

# Fair Use For All and the Blurred Lines of Copyright

Brandon Butler  
Practitioner-in-Residence  
American University Washington College of Law  
EIFL Webinar Oct. 28, 2015

# 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 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

# 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

- US case involving Marvin Gaye song “Got to Give It Up” and Robin Thicke/Pharrell Williams hit “Blurred Lines.”
- Songs had elements in common - cowbell, rhythm of bass line, sparse arrangement - but were these expressions or ideas?
- Experts disagreed, but most said “ideas”; court decided the opposite - Thicke/Pharrell had infringed! Millions of dollars on the line.

# 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

- Blog Fair use, open norms and blurred lines between common law and civil law, Brandon Butler - [http://www.eifl.net/blogs?field\\_programme\\_tid\\_1=303](http://www.eifl.net/blogs?field_programme_tid_1=303)
- EIFL Draft Law on Copyright
- Fair Use/Fair Dealing Handbook (Band & Gerraiffi)
- Fair Use in Europe: In Search of Flexibilities (Hugenholtz and Sentfleben)
- [infojustice.org](http://infojustice.org)