



PROGRAM ON
INFORMATION JUSTICE AND
INTELLECTUAL PROPERTY

Evaluating the Benefits of Fair Use in the Digital Economy

Sean Flynn

sflynn@wcl.american.edu

WHAT IS FAIR USE?

(3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any **quotation** therefrom, **including** any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be **compatible with fair practice**, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

-South Africa, 12(3)

(4) ... a person who is in lawful possession of a computer program may do any of the following acts without the authorization of the right holder whereby copies are **necessary for the use of the computer program in accordance with its intended purpose**

...

or **(d) for any purpose** that is not prohibited under any license or agreement whereby the person is permitted to use the program.

Kenya - Copyright Act 2001 Section 26, Art (4)

CHINA

Second Draft of the Third Revision of China's Copyright Law (2012)

Article 42: Under the following circumstances, works may be used without the permission of the copyright holder, and without paying remuneration, but the full name of the copyright holder, the name of the work and the source of the work shall be indicated, and it may not infringe other rights enjoyed by the copyright holder according to this Law:

* * *

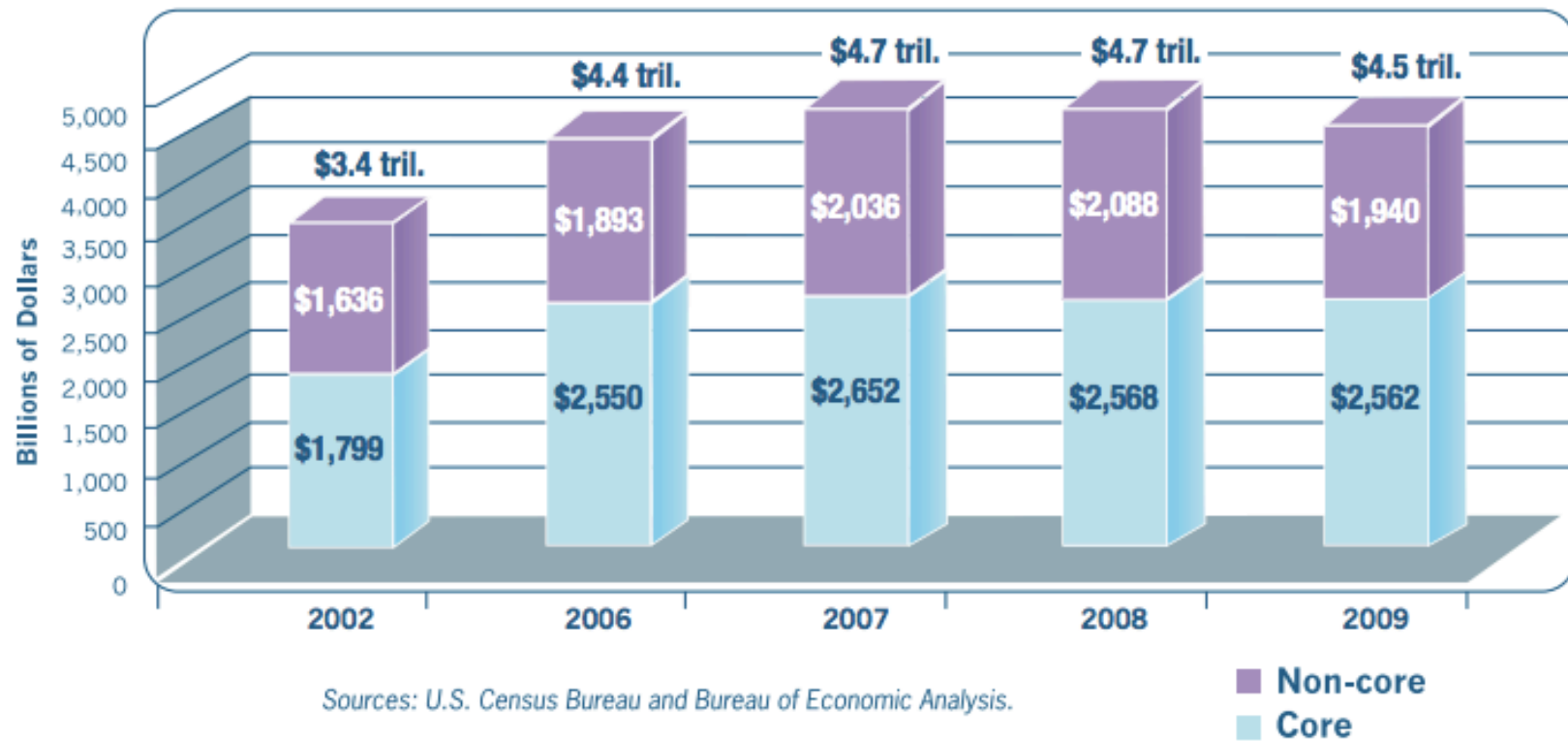
(13) Other circumstances.

