

EIFL Webinar

What's fair in copyright? Fair use, fair dealing and fair practice

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Attribution 4.0 International

What is fair dealing?

- Developed by English courts in 18th century, codified in Copyright Act, 1911
- Incorporated into laws of British colonies, retained in copyright laws of Commonwealth and former colonies on independence – now in 40+ countries
- Fair dealing of a work *for the purpose of [non-commercial] research, private study, criticism, review, news reporting, caricature, parody, or pastiche is not an infringement*

What is fair use?

- Developed by U.S. courts in 19th century, particularly *Folsom v. Marsh* (1841), codified in Copyright Law, 1976
- Adopted by Liberia, Israel, Singapore, Malaysia, Taiwan, South Korea and Sri Lanka, expanded by Nigeria (2023)
- Fair use of a work *for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement*
- Factors to be considered in determining whether the use is a fair use:
1) the **purposes and character** of the use; 2) the **nature of the work**; 3) the **amount and substantiality of the portion used**; and 4) the **effect of the use on the potential market** for the work

What is fair practice?

- Set out in the Berne Convention (1886)
- Article 10 (1) *It shall be permissible to make quotations from a work, provided that their making is compatible with fair practice*
- Article 10 (2) *It shall be a matter for legislation to permit the utilization of works by way of illustration in publications for teaching, provided such utilization is compatible with fair practice*
- Some countries incorporated “fair practice” in domestic legislation e.g. Botswana, Ghana and Malawi

Fair use v fair dealing

- Fair use typically described as more flexible and open ended than fair dealing because of “*such as*”, but
 - some say this is a misunderstanding of the British cases leading to adoption of fair dealing
 - and in Canada, ‘fair dealing’ has been interpreted in the same manner as ‘fair use’ in the United States
 - also, some countries use “fair dealing” in statutes that have “such as”, e.g. Nigeria
- So you must read the statute and applicable precedent carefully

Trends and developments

- Some countries have expanded fair use/fair dealing with little fuss *e.g.*, Nigeria, while it has been controversial in others, *e.g.*, South Africa
- U.S. government position towards “exporting” fair use/fair dealing typically is hostile or neutral, depending on the country, but never supportive (even though fair use is an integral part of the U.S. copyright system, giving it some would say, a competitive edge over other countries)
- A country’s success in expanding fair use/fair dealing seems to turn on 1) degree of commitment of local copyright officials, 2) vehemence of U.S. government, and 3) the overall political dynamic

Benefits to libraries of fair use

- Digital technology evolves more rapidly than legislation
- Flexible, open-ended provisions allow courts to approve innovative library activities relying on fair use
- In U.S., for example, courts have found that mass digitization of works in library collections can be fair use for purpose of preservation, accessibility, and indexing, also to permit e-reserves
- It helps to keep the law relevant for longer – how can legislators foresee technological developments that don't yet exist?

Does it create legal uncertainty?

- A library can engage in an activity it believes to be fair use (provided of course it has fair use in its law)
- If sued by a rights holder, the library can use fair use as a defense
- The court will rule on the validity of the defense
- If the library exercises fair use carefully, it is unlikely to be sued; and if sued, it is likely to win
- Libraries can rely on fair use decisions from other jurisdictions
- Domestic legislation can combine fair use with specific exceptions for libraries

You win some, you lose some - Hachette v Internet Archive

- Controlled Digital Lending and the Internet Archive's Open Library and National Emergency Library
- District Court Ruling
- Court of Appeals Ruling
- Why concerns about the Hachette decision might be overstated

Fair use/fair dealing v specific exceptions

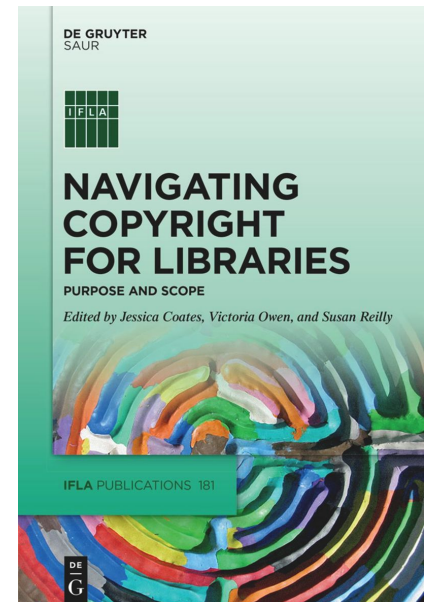
- Most countries with fair use/fair dealing also have specific library exceptions
- Library exceptions reflect a legislative judgment that certain activities undertaken by libraries that meet certain criteria are always permitted
- A fair use/fair dealing exception supplements this specific exception by providing flexibility to enable activities that might not have been contemplated by the legislature at the time the specific exception was adopted
- This framework provides the best of both worlds: certainty and flexibility

Where can I learn more?

- The Fair Use/Fair Dealing Handbook (2023 edition)
- Why Libraries Need Limitations and Exceptions by Jonathan Band and Brandon Butler. From the book Navigating Copyright for Libraries (2022)

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**THE FAIR USE/FAIR
DEALING
HANDBOOK**

Thank you!

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