

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

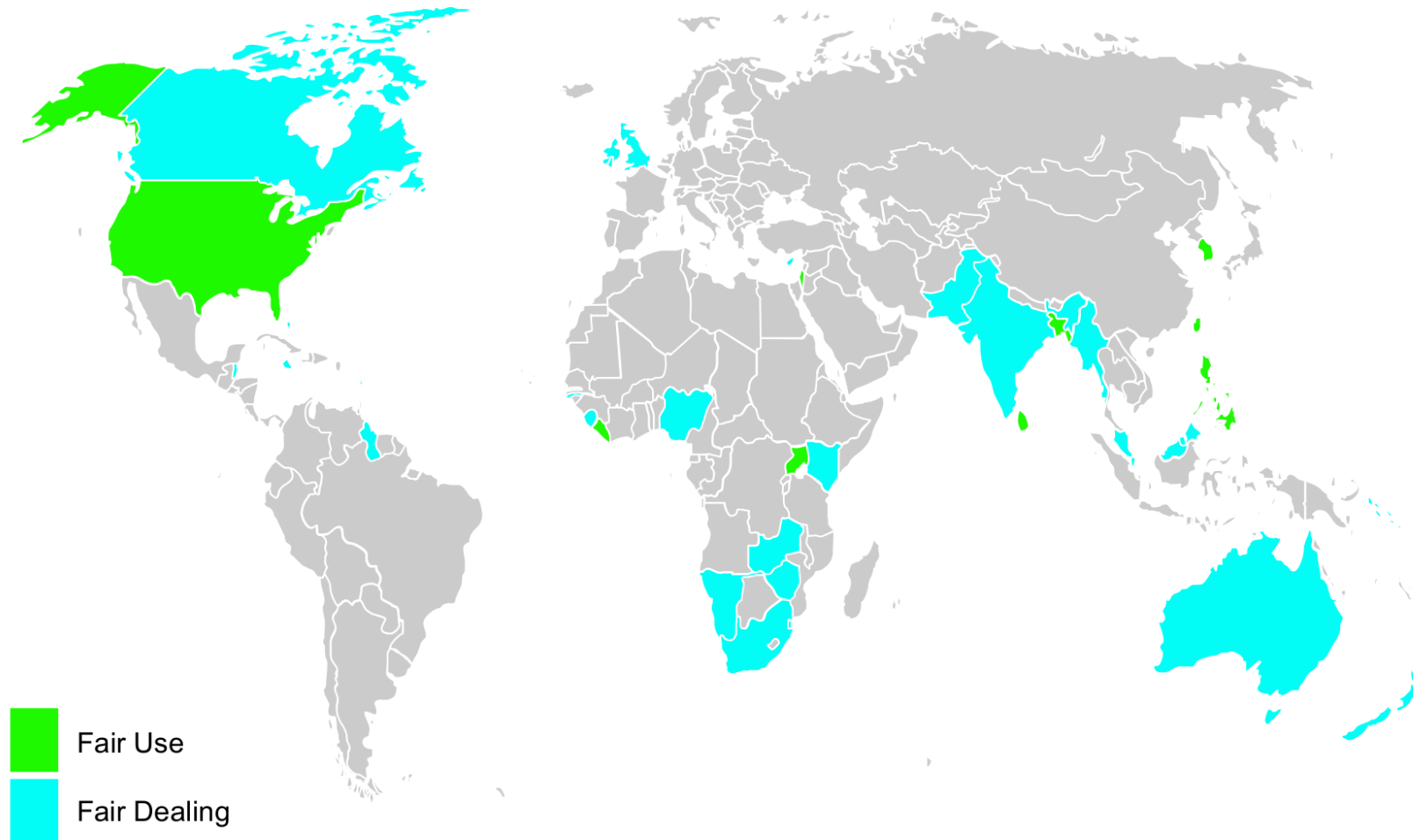
Fair Use, Fair Dealing, and Open Norms in Copyright

- 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



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

- Blog Fair use, open norms and blurred lines between common law and civil law, Prof. Brandon Butler
www.eifl.net/blogs/fair-use-and-blurred-lines-between-common-law-and-civil-law-countries
- Fair Use/Fair Dealing Handbook (Band & Geraffi)
- 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 Sentleben)
- infojustice.org



Thank you.

Questions?