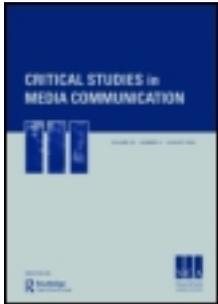


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Fair Use Goes Global

Peter Decherney

For 150 years, fair use was a solely American doctrine. But in the 1990s and 2000s, the Philippines, Israel, and South Korea all adopted American-style fair use. Since then, debates have erupted over whether or not to introduce fair use into the copyright laws of a half dozen additional countries, including the Netherlands, Canada, the United Kingdom, Japan, and Australia. Why is fair use going global? What do innovators, scholars, and legislators see in the fair use doctrine? And what is tipping the scale in favor of or against fair use? We don't yet know whether the global fair use movement will fizzle out or take over world intellectual property regimes. But looking at the debates over the global spread of fair use, even at this early stage, tells us a lot about digital media's challenge to the regulation of both technological innovation and online expression.

Keywords: Copyright; Fair use; Global; Policy; Law

For 150 years, fair use was a solely American doctrine. But in the 1990s and 2000s, the Philippines, Israel, and South Korea all adopted American-style fair use.¹ Since then, debates have erupted over whether or not to introduce fair use into the copyright laws of a half dozen additional countries, including the Netherlands, Canada, the United Kingdom, Japan, and Australia. Why is fair use going global? What do innovators, scholars, and legislators see in the fair use doctrine? And what is tipping the scale in favor of or against fair use? We don't yet know whether the global fair use movement will fizzle out or take over world intellectual property regimes. But looking at the debates over the global spread of fair use, even at this early stage, tells us a lot about digital media's challenge to the regulation of both technological innovation and online expression.

Fair Use Today

Fair use, simply, is the exception that allows for the reuse of copyrighted material without permission—at least in certain situations. I frequently hear the perpetuation

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of myths like “all commercial uses are not fair uses” or “all educational uses are fair uses.”² Neither proposition is true, and just about any sentence that begins with the word “all” is doomed to represent a fallacy about fair use. Fair use is widely misunderstood in part because it refuses to stand still. Especially since the 1990s, fair use has changed dramatically. Case law regarding the reuse of copyrighted work has shifted from emphasizing the market impact to the purpose of the reuse. Second Circuit Court of Appeals Judge Pierre Leval first labeled this interpretation of the fair use doctrine “transformative use,” (Leval, 1990) and the phrase has caught on. The Supreme Court relied on the transformative use test in its 1994 *Campbell v Acuff-Rose* decision (510 U.S. 569), and ever since fair use determinations have increasingly hinged on the extent to which works repurpose and recontextualize the copyrighted material that they quote.

Examples of transformative use include playing an excerpt of a popular song during a public lecture about music, quoting snippets of news articles in search engine results, and reediting a television episode to highlight the activity of a minor character. In all of these examples, the quoted work is being used for a new purpose: a popular song is used for education instead of entertainment, excerpts of news stories are displayed to help users find the best information, and a reedited television show comments on popular culture. These uses are likely to be fair uses even if there is a commercial aspect to their use. Indeed, many landmark fair use cases involve commercial uses, since it is large companies that have the motivation and means to litigate.³ From the development of technological giants like Google to the fan-made mashup videos that draw millions of viewers to video sharing sites, fair use has been a major driver of internet technology, culture, and commerce. And policy stakeholders in many countries have seen an innovation gap created by their lack of a fair use provision.

Exporting Silicon Valley

Is the spread of fair use just another American export in a globalized economy, like Starbucks or Lady Gaga? To hear United Kingdom Prime Minister David Cameron talk about fair use, you might think so. In the wake of the 2008 financial crisis, Cameron’s government looked for ways to stimulate the British economy, and it settled on a plan to emulate the success of Northern California’s Silicon Valley. Silicon Valley had already spawned competitors in Bangalore, India; Daejeon, South Korea; and Zhongguancun, China, among other cities that claimed the “Silicon Valley of” mantle for their region. Cameron wanted the Shoreditch section of east London to be next in line, the first British “Silicon Roundabout.” Clearly a devotee of social theorist Richard Florida’s work on the creative class and urban renewal (Florida, 2002), Cameron pointed out that Shoreditch already had the bohemian culture that seems to be a prerequisite for a tech boom. Cameron planned to introduce the necessary policy overhauls as well, including immigration reform and, yes, fair use (Cameron, 2010). Cameron expressed concern that Google could not have been started in the U.K.,

because its indexing of the web relies on fair use. “Over there,” Cameron said referring to the United States,

they have what are called “fair-use” provisions, which some people believe gives companies more breathing space to create new products and services. So I can announce today that we are reviewing our [intellectual property] laws, to see if we can make them fit for the internet age. I want to encourage the sort of creative innovation that exists in America. (Cameron, 2010)

