



Copyright Fair Use and the Global Internet Economy

Internet industries have thrived in countries such as the United States and Singapore that provide those industries a limited exception to copyright rules for “fair use.” Without the protection of a fair use doctrine, a range of activities critical to innovation in the digital environment would infringe copyright. As a result, the absence of fair use in other legal systems interferes with the development of the global Internet economy. Accordingly, the fair use doctrine should be included in the Trans Pacific Partnership agreement.

I. Introduction

The growth of the Internet as an important platform for communications and commerce in the years after the completion of the Uruguay Round has prompted U.S. trade negotiators to seek additional copyright provisions reflecting this new medium. U.S. Internet businesses such as Google, Facebook, Yahoo, Amazon, and eBay—all established after the Uruguay Round—thrived because the U.S. legal regime combined fair use with insulation for Internet service providers (ISPs) from liability for infringing activities by users. Thus, recent U.S. free trade agreements (FTAs) contain provisions requiring signatories to adopt prohibitions on the circumvention of technological measures similar to those found in Title I of the Digital Millennium Copyright Act (DMCA). At the same time, the U.S. recognized that Internet service providers (ISPs) need relief from liability from the infringing activities of their users if they are to invest in the development and deployment of new services. Accordingly, Congress enacted safe harbors for ISPs in Title II of the DMCA, and the free trade agreements require contracting parties to adopt similar provisions limitations and exceptions.

As technology companies have expanded globally, they have become more aware of the challenges posed by the diverse legal systems they confront. Internet companies, for example, have learned that DMCA-style safe harbors, by themselves, are insufficient to permit the full range of new services introduced by these dynamic firms. The DMCA works well in the U.S. because it operates against the backdrop of the fair use doctrine. The DMCA provides Internet companies with relief from certain copyright remedies when they engage in a specific set of

activities. Fair use, by contrast, permits a court to exercise its judgment to permit otherwise infringing content. The DMCA is definite, rigid, and relatively narrow; fair use is indefinite, flexible, and accommodating. Together, the DMCA and fair use create a legal environment with both a degree of certainty and flexibility. This combination of attributes encourages Internet companies to invest in innovative products and services.

The Internet is an integral part of a new digital environment in which we all live. Users connect to this environment via a diverse array of devices including desktop and laptop computers, personal digital assistants (PDAs), smart phones, MP3 players, and digital video recorders (DVRs). These devices all enable their users to make hundreds, if not thousands, of digital copies each day. Many of these copies exist only temporarily in a computer's random access memory; other copies persist for longer periods in hard-drive. While users often employ these devices for personal entertainment purposes, they also use them at the workplace. The copies made by these devices typically do not infringe copyright because they are permitted by the fair use doctrine. The knowledge that these devices have substantial noninfringing uses allows companies to invest in the development of the necessary hardware and software without incurring liability as secondary copyright infringers.

Although the U.S. Copyright Act contains both a fair use provision and the DMCA's safe harbors, the copyright laws of most other countries possess neither. Through the free trade agreement process, some countries have started to adopt DMCA-type safe harbors. But even in these countries, a flexible fair use provision is missing. The absence of such an exception exposes technology companies to potential copyright liability for activities permitted in the U.S. This prevents global technology companies from expanding their operations in these countries, and it inhibits the creation of domestic technology start-up companies. Accordingly, a flexible fair use provision should be included in the TPP agreement.

II. What Is Fair Use?

The term "fair use" often is employed to describe the full range of exceptions and limitations found in the U.S. Copyright Act. Technically, however, the fair use doctrine is embodied in one specific provision, 17 U.S.C. 107. This paper will employ the term "fair use" in this technical sense. Section 107 in its entirety provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or

by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The U.S. Congress first codified the fair use doctrine in the 1976 Copyright Act, but courts had been applying fair use at least since the U.S. Supreme Court's 1841 decision in *Folsom v. Marsh*. Judges and scholars have struggled to categorize fair use. It has been called an affirmative defense, a user privilege, and even an affirmative right. Some scholars have viewed it as a solution to market failure – as a means of permitting a use when the transaction costs were too great relative to the use, *e.g.*, a short quotation, or the copyright holder refused to license the use, *e.g.*, a parody.

