

Session IV: Fair Use and Other Exceptions*

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Let me begin by inviting you to think about the purpose of the trade agreement. Contrary to what you might gather from watching our current presidential election, a trade agreement is not some kind of business transaction where the U.S. comes to, say, New Zealand and says, “Hey, we’ve got a lot of movies, you’ve got a lot of powdered milk, let’s do a deal.”

It doesn’t quite work that way. Recall some of the words that Probir used this morning when he was describing the achievements of the TPP: ‘coherence,’ ‘consistency,’ ‘stability,’ and ‘transparency.’¹ He called it a platform for standards. Eric talked about facilitation and harmonization.² In line with those remarks, you can think of trade agreements not as business transactions, but as bargains. Bargains that seek to balance national interests in crafting a shared, rules-based mechanism to provide an environment of certainty and transparency so that business transactions can occur. In fact, we value certainty and transparency so much in international trade negotiations that even when countries can’t agree to eliminate a trade barrier, they often perceive value in just cataloguing it, stabilizing it, writing it down, making it transparent, and making sure it doesn’t get any worse.

One of our main purposes in doing this, as economists have observed, is to force governments to internalize to some extent the negative externalities that their unilateral policies would otherwise impose on the citizens and businesses of their trading partners.³ For example, a country with a very low perceived interest in protecting copyrights, especially the copyrights of foreigners, might in isolation prefer to permit widespread theft of foreign works, or allow their country to be a haven for digital pirates who steal from foreigners. This would have certain benefits, domestically: lots of free stuff for consumers, and lots of free spending on fast cars and expensive watches by pirates who make money off of other people’s works and inject that money into the local economy. But this self-interested approach would

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1. Probir Mehta, *Session I: Keynote Panel, Describing the Legal Landscape*, 40 COLUM. J.L. & ARTS 311 (2017).

2. Eric Schwartz, *Session II: The Impact of Int’l Copyright Treaties*, 40 COLUM. J.L. & ARTS 339 (2017).

3. Gene M. Grossman, *Why the WTO? An Introduction to the Economics of Trade Agreements*, RESEARCH INSTITUTE OF INDUSTRIAL ECONOMICS, STOCKHOLM (2012), <https://perma.cc/TA2K-7UX7> (“International negotiations and agreements are a means to ‘internalize’ the externalities that flow from national politics, that is, to make decisionmakers behave as if they took these beneficial or adverse external effects into account.”).

produce negative externalities for the creators of those works, and their business partners, in the form of uncertainty or outright loss of protection of their property.

Or, to use a less extreme example, countries like Canada, which, as Ysolde confirmed earlier, perceive themselves as net IP importers, might choose to afford minimal protection as a matter of self-interest, comfortable that the externalities of that policy choice would fall more heavily south of the border than in Canada itself.⁴ And indeed, as many speakers have confirmed over the course of the day, the United States has an enormous problem with trading partners imposing this sort of negative externality on our creators and creative sector businesses.⁵

So, bearing in mind the *raison d'être* of trade agreements, when you approach a trade negotiator with the idea of including something in a trade agreement, the negotiator is bound to ask, on some level, whether the proffered provision advances the national economic interest in certainty and stability. He or she will be looking for evidence that the proffered provision would constrain trading partners from imposing some kind of negative externality on the United States.

With respect to fair use, these have not been particularly easy questions. Our curious American friend, fair use, is 200 years old, but its complexion changes like a teenager's. As David has observed in the past, the fair use we know today is not the one we knew twenty years ago. Each application is case-by-case, depending on how U.S. judges view a particular use in light of U.S. cultural and constitutional contexts. Sometimes the term is used unsophisticatedly or opportunistically as a sort of code word for doing whatever one can convince themselves is "fair," or is not unfair.

The idea of fair use emerged from a very understandable imperative for U.S. judges to interpret the U.S. constitutionally-derived copyright protections against the backdrop of U.S. constitutional free speech.⁶ Fair use is a creature in statute but not of statute. We are unsure at any given moment exactly how many limbs this creature has. It seems to have some little vestigial arms like a tyrannosaurus, and one big claw like a fiddler crab (in some circuits at least).⁷ And many have questioned whether exporting this curious creature of American law truly advances the national economic interest in certainty and stability on the U.S. side.

There is, some might say, a national interest in attaching a certain vagueness to the rights of others with a view to building and sustaining U.S. businesses that seek to derive profit from those works in ways that might fall within the ambit of fair use.

4. Ysolde Gendreau, *Session II: The Impact of Int'l Copyright Treaties*, 40 COLUM. J.L. & ARTS 335 (2017).

5. *Cf. id.* at 739 ("More recently, both the United States and the European Union have used their trade power to negotiate bilateral and other free trade agreements with a number of developing countries that require the adoption of stronger domestic intellectual property protection regimes than is mandated by TRIPS or other international intellectual property treaties."). See also *Special 301 Report*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (2016), <https://perma.cc/RVA5-QE92>.

6. See Hon. Stanley F. Birch Jr., *Copyright Fair Use: A Constitutional Imperative the 36th Annual Donald C. Brace Lecture*, 54 FED. LAW. 44, 50 ("The fair use section is the one provision of the 1976 act that appears necessary for that statute to be constitutional [under the First Amendment].").

7. The jolly metaphor here of course refers to the recent trend to make transformative use the *sine qua non* of fair use, and the related atrophy of the other "limbs" of fair use.