Fair use has indeed allowed for the creation of new technologies from the VCR to the iPod to the still controversial Slingbox set top devices that bring digital video to phones and tablets. U.S. copyright law has aided in the development of these technologies, because it provides what Google copyright lawyer Fred von Lohmann calls “fair use startup capital.” (von Lohmann, 2008). Fair use acknowledges that innovation requires the ability to build on existing technologies and find creative ways of distributing and reusing media. Debates about how to measure the contributions of fair use and the copyright industries to the U.S. GDP will continue to rage (World Intellectual Property Organization, 2012; Rogers & Szamoszegi, 2010), but it is clear that fair use has created entire new industries and greatly expands the reach of existing media companies. The paradigm here is, of course, the VCR which appeared first as a threat to and then the savior of Hollywood (Decherney, 2012). It is not surprising that the first two countries outside the U.S. to adopt fair use are also two of the most active innovators in the field of digital technology: Israel and South Korea. Israel has been dubbed the “startup nation,” because it hosts more tech startup companies per capita than any other country. From text messaging protocols to semiconductor chip design, it is difficult to use a cell phone or computer without relying on a technology developed in Israel. Fair use is also in line with many of the organizational structures of Israeli high tech companies, as Dan Senor and Saul Singer have described them. Israel’s tech companies, in particular, tend to be non-hierarchical, focusing on bottom up innovation and collaborative problem solving (Senor & Singer, 2009). Fair use embodies a related collaborative ethos. It is premised on the idea that a bit of permissionless reuse facilitates the generation of new ideas and expands markets for all, where a closed permission-based society thwarts new entrants with little power or capital.

South Korea has also been a leading developer of digital technologies and internet policy innovations. The Korean government jumpstarted its tech boom by building out a large and superfast broadband network in order to spur the development of internet technologies and speed up their adoption among consumers. Both goals seem to have been met successfully. One recent study, for example, ranked Korea first in “digital natives” with 99.6% of Korean young people active internet users for five or more years (Pfanner, 2013). As the Korean government provided a shared broadband infrastructure—a commons—on which its citizens could deploy and access new technologies, it has adopted fair use with the expectation that a certain amount of shared infrastructure is part of a successful climate for innovation.

David Cameron’s “Silicon Roundabout” speech did lead to two large-scale studies of the United Kingdom’s intellectual property laws, the Gowers Review of Intellectual Property (2006) and the Hargreaves report (2011). The recommendations from those studies call for some far-reaching reforms, though they ultimately reject the adoption of fair use, because they claim it is incompatible with existing U.K. law. Moreover, the Hargreaves report downplays the importance of fair use, noting that “Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to IP law” (Hargreaves, 2011, p. 45). Perhaps the report is correct, but just because the U.K. cannot reproduce every aspect of Silicon Valley’s success is not a reason to reject one ingredient of the recipe. It is interesting to note that although Shoreditch has developed into a kind of “Silicon Roundabout,” Google, Facebook, and other U.S. companies—many deeply reliant of fair use—tend to dominate it.

Freedom to Mashup

In addition to facilitating high tech development, fair use has a long history of promoting free speech and debate in the U.S, a function that has become especially apparent since the advent of YouTube, iTunes (think podcasts and iTunes U), and other media sharing outlets. During the 2008 presidential election, for example, both the Obama–Biden and McCain–Palin campaigns employed their YouTube channels to reach voters and quickly respond to their opponents, often invoking fair use when excerpting news reports and speeches. In a letter to YouTube, the General Counsel of the McCain–Palin campaign defended the campaign’s videos as “paradigmatic examples of fair use,” while expressing frustration that copyright holders kept asking to have them removed (Potter, 2008). Scholars and legislators in the Netherlands and the European Union more generally have begun to worry that without fair use an expression gap is developing in addition to an innovation gap. Without fair use, Europeans are not able to participate fully in the growing public sphere of debate on YouTube, Vimeo, and other sharing networks. Intellectual property expert Bernt Hugenholtz has been one of the leading voices in favor of importing fair use to the EU. Hugenholtz has worried about the inability of EU citizens to take part in the important discussions occurring online. Many of the videos we find [on YouTube], he writes,

are creative remixes of material protected under copyright. They’re mostly for laughs or political commentary ... If we applied the law today strictly, we would not be allowed to do these things [in Europe] ... Freedom is a good thing ... But in Europe, where we do not have open norms like the fair use doctrine in the United States, we can’t do these things without infringing the law. (Hugenholtz, quoted in Chesal, 2012)

Hugenholtz is well aware of the complications of harmonizing fair use and European intellectual property directives. Nevertheless, he argues that, “[t]he current lack of flexibility in [EU] copyright law undermines the very fundamental freedoms, societal

interests and economic goals that copyright law traditionally aims to protect and advance” (Hugenholtz & Senftleben, 2011). Copyright, in other words, should promote rather than deter creative production, and copyright law has historically been updated to accommodate new modes of creativity (Decherney, 2012).