Methods of use of the work referred to in the previous paragraph shall not influence the normal use of the work, and must not unreasonably prejudice the legitimate interest[s] of the copyright owner[s].

IS FAIR USE GOOD FOR YOU?

Chart 1. Revenues of Fair Use Industries

Total Revenue = \$4.5 trillion in 2009



Benefits	L&Es	Dependent Variables	Theoretical	Empirical
Technological Innovation	Time/ space shifting, private use, non-commercial copying, fair use	Personal use devices; High tech investment; Firm and Industry Statistics	Von Lohman	Lerner; Carrier (survey); Handke (survey); Ghafele & Gilbert; Gilbert
Research and development	Fair use, educational exceptions, quotation, criticism & review, text and data mining	Educational attainment; Workforce Productivity; Follow-on science; Datamining research output	Lemley & Frischmann; Benkler	Moser; L. Guibault, C. Handke & J.-J. Vallbé
Freedom of expression and cultural flourishing	Transformative use; fair use; user generated content	YouTube uploads; cultural production	Jaszi and Aufderheide	Aufderheide (survey); WIPO Global Innovation Index

Index	Features	Limitations
WIPO L&E surveys	Broad list of countries, fine detail	Static (no time series), yes/no answers, little case law/interpretation
Consumers International	Focused on L&Es	Static, mostly limited to yes/no questions w/in categories
Gilbert	Ranks w/in L&Es (1-3 scale)	“Flexibility” = “robust”; static (2006), narrow group of high income countries; no case law
GIPC	Rankings of countries on IP strength	Static, but survey updated each year; little L&E coverage; subjective and politically inspired

<http://tinyurl.com/user-rights-survey>

USER RIGHTS SURVEY

<http://tinyurl.com/user-rights-survey>



AMERICAN UNIVERSITY
WASHINGTON, DC

Introduction and Instructions

The purpose of this survey is to identify points in time at which the law on copyright and related rights in a group of countries changed since 1990. We will use the information to create an index of these changes to facilitate econometric and other analysis of the social and economic impact of copyright changes. We are going to conduct the survey in a series of phases. Version 7 is a draft of the first phase.

The first phase of this survey will focus on the scope, exhaustion and limitations of copyright. This is based on the idea that the most basic landscape of what a user may freely access is shaped by these factors together. In future phases, we plan to ask about other aspects of copyright law that affect user practice, such as enforcement.

The term "law" as used in this survey refers to all sources of published law -- including statutes, regulations, decrees, court decisions, etc.

The term "copyright" refers to copyright and related and neighboring rights.

Copyright Limitations

When did the country's law adopt or change its limitations and exceptions permitting the free (uncompensated) use in any of the categories below?

