

# Fair Use

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## INTRODUCTION

Intellectual property legislation has continuously redefined the balance between the interests of stakeholders, especially the authors of creative works, and the users of the works. The contemporary balance of legal, technical, social, political, and economical interests has typically been formulated into the copyright law stating the limits of the exclusive rights of the authors of creative works and the exceptions to the exclusive rights, defining the fair use of the works by other stakeholders. National legislation reflects the changes in the surrounding society, its technical development, and so forth, but global technical development and international treaties have harmonized the laws and user expectations to some extent.

The concept of fair use cannot be fully understood from a single perspective, such as piracy, freedom of speech, or different legal systems. The purpose of this article is to give the reader a balanced overall understanding of the aspects impacting evolution of fair use in the digital environments. The next section provides a short history of copyright developed in a dialogue between the authors, content users, national governments, and international bodies. A review of the contemporary laws in the United States and in Europe follows, and then the focus turns to new technology as an enabler of content use, and approaches are reviewed to adopt fair use in this context. The next section elaborates technical protection means, followed by a review of the means to incorporate fair use to them. Finally, the article concludes that defining the legal limits of fair use needs to be renegotiated for each new technical context created based on balancing the interests of the parties.

## BACKGROUND

In general, fair use refers to the exceptions of exclusiveness of the copyright, either as a general concept or as defined by the national law. Thus we need to have a closer

look at copyright and the history of copyright prior to elaborating the aspects and trends of fair use.

*Copyright* refers to the exclusive right of authors to exploit their works or authorize others to do so. Authors may exercise this control by authorizing or prohibiting others from using the work. An author can permit an orchestra to play the song composed or deny printing copies of the book written. The rights include both economic and moral rights. For example, the author can charge fees from the users and deny presenting the work in a context the author considers inappropriate, for example, in certain TV commercials.

Individual authors may manage their rights themselves or pass over the responsibility to a collective society. Typically the collective societies monitor the use of the works, negotiate with the potential users on the terms and fees to use the works, license the rights to the users, collect fees, and distribute the fees to the right owners. Right owners may also license the rights for, for example, one concert or a TV commercial themselves or sign a contract, which transfers exclusive rights to their works to a publisher or a record company.

The historical development of copyright started with the authors of drama literature writing plays for theatre. Often the authors did not get compensation from the theaters presenting their works, especially from those in faraway cities. To remedy the situation, they established Bureau de Législation Dramatique, the first society to promulgate authors' rights in 1777 in France. Authors of musical works followed in 1850 by establishing Soci'et'e des Auteurs, Compositeurs et 'Editeurs de Musicque (SACEM). Similar societies were established at the end of the nineteenth century and in the early twentieth century in nearly all European countries, and the national legislations acknowledged widely the authors' rights under the concept of copyright (Ficsor, 2003).

Authors' societies established CISAC as an international organization in 1926. CISAC started negotiations with international representatives of other stakeholders (e.g., IFPI, the International Federation of the Phonographic Industry). These long negotiation processes

were mostly led by the World Intellectual Property Organization (WIPO), including the United Nations UNESCO Universal Copyright Convention (UCC) and the WIPO Berne Convention laying ground for international intellectual property management systems in the 1970s. In the mid-1980s the work in Paris, Geneva, and Sydney meetings addressed new challenges brought by new technology, such as use of computers to store and retrieve copyrighted works, cable TV broadcasting, personal copies enabled by tape recorders, and satellite broadcasting. The process resulted in “Internet treaties,” most importantly the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which laid the foundation to the continental and national legislations. These include the European copyright directive (EUCD) (EU2001/29/EC, 2001), under implementation in the member states and the Digital Millennium Copyright Act (DMCA), adapted in the U.S. code of law defining the limits of fair use in the United States (U.S. Code, 2000).

## FAIR USE IN LEGAL CONTEXT

As a general concept, *fair use* refers to legally protected right of people to use content based on exceptions and limitations, in copyright laws, to the exclusive right of authors to exploit their works. Sometimes fair use is also thought to cover uses that users expect to be fair although they are not included in law, here referred to as *fair use expectations*. The national regulations on copyright are harmonizing due to general willingness to comply with the WTC and the same technical changes impacting all nations. However, the definition of and terms used for fair use vary. We will now elaborate on the U.S. and the EU legal context to some extent.

The right to use a copyrighted work without a license from the rights holder is included both in the U.S. code of law and in the EUCD stating the requirements for national laws. The specific term “fair use” can be found in the U.S. Code (2000), while EUCD uses terms such as “exception or limitation . . .” to copyright or “in national law” (EU2001/29/EC, 2001).

Use of copyrighted content for purposes such as criticism, comment, news reporting, and teaching is not considered as infringement of copyright, but as fair use in the U.S. law. In most EU countries the following exceptions are recognized: private copy or other private use, parody, quotation, use of a work for

scientific or teaching purposes, news reporting, library privileges, and needs of the administration of justice and public policy (Dusollier, 2002).

In the U.S. the judges determine only afterwards if an unauthorized use of copyrighted work was fair use or not. Any licensing in advance will remove any fair use considerations afterwards. In case of evaluating fairness of use afterwards, the judges’ determination should include the following four broad factors on a case-by-case basis:

- the nature of the use (e.g., commercial or non-profit),
- the nature of the original work,
- the portion of the original work used, and
- the effect of the use on the market or value of the work.

Rather than treating fair use as a defense to copyright infringement, as in the U.S., the national law tradition in most European countries provides a list of circumstances where the author is not allowed to enforce his or her rights. Also the EUCD follows this approach and aims at enforcing service providers to support fair use in the Internet environment (Article 6, Paragraph 4 in EU2001/29/EC, 2001):

“In the absence of voluntary measures taken by rightholders [the Member States should] ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law. . . that the beneficiary has legal access to the protected work or subject-matter concerned.”

## FAIR USE IN THE DIGITAL ENVIRONMENT

New technology development has been one of the drivers of the WIPO process and national copyright law redefinitions, and has thus also impacted user expectations on use of copyrighted works as such as well as fair use of the works. Thirty years ago no one could anticipate that songs could be copied from an LP record to a black-and-white TV set or to a phone. Now users expect ease of use while copying songs from CDs to mobile phones, to TV set-top boxes, or to PVR/DVD equipment. This has extended the scope of expected fair use, namely personal use, which is widely recognized, especially in the North-European

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