Consumers and Digital Content
Copyright and Exceptions for Personal Use

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Outline

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  Remuneration of personal uses?

Threats to personal use rights

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  An old example: DVDs
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Copyright never covered *all* uses of works

Though the list of uses it *does* cover has been growing over time
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- Reproduction
  - Adaptation
    - Public performance
    - Broadcasting
    - Making available
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Reproduction

⇓

Adaptation

⇓

Public performance

⇓

Broadcasting

⇓

Making available
Personal uses that copyright doesn’t cover

(Example only: exact boundaries vary from country to country)
So where do personal use rights come from?

- \textit{Some} come from copyright law
  - \textit{Limitations} delimit the scope of rights and are often \textit{implicit}
  - \textit{Exceptions} carve out specific permitted uses (eg. quotation)
  - \textit{Licences} may be given gratuitously (eg. Creative Commons), implicitly (copying computer software into memory) or compulsorily

- \textit{Some} \textit{technically infringing} personal uses are \textit{tolerated}
  - Forwarding emails, backing up hard drives, format shifting
  - \textit{De minimis} – courts may refuse to grant substantive relief

- \textit{Some} are supported by other sources of law
  - Competition law (TRIPs Article 8(2) on IP abuse)
  - Consumer law (eg. a right to rescind unfair licence terms)
  - (Ultimately) from international human rights law

- \textit{Some} are \textit{none of the above} – but have always been enjoyed
Personal use distinguished from

- Personal use is not just individual use
- Personal versus is not just private use
- Personal use is not just non-commercial use
- Personal use is not always transformative

Example

Article 30 of Korean copyright law: It shall be permissible for a user to share a copyright work already being made public for the purpose of his personal, family or other similar uses within a limited circle.

- Personal uses are rapidly evolving
Personal use distinguished from

- Personal use is not just individual use
- Personal versus is not just private use
- Personal use is not just non-commercial use
- Personal use is not always transformative

Example

Canada’s “YouTube exception” (29.21) grants individuals the right to incorporate copyright-protected works in the creation of new non-commercial works (eg. mash-ups).

- Personal uses are *rapidly evolving*
Personal use distinguished from

- Personal use is not just individual use
- Personal versus is not just private use
- **Personal use is not just non-commercial use**
- Personal use is not always transformative

**Example**

There are non-commercial uses (such as library lending and classroom instruction) that are not personal uses

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It can be (when interacting with texts – performing them, mashing them up, fan art) – but eg. backups are not

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About fair use

- In this context of *rapid evolution*, a flexible standard like fair use is helpful
- But noting that fair use is *broader* than personal use
- Fair use style copyright exceptions are extending throughout the world
  - Israel, Singapore, Korea adopted, Australia currently reviewing
- But opposition is also mounting
  
  “*Screenrights reiterates its concerns about a broad fair use regime contravening the three-step test in Berne.*” – *Screenrights Australia*

- Fair use is a necessary but not sufficient copyright flexibility because there can be *some uncertainty* about its application
Difference between “personal use” and “fair use”

**Personal use**
- Broader range of sources than copyright law
- Some personal uses exist in every country
- Some personal uses are not fair use
- Some personal uses may be remunerated

**Fair use**
- An exception to copyright law
- Does not exist in every country
- Some fair uses are not personal
  - eg: big data
- Not remunerated
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Should personal uses be remunerated?

- Most OECD countries allow consumers to make personal copies of copyrighted material that they have legally purchased.
- But in some cases this right is remunerated:
  - EU Infosoc Directive Article 2 (typically media and/or equipment levies)
  - Norway (through a state-run fund), Canada (levies)
- In other cases it is not:
  - Australia (time, space and format shifting exceptions)
  - UK (time shifting, Hargreaves recommendation to broaden)

No justification to compensate authors for personal uses when there is a broader public policy interest in allowing those uses freely.
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Philosophical differences – the rights-holder view

Creators

Authors' rights

Personal use

Public domain

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Assumptions of the rights-holder model

- Creation as authorship
- Authors’ rights the default position
- Private copying is a “loss” to authors
  
  “As an exception to copyright, it deprives rightholders of their right to authorise these copies” – Society of Audiovisual Authors

- Uncompensated sharing is “theft” or “piracy”
Philosophical differences – the consumer view

Creators and consumers

Culture

Authors' rights

🎥 ✒️ ✨🎨🎶
Assumptions of the consumer model

- Consumers and creators both benefit from unremunerated use
- Access is the default position, copyright a limited monopoly
- No inflexible definition of “personal use”
- Private copying does not equal lost sales
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Shrinking of personal use rights

• Why?
  • Distribution based on access rather than physical control
  • Acts of technical copying are involved to view, enjoy or modify digital products

