

The importance of addressing adequately legitimate user requests for legal access to intellectual property

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A great and worldwide battle is being waged today between the compensated use of copyrighted works and the free use of these works. The outcome of the battle between compensated and uncompensated uses will, I believe, alter the structure of copyright law, copyright industries and copyright institutions for at least the remainder of the present century. This outcome, though predictable, is not entirely inevitable, a fact to which I will return toward the conclusion of my remarks, when I describe the position that copyright collectives can take to stem the further legal erosion of the rights that they license.

On the compensated side of the battlefield are individually negotiated licenses and licenses entered into by collectives, such as those gathered under the IFRRO umbrella. On the uncompensated side of the battlefield are free uses that are not authorized by law—what we commonly call piracy—and free uses that are authorized by law—the uses permitted by copyright exceptions and limitations. The focus of my remarks will be collective rather than individual licensing, because that is the business you are in, and authorized rather than unauthorized free uses because the first appear to be spreading more rapidly than the second and, in any event, are the more realistic present object of control.

If the nineteenth century was the century of copyright's great expansion of the exclusive rights, it is safe to predict that the twenty-first century will go down as the century of copyright's great erosion of rights. It is more than symbolic that the Marrakesh Treaty, the first new copyright treaty of the present century, should have as its object the minimum scope for *exceptions* to rights and not, as in the past, the minimum scope for economic rights themselves.

Historically, copyright exceptions and limitations around the world occupy a spectrum, from broad and flexible at one end, to narrow and rigid on the other. The United States of America is at the far left of the spectrum, with no fewer than 65 fine print pages of exceptions and limitations to the statute's exclusive rights and, in addition, a statutory fair use provision that has become a free-ranging exception to exclusive rights. At the other pole of the spectrum are the civil law countries of the European continent and elsewhere with a closed list of narrow exception to liability. In the middle are Britain and the Commonwealth countries with some limited exceptions but also the so-called fair dealing exception that, despite its name, is historically less flexible and wide-ranging than American-style fair use.

That, as I said, is history. However, if you array the countries of the world along the left-to-right spectrum that I have described, and look for movement along the spectrum from the beginning of the century to the present, you will see that all of the movement is in the direction of right to left, and not only among the fair dealing countries of the middle, but among the civil law countries of the right. In Europe, the main legal source for this movement has been the 2001 EC InfoSoc Directive offering one mandatory and 20 optional exceptions to member countries from, providing in the aggregate an unprecedented legitimacy to carve-outs from copyright and author's right.

Even more striking than these developments is the emergence of fair use as a new norm of international copyright. Twenty-five years ago, the United States was the only country in the world that had fair use on its books. Yet, at least six countries today, including Israel, Korea and Singapore, have US-style fair use provisions on their statute books. The Australians have been considering the doctrine since the turn of the century. It would not be a surprise to see the subject arise in discussions of the EU's current Digital Single Market Initiative. And, according to its recently-released text, the intellectual property chapters of the final agreed version of the Trans-Pacific Partnership require the 11 TPP member countries to "endeavor to achieve an appropriate balance in copyright law" through exceptions comparable to those allowed by American fair use.

Countries that have allowed themselves to be drawn into the American fair use orbit have either lost faith in copyright as the unparalleled mechanism that it is for promising consumers the widest array of creative and informational goods at the lowest possible price, or these governments have bought the academic pipe dream that fair use is no more than a modest safety valve installed to remedy the occasional market malfunction. Consider how radical a doctrine fair use has in fact become: in 1973 a US appellate court held in the *Williams & Wilkins* case that massive library photocopying of entire journal articles was fair use, and the US Supreme Court failed to muster a majority to overturn the decision. Eleven years later the Supreme Court did muster a majority to hold that it is fair use to make and store videotape copies of entire feature films off the air. In 1994 the Supreme Court introduced the concept of *transformative use* to permit parodies as fair use—a modest-appearing doctrine that has since been carried far afield from socially valuable transformations of copyrighted works to excuse, among other appropriations, the massive digitization of literally millions of copyrighted volumes in the *Hathitrust* and *Google Books* decisions.