Regardless of its categorization, fair use has a constitutional dimension. Scholars have long noted a tension between the U.S. Constitution's Intellectual Property Clause, which authorizes Congress to provide copyright protection to authors, and the First Amendment, which prohibits Congress from restraining speech. Litigants have attempted to exploit this tension in an effort to convince courts to declare various provisions of the Copyright Act unconstitutional. The U.S. Supreme Court recently rejected such an effort on the grounds that the "copyright scheme ... incorporates its own speech-protective ... safeguards." *Eldred v. Ashcroft*, 123 S.Ct. 769, 788 (2003). In *Eldred*, Justice Ginsburg specifically identified fair use as one of copyright law's "built-in First Amendment accommodations...." *Id.* at 788-89.

In other words, fair use is not simply an exception created by Congress during the course of the political process that led to the 1976 Copyright Act, nor is it just an enactment of a long standing judicial principle of equity. Rather, fair use is a necessary structural element of copyright law that harmonizes those restrictions with universally accepted principles of free expression. As the Eleventh Circuit's Judge Stanley Birch argued in the Brace Lecture

sponsored by the Copyright Society of the U.S.A., fair use is essential to the constitutionality of the Copyright Act.¹

Fair use also plays another constitutional role: it helps achieve the stated objective of the U.S. Constitution's Progress Clause – promoting the progress of science and the useful arts – by permitting socially beneficial uses that do not unreasonably prejudice the copyright holder. The Supreme Court explains that fair use is an “equitable rule of reason which permits courts to avoid rigid application of the copyright statute when, on occasion, *it would stifle the very creativity which that law is designed to foster.*” *Stewart v. Abend*, 495 U.S. 207, 237 (1990)(emphasis supplied). Judge Kozinski writes that fair use, along with the idea/expression and fact/expression dichotomies, are “necessary to maintain a free environment in which creative genius can flourish.” *White v. Samsung Electronics*, 989 F.2d 1512 (9th Cir.)(Kozinski, J., dissenting), *cert. denied*, 113 S. Ct. 2443 (1993). Judge Kozinski observes that these limitations allow “much of the fruit of a creator's labor may be used by others without compensation.” *Id.* Paraphrasing the Supreme Court's decision in *Feist v. Rural Telephone*, 111 S. Ct. 1282, 1289-90 (1991), Judge Kozinski stresses that this reuse “is not some unforeseen byproduct of our intellectual property system; it is the system's very essence.” 989 F.2d at 1517. Judge Kozinski explains that “culture, like science and technology, grows by accretion, each new creator building on the works of those who came before.” *Id.* The intellectual property system provides authors with an incentive to create, but at the same time permits other authors to build on this creativity. This “is the means by which intellectual property law advances the progress of science and art.” *Id.*

In sum, fair use is part of the U.S. constitutional fabric of the copyright law. It harmonizes the IP clause with the First Amendment, and it promotes the progress of science and the useful arts by allowing new authors to build on the work of earlier authors.

U.S. trading partners, of course, do not employ the same constitutional framework as the U.S. However, the tension between the goals of promoting free expression and protecting copyright exist in any legal system with those two goals, and thus a fair use provision can play an important role in alleviating that tension. Similarly, all copyright laws seek to encourage creativity. A fair use provision would further that objective, regardless of the legal system.

¹ Stanley F. Birch, *Copyright Fair Use: A Constitutional Imperative*, 54 J. Copyright Soc'y 139 (2007).

III. What Activities Related to the Digital Environment Fall Within Fair Use?

By definition, fair use is open-ended. Applying the four statutory factors, and other considerations it deems relevant, a court can excuse any otherwise infringing conduct. There have been hundreds of reported decisions concerning fair use, and, not surprisingly, they are far from consistent with one another because they reflect a judge's weighing of the fact-specific equities before him. Courts have not hesitated to apply fair use to new circumstances, resulting in a gradual expansion of fair use over time. Traditionally, the uses approved by courts (or the Congressional reports relating to the 1976 Copyright Act) tend to fall into three categories. *See* Birch at 157. First, a wide range of **educational uses** are considered fair use, including for example photocopying newspaper articles for use in a classroom. Second, courts have treated certain **personal uses** as fair, most notably the time shifting of television programs permitted by the Supreme Court in *Sony v. Universal*, 464 U.S. 417 (1984). Third, courts have allowed **creative uses** of works, such as rap group 2 Live Crew's parody of Roy Orbison's "Pretty Woman" in *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994). More recently, courts have expanded the boundaries of these categories to accommodate the technological needs of the digital environment.²

Below we provide a few examples of activities critical to the digital environment that fair use permits.