But apropos of that: Jonathan’s comment earlier positing this as a contest between big media companies who don’t understand the creative process and individual creators who need exceptions of fair use,⁸ reminds me a bit of the comments of H.L. Mencken who said, “When some[bod]y says] it’s not about the money, it’s about the money.”⁹

Make no mistake, there are very big businesses out there looking to profit from the exploitation of exceptions and limitations. And I say that fully acknowledging that there is a big role for appropriation and derivation and exceptions and limitations in the creative process.

The “fiddlersaurus rex” of fair use works in the United States because we’ve developed an approach to the law that’s tolerant of a high degree of uncertainty, and we accept the resulting litigation culture as a cost of doing business. For many of our trading partners, as we found out when the U.S. tabled its proposals on the exceptions and limitations in the TPP negotiations, that’s not a bargain that they’re really prepared to accept.

And indeed, if you look at the final TPP language, what it says is that “each party shall endeavour to achieve an appropriate balance in *its* copyright and related rights system”¹⁰ And that’s the trading partners saying, “Just because you want me to achieve an appropriate balance, doesn’t mean I’m going to change my system for you.” And indeed, other than the U.S., fair use factors have been adopted in only a handful of other jurisdictions.

The vast majority of countries—163 other Berne Convention members and 156 other WTO members—do not have fair use.¹¹ In these countries, as required by Berne, exceptions to the copyright holder’s rights are limited to cases that conform to the requirements of the three-step test (certain special cases, and so on). Most other countries have legal systems deriving from the civil law tradition, or mixed tradition, where statutes spell out specific exceptions that allow for activities similar to those provided by fair use, or fair dealing, but in an enumerated and prescribed way. For countries that follow other kinds of legal traditions, there are some important reasons why they might view adoption of fair use as a negative.

First, there’s the uncertainty. Interpreting whether an act is fair use is, of course, not a simple matter, as everyone in this room knows. The concept is inherently ambiguous, and may be too much so for trading partners whose legal systems place a higher value on the role of the law as an *ex ante* guide to behavior. One of course can argue that they’re wrong to do this, but there are powerful sociocultural imperatives that lead many of our trading partners to take a different view about what they want their law to do for their citizens.

8. Jonathan Band, *Session IV: Fair Use and Other Exceptions*, 40 COLUM. J.L. & ARTS 365 (2017).

9. See, e.g., Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391, 391 (2009) (attributing quote to American essayist and satirist H. L. Mencken).

10. Trans-Pacific Partnership, § H, art. 18.66, 2016, <https://perma.cc/NA68-FRGE> (emphasis added).

11. Cf. Raoul Grifoni-Waterman, *International Fair Use Developments: Is Fair Use Going Global?*, AUTHORS ALLIANCE (Feb. 25, 2016), <https://perma.cc/QG9M-TPBK>.

Second, judge-made fair use law is often unsuitable for other kinds of legal traditions. Here in the U.S., we have reference to 200 years of case law in helping us understand fair use. But there's very little precedent outside the U.S. regarding the application of fair use factors.

Third, it's unnecessary. There is, in fact, no shortage of meaningful exceptions in civil law, mixed, and fair dealing jurisdictions. When the APEC IP Experts Group surveyed exceptions and limitations in the APEC region in 2010, the resulting 204-page report catalogued quite a wide array of flexibilities addressing purposes similar to those mentioned in § 107 that balance the competing interests within those countries' individual legal frameworks.¹²

I would submit to you that the burden would have to be on the proponents of exporting a fair use style regime to demonstrate that these systems produce some externality of over-certainty that harms U.S. jobs, and I don't think that burden has yet been sustained. On the contrary, there is not at this point a demonstrated need to upset countries' legal systems to incorporate a rather amorphous and *sui generis* U.S. law, developed in the context of specific U.S. constitutional and legal principles. And that's a large part of the reason why we've heard resistance to that concept from U.S. trading partners, who are only too happy to have exceptions and limitations, and to try to vindicate the purposes behind provisions like § 107, but want to be able to do that in a context and in a way that makes sense for their own systems.

Finally, to come back to grounding this in what are really the commercial export needs that would be served by exportation of a so-called "flexible norm" like fair use in a trade agreement, I think the European experience tends to further contradict the notion that uncertainty is necessary for U.S. tech sector companies to thrive in overseas markets. The absence of fair use has not prevented U.S. technology companies from, indeed, rising to positions of dominance in foreign markets. For example, the dominant U.S. search engine holds more than 90% market share in the EU, which does not have a fair use regime.¹³ YouTube similarly enjoys large market shares outside the United States without the benefit of a fair use-style regime.¹⁴

So, there is room to question the notion that a very broad notion of an exception and limitation, as opposed to specific exceptions and limitations that are consistent with the three-step test, is fundamentally necessary in order for U.S. companies to thrive in foreign markets. I think with that I'll stop there and we can leave it for the Q&A session to explore some of these issues in more detail. Thanks.

12. *APEC - IPEG Survey on Copyright Limitations & Exceptions Report on Copyright L&E in APEC Economies*, APEC INTELLECTUAL PROP. EXPERTS' GRP. (2010), <https://perma.cc/BAN5-L2VS>.

13. See Matt Rosoff, *Here's exactly how dominant Google is in Europe in search, smartphones, and browsers*, BUS. INSIDER (Apr. 20, 2016), <https://perma.cc/3GNP-HQRQ>.

14. See Will Richmond, *Globally, YouTube's Market Share is 20 Times Its Nearest Competitor*, BUS. INSIDER (Dec. 28, 2011), <https://perma.cc/JQM9-JNHN>.