Fair use, though touted as an instrument of balance, in fact offers no middle ground. Not a penny was paid to authors or their publishers in the photocopying, videotape and *Google Books* cases just mentioned, nor will a penny be paid for these or similar uses in the future, for a license will be negotiated, and compensation paid, only in the face of a right that would otherwise bar the licensed use. Every time a court holds that a particular use qualifies as fair—or a legislature votes that a use should be exempted—that lawmaker has foreclosed, effectively for all time, any prospect for a negotiated license to encompass that use.

Where do collective management organizations fit into this grim portrait of policy dysfunction? If you consider why, until now, other countries have not found it necessary to introduce fair use doctrine as a solution to the problem of transaction costs, it is because at least a partial solution to the problem already existed in the form of CMOs. German copyright jurisprudence, to take one example, had no need for fair use because it could both foster such new technologies as photocopying and videotaping, while at the same time ensuring compensation for creators, by imposing a levy on equipment and media and relying for the distribution of the resulting revenues on collective mechanisms like *VG Wort*. Whether or not levies are involved, this pattern of reliance on CMOs to accommodate the rough edges of new technological uses of copyrighted works has been repeated around the world.

Thus viewed, American fair use can properly be viewed as a reaction to this country's cultural distaste for collective licensing. Indeed, I think it is accurate to say that, a century ago, courts would have excused restaurant and dance hall performances of musical works from copyright liability had not America's first collecting society, ASCAP, established itself in 1914 to remove the obstacle of transaction costs to the collection of revenues from these dispersed performances. Thus viewed, the embrace of fair use by countries that do not share America's dislike for collecting organizations raises serious questions about motive and legitimacy.

Although it is always dangerous to draw comparisons across industries, I believe that even the quickest look at the American music industry will reveal the impact that collectives and licenses, compulsory and otherwise, can have on reducing the incidence of exceptions and limitations. No American copyright industry is more completely surrounded by compulsory and collective licensing than is the music industry. In the case of musical works, the two most important rights—reproduction and public performance—are moderated respectively by the mechanical license and the blanket licenses offered by ASCAP, BMI and SESAC. In the case of sound recordings the performance right, already narrowed, is further limited by a compulsory license and the collecting activities of Sound Exchange. Is it any wonder that, outside of narrow, ad hoc excuses for parody, fair use has rarely visited the house of music?

In an ideal world, the prescription to draw from this story in the US, and from this pattern generally, is that, as soon as a new technological use of copyrighted works emerges, CMOs should promptly organize to collect and distribute revenues from that use—whether under a compulsory or a negotiated license. Historically the window for that organizing activity has not been overly narrow and, so long as legal uncertainty respecting the infringing nature of the new use persisted, the opportunity for concluding a compulsory or negotiated license remained. Probably the most notable example of this is the American Geophysical case in the US where the defendant argued that its unlicensed photocopying activities constituted fair use under the earlier Williams & Wilkins decision, and the Second Circuit Court of Appeals responded that, in the interim since Williams & Wilkins, the Copyright Clearance Center had formed, so that the transaction costs that formerly stood in the way of negotiated licenses—and justified fair use—no longer existed and, so, no longer justified fair use.

Sadly, that ideal world, if ever it in fact existed, is gone. In the US, as we have seen, transformative use has overtaken transaction costs as the governing rationale for fair use, even in the presence of collective mechanisms that could entirely remove transaction costs as an issue—hence the Hathitrust and Google Books decisions in the same Second Circuit that earlier decided American Geophysical. Worldwide, we see an increasing impatience with copyright; an increased appetite for exceptions to copyright, including fair use; and a narrowing of the window for collective action. Nor are these appetites bounded by copyright alone. In fact, they are more deeply rooted in a zeitgeist that has been aided and abetted by the political economy of the Internet. It is probably too soon to measure in all its dimensions the contributions made by Internet companies in valorizing as a copyright norm the political slogan that information wants to be free, but at least one such company—the company that gave us

Hathitrust and Google Books-- has already succeeded in transforming the cultural metaphor that information want to be free into a hard operational reality on the ground.

The title assigned to my remarks today is "The Importance of Addressing Adequately Legitimate User Requests for Legal Access to Intellectual Property." I didn't compose that title, but I could not possibly improve on it for it implicitly poses a question that goes to the very heart of maintaining exclusive rights in the contemporary digital environment: How, institutionally, should a rights owner answer when a user asks for access to copyrighted works within the rights owner's domain (or, ideally, how should it answer even before the request is made)? The rights owner should answer: "Yes. Yes. A thousand times yes."