A. Fair Use and Search Engines

Search engines, the basic tool that allows users to find information on the Internet, rely on fair use in their daily operations. A search engine firm sends out software "spiders" that crawl publicly accessible websites and copy vast quantities of data into the search engine's database. As a practical matter, each of the major search engine companies copies a large (and increasing) percentage of the entire World Wide Web every few weeks to keep the database current and comprehensive. When a user issues a query, the search engine searches the websites stored in its database for relevant information. The response provided to the user typically contains links both to the original site as well as to the "cache" copy of the website stored in the search engine's database.

² For example, courts have enlarged the category of transformative uses to include the automatic translation of object code into source code or the storing of thumbnail images in a search database. These examples will be discussed below in greater detail. *See* Edward Lee, *Technological Fair Use*, 83 S. Cal. L. Rev. 797 (2010).

Significantly, the search engines conduct this vast amount of copying without the authority of the website operators. Although the search engines will respect an exclusion header, a software “Do Not Enter Sign” posted by a website operator, the search engines does not ask for permission before they enter websites and copy their contents. Rather, the search engine firms believe that the fair use doctrine permits their activities. In 2003, the Ninth Circuit in *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003), confirmed that search firms were correct in this belief. The court found that the caching of reduce-sized images copied from websites, and the display of these images in response to search queries, constituted a fair use. Relying on *Kelly*, the district court in *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006), excused Google’s display of text cached in its search database as a fair use. In 2007, the Ninth Circuit again ruled that the display of thumbnail images in response to search queries was a fair use. The court in *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1166 (9th Cir. 2007), concluded that “the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superceding and commercial uses of the thumbnails in this case.”

Thus, the hundreds of billions of dollars of market capital represented by the search engine companies are based primarily on the fair use doctrine. Moreover, the hundreds of billions of dollars of commerce on the Internet facilitated by search engines rely heavily on fair use.

To be sure, Section 512(d) of the DMCA creates a safe harbor for providers of information location tools such as search engines. However, the specific terms of the safe harbor apply to infringement occurring “by reason of the provider referring or linking users to an online location containing infringing material or activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.” While search firms take the position that this safe harbor applies to all the copies a search engine makes in the course of its provision of information location services, to date no court has interpreted Section 512(d) in this manner. Furthermore, two district courts have construed the system caching safe harbor in Section 512(b) as applying to the caching performed by a search engine, *see Field v. Google, supra, and Parker v. Google*, 422 F. Supp. 2d 492 (E.D. Penn. 2006), but so far no appellate court has ratified this construction.

Yet, even if sections 512(b) and (d) unquestionably applied to the full range of search engine activities, search engines would still be subject to injunctions relating to the reproductions

they make during the course of performing their search function. Sections 512(b) and (d) prohibit monetary relief against an eligible service provider, but still permit injunctive relief. Moreover, a search engine is eligible for the Section 512(d) safe harbor only if it expeditiously removes material at the request of the copyright holder, and meets a variety of other conditions. As a result, even with the DMCA's protection, a search engine could still be required to remove information relating to vast numbers of legitimate websites, to the extent that the search engine indexed that information without the express permission of those websites' operators.

For this reason, fair use remains critical to the efficient operation of search engines. And for the same reason, the ISP safe harbor provisions in the FTAs are insufficient. Like the DMCA on which they were modeled, at most they only provide a safe harbor against money damages, not injunctive relief.

