceptions - two steps from Berne three-step test must apply in each case where specific exceptions are applied

• No conflict with normal exploitation of the work

• Does not unreasonably prejudice legitimate interests of rights holder
Predictable Fair Use

- Several categories of use have now emerged as clearly fair use, and people in the US rely on them every day
  - Search engines and text mining
  - VCRs, DVRs, and time-shifting
  - Parody and criticism
  - News reporting
  - Reverse engineering
  - Excerpts for teaching
Lawsuits?

• No more common than in other parts of US law - we just like to sue each other!

• In areas where fair uses are well-established, aggressive suits are treated as frivolous

• Reversals in edge cases don’t prove uncertainty at core.
Fair use for libraries

- Libraries in the US use fair use to:
  - Digitize special collections
  - Support teaching and learning
  - Preserve at-risk works
  - Make works accessible to disabled people
  - Mount exhibits
More Resources


• Fair Use/Fair Dealing Handbook (Band & Gerraffi)

• Fair use in the US economy. Economic contribution of industries relying on fair use 2011 (Computer & Communications Industry Association)

• Fair Use in Europe: In Search of Flexibilities (Hugenholtz and Sentfleben)

• infojustice.org
Thank you.

Questions?