Just as fair use creates a form of startup capital for technology businesses, it underpins modes of expression that are becoming important outlets for political speech online. And governments that do not want their citizens to be left out of the conversation will have to seriously consider developing a fair use standard. Another option is to create specific statutory exceptions for important modes of expression like parody or online platforms like YouTube. But creating narrow exemptions has proven to be politically controversial, and the legislative process is destined to lag behind innovation in cultural expression.

What’s Not to Like?

If it promotes the development of new technologies and creative expression, what is not to like about fair use? A common concern is that fair use in the United States has had over a century and a half to evolve. Fair use, like other case law, is built on example, and moving from no fair use one day to active fair use the next might cause chaos and confusion. This has been a concern of the Motion Picture Association of America—never fair use’s biggest cheerleader—and the organization has warned the Australian government about this issue in an official comment on their deliberations about adopting fair use (Motion Picture Association of America, 2013).

Luckily, we already have two examples of countries, Israel and South Korea, that have adopted fair use standards. One phenomenon that we can identify is the replaying of American fair use cases, though often with culturally specific facts and conclusions. In Israel, for example, all uses of copyrighted material that claim fair use must also include attribution of the original work. Attribution is not a requirement for fair use in the United States. This adaptation of fair use draws on the rights of attribution present in continental moral rights as well as the ancient Jewish exegetical insistence on citing the authorities that scholars respond to and comment on.

One Korean fair use case in particular seemed to replay a highly publicized U.S. case. In the Korean case, a music label sent a takedown notice to a man who posted a video of his son imitating a popular dance from a K-pop music video. (K-pop is an abbreviation for the South Korean popular music movement brought to international attention by Psy’s song “Gangnam Style.”) This fair use case involved a boy imitating a widely parodied “chair dance” from the video for musician Son Dam-bi’s song “Crazy.” The boy’s father brought the case to court, filing for a declaratory judgment—a ruling on copyright holder’s claims that his son’s dance required permission. It is a case that reminded some of a U.S. case involving a YouTube video of a young boy dancing to the Prince song “Let’s Go Crazy” (*Lenz v Universal*)—even the song names—“Crazy” and “Let’s Go Crazy”—were uncannily similar. The Prince case is still being litigated, but so far courts have found it to be a clear fair use. In the Korean case, the court strongly agreed. “If this kind of User Generated Content is barred

from uploading online,” the judge wrote, “it results in a unnecessarily excessive restraint on the free expression.” The Korean court also ordered the copyright holder to pay the father for “mental damages suffered from the takedown” (Masnick, 2010). Again, we see fair use emerging as an important engine for new genres of expression in online environments. And we see that countries new to fair use have been able to forge their own models of the doctrine, promoting cultural specific values.

Googlization, Good or Evil

The global spread of fair use may tell another story as well, one of money and power. Media scholar Siva Vaidhyanathan warns us about the potential “Googlization of Everything” (Vaidhyanathan, 2011), and cynics might see the global spread of fair use as simply another front in Google’s takeover of the digital world. Google has been a strong proponent of fair use, which underlies much of its business model and functionality from its search engine to YouTube. And Google has continually been thwarted by copyright law outside the United States (see, for example, Carr, 2012). In response, Google has greatly expanded its lobbying offices both inside and outside the United States and Google’s lobbyists and legal teams have actively advocated for fair use internationally. Google is certainly one force behind the globalization of fair use, and their attention is obviously self-interested. But it may be an instance in which Google’s self-interest is in line with a policy initiative that supports the next wave of global technological, political, commercial, and artistic innovation. In any case, we have a rare opportunity to follow the diffusion of the global fair use experiment and measure the value of fair use for countries that adopt it, for countries that reject it, and for the control group, the United States.

Notes

- [1] While the Philippines does have a fair use standard, it seems to be largely dormant.
- [2] See, for example, discussions of fair use on Quora.com.
- [3] See, for example, *Suntrust v Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001), and *Bill Graham Archives v Dorling Kindersley*, 448 F.3d 605, (2d Cir. 2006).

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