• The decision on how much usage is fair or personal is being taken away from consumers
  • Where you can access digital products and services
  • How many devices you can access the products and services on
  • From whom you can acquire those to access on your device
  • What uses you can put those to (e.g. reading aloud e-books)

• How?
  • Technical and legal means and through intermediaries
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Technical limits on personal use rights

- Digital locks (DRM) often prevent the exercise of personal uses, *even those that are remunerated*

- Access controls such as geolocation
- DRM to prevent copying and sharing
  - Even recently on track for a Web standard
- Remote device updating
  - Deletion of books from Amazon Kindle
  - Removal of Other OS function of Sony PS3
Legal limits on personal use rights

- **Extended definition** and **criminalisation** of commercial use
  - US No Electronic Theft Act
    - Amended the term “financial gain” to include “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works”
    - Increased penalties to $30,000 per infringement or $150,000 if wilful
    - This led to judgments such as $222,000 against Jammie Thomas-Rasset and $675,000 against Joel Tenenbaum for non-commercial sharing of music
  - Trans-Pacific Partnership (TPP) (and before it ACTA) aim to globalise these rules
- Small print in licence agreements claws back personal uses that the law may allow
There is something wrong with a law that routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood.

– Judge Nancy Gertner, 2010
Intermediaries limiting personal use rights

- Failed HADOPI three strikes regime in France
  - Secured one conviction in four years, at a cost of several million euros
  - Similar schemes in Ireland, Taiwan, New Zealand, South Korea, UK, USA

- Seizure of Internet domain names
  - Spanish website rojedirecta.com, twice ruled legal in Spain, seized under US copyright law

- Spurious content removal and censorship
  - US DMCA has become a de facto global standard
  - TPP seeks to mandate use of Content ID-style scanning

- Misuse of power by unaccountable payment intermediaries against alleged infringers
“Please tell me who decides on the top Ren,” she asked again.

She had a good command of Japanese but obviously she was not a native speaker.
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**DVD region coding**

- Moving to America, my Region 3 DVDs have ceased to work
- Circumvention of the copy protection to allow playback is unlawful
- In Europe there is only one region, but restrictions are still enforced by choice of dubbing and subtitles offered by rights holders on disc
- Fan-created subtitle sites are being blocked and threatened
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Preserving personal use rights over DVDs

- Under the Australia – United States Free Trade Agreement, Australia preserved the right to allow region-free DVD players.
  
  “neither Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure”

- Similar proposal for TPP by Singapore and Chile to allow legal importation of devices such that do not honour DRM
- Fair use argument
- In Spain the distributor of any product locked up with DRM must provide the means to bypass it for permitted purposes
- Similar proposal for new Brazil copyright law
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Newer impediments to personal use

- Geoblocking of legal streaming and download services
  - Legal grey area – is a geoblock a technological protection measure?
- Locked-down devices
  - Game consoles, phones, HDMI cables
- Locked-down media
  - Ultra HD 4K discs may include “phone home” functionality (based on Sony patent)
- Closed DRM ecosystems
  - UltraViolet is not available across many popular devices and content libraries
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Towards a more balanced international IP regime

- International norm setting needs to be more balanced
  - EU opposition to library exceptions at WIPO
  - TPP proposals that would negatively impact personal use (WCT+ text on circumvention narrowly confines exceptions, criminalisation of non-commercial sharing)

- In comparison P4 (TPP’s predecessor) states:
  - The Parties recognise the need to achieve a balance between the rights of right holders and the legitimate interests of users and the community with regard to protected subject matter.
  - Standard form non-negotiated licenses for products do not prevent consumers from exercising ... limitations and exceptions ...
  - [parties may] facilitate the exercise of permitted acts where technological measures have been applied
Accept personal use as the default

- Some personal uses of content are outside the scope of copyright altogether
- The personal/non-personal use distinction isn’t and can’t be considered a fixed one
  - *Fifty Shades of Grey* began as *Twilight* fan fiction
  - What was once private but now public
- For the rapidly changing personal uses that *do* fall within copyright, only a broad fair use style exception is enough
  - **Wrong questions:** eg. “How many times should they be allowed to make such copies?”
- Working towards a globalised fair use exception
- *In conjunction with* narrower specific exceptions including “new exceptions and limitations that are appropriate in the digital environment” (WCT, P4)
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Summary

- If copyright rules are not resulting in *more or higher quality creativity and innovation* then the copyright bargain is not working and needs to be reassessed

- The boundaries of personal and private use have been taken out of the consumer’s hands

- This amounts to a significant realignment of the rights of consumer and creator

- Through plurilateral agreements such as the TPP, this realignment of rights is being extended beyond the OECD

- Fair use and fair dealing exceptions need to be liberalised to permit full *personal use of digital content by default*

- *Globalising fair use* is part of the way forward, but recognising that *some uses are not controlled by copyright at all*
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