Any purpose (general exception)

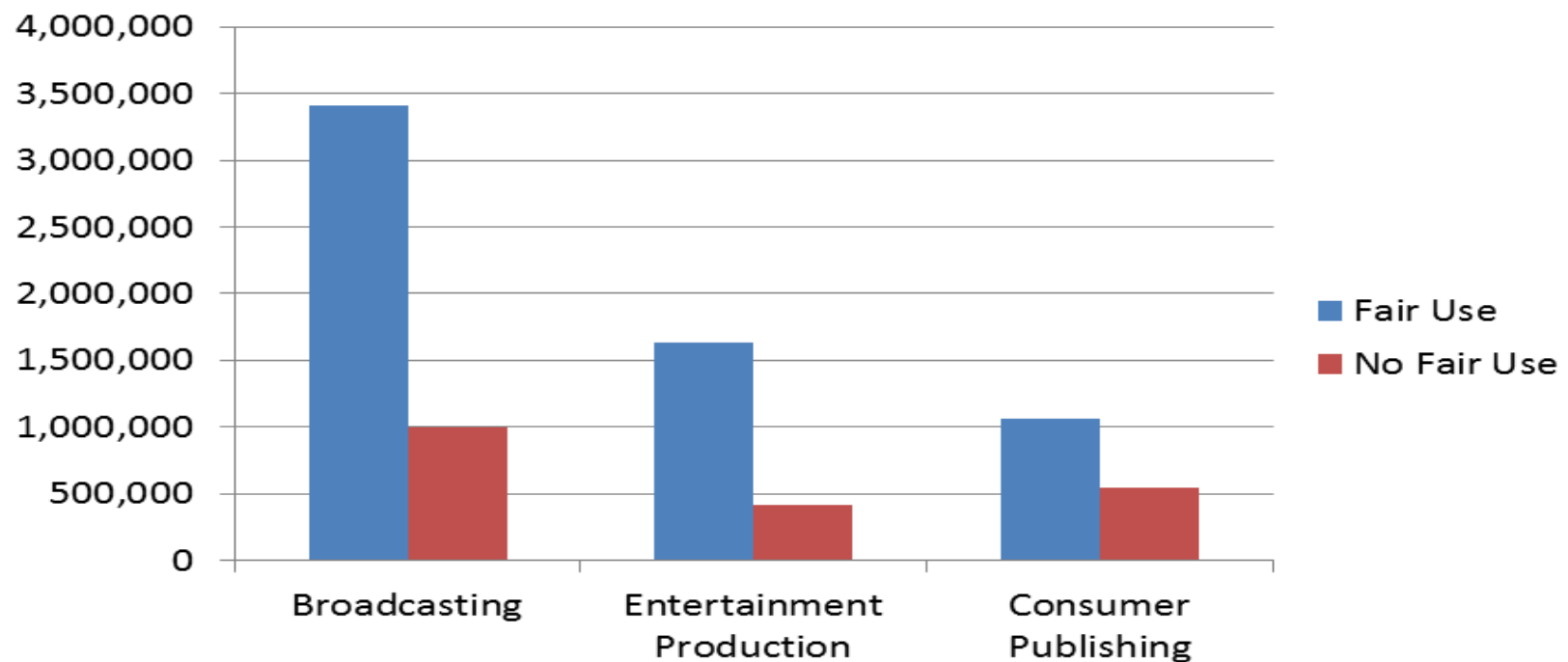
Please answer affirmatively if your country's laws include flexible limitations to copyright that are similar to the fair use provision found in [17 USC 107](#), in which any uses may be permissible subject to a general balancing test.

	Exception in law?	When was law in force?	This limitation applicable to			Limitation subject to			Citation	Comments
		Year	Any work	Any user	Commercial use	A "fair" factor test	Three step test	Additional limitations (explain in comments)	Please enter the applicable law, regulation, or judicial ruling.	Provide any additional information to explain law on the books does not cover scope of copyright relevant type of work
Law as it stood in 1990.	<input type="text"/>	<input type="text"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
Other limitations applicable to this category, or change to law	<input type="text"/>	<input type="text"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>

Use of Computer Programs

[illegible]

Average Net Sales & Revenue for Firms in Nations With/Without Fair Use (USD)



By Mike Palmedo

sflynn@wcl.american.edu