It is worth noting that EU law is less friendly to search engines than U.S. law. No court has interpreted the EU Copyright Directive's exception in Article 5(1) for temporary and incidental copies of no economic significance as shielding search engines from liability for the copies they make. The EU E-Commerce Directive has safe harbors for mere-conduit, caching, and hosting functions, but not for information location tools. Additionally, it is far from clear that the caching safe harbor would apply to the kind of caching performed by search engines. The U.K. copyright law has a fair dealing exception, but it is narrower than fair use; it is limited to noncommercial uses for research or study.³ Several European courts have found search engines' gathering of information from websites to violate national implementations of the EU Database Directive.⁴ A Belgian court found that Google's caching of websites, and subsequent display of the cache to users, infringes copyrights.⁵

It is no accident that the world's leading search engines are all based in the United States; fair use provides a far more fertile legal environment for innovation than regimes with a handful

³ British Commonwealth countries have adopted the U.K. concept of "fair dealing," which typically is much narrower than the U.S. concept of "fair use."

⁴ See B. Hugenholtz, *The Database Right File*, Inst. for Info. L., Dec. 13, 2006, <http://www.ivir.nl/files/database/index.html>.

⁵ *SCRL Copiepresse v. Google*, Gen. Role No. 06/10.928/C, 22 (Ct. of the First Instance of Brussels Feb. 15, 2007). The court considered, and rejected, the various defenses Google raised, including the exception for news reporting. Moreover, the court found that GoogleNews infringed copyright and violated the Database Directive by copying and displaying the headlines and lead sentences from articles.

of specific exceptions. However, as search engines attempt to operate around the world, they expose themselves to infringement liability.⁶

B. Fair Use and Software Development

Fair use is also critical to the inner workings of digital network technology. A user's computer can access information stored on a distant server only because the software on the user's computer, on the server, and on all the computers in between, can communicate with one another. This interoperability often can be achieved only if the software developer can reverse engineer the products with which it seek to communicate. And because of the nature of software, this reverse engineering, this studying of the operation of an existing product, can require the making of temporary copies or translations of the existing program. Several courts have concluded that fair use permits the copying that occurs during the course of software reverse engineering. *See Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992); *Atari v. Nintendo*, 975 F.2d 832 (Fed. Cir. 1992); *Sony v. Connectix*, 203 F.3d 596 (9th Cir. 2000).

The EU Software Directive contains exceptions for reverse engineering, as does Australia's copyright law. But these exceptions were the result of a lengthy, hard fought legislative process. For example, "Australia debated the issue of software reverse engineering for over a decade."⁷ According to the Australian Attorney-General, the Hon. Daryl Williams QC, the reverse engineering exception to copyright law was vital in order for Australia to maintain its competitive edge in the world economy.⁸ The decision making process to create an exception to copyright for software reverse engineering allowed for extensive input from concerned parties, jurists, and other experts. However, the delay between the start of discussions and the final passing of legislation creating this exception allowed other countries a long head start in technological innovation. Significantly, Australia's fair dealing provisions failed to adapt to the changing environment of software development without a statutory amendment.

⁶ In another example of fair use enabling innovation, the Fourth Circuit found that fair use excused the copying necessary to create a database designed to detect plagiarism in student papers. *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

⁷ Jonathan Band, *Software Reverse Engineering Amendments in Singapore and Australia*, J. Internet L., Jan. 2000, at 17, 18.

⁸ *Id.*

Singapore and Hong Kong, in contrast, adopted provisions based on 17 U.S.C. § 107 in order to accommodate software reverse engineering.⁹ The Philippines enacted a hybrid of section 107 and EU Software Directive's decompilation exception.

The FTAs permit parties to fashion exceptions to the prohibition on circumvention of technological protection measures to permit

noninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to that person, for the sole purpose of achieving interoperability of an independently created computer program with other programs.

Chile-U.S. Free Trade Agreement, Article 17.7(5)(d)(ii).¹⁰ However, the FTAs do not require parties to create exceptions to the copyright law to permit the copying necessary to perform reverse engineering essential for interoperability. Thus, an FTA might require a country to create a reverse engineering exception to the circumvention law, but that act of reverse engineering might still infringe the country's copyright law. This, of course, makes absolutely no sense. Inclusion of fair use in the FTAs would resolve this absurdity.

C. Fair Use and Creativity on the Internet.

The Internet allows every user to publish her creativity globally through blogs, bulletin boards, listserv, and websites. Much of this creative output is commentary on the news or culture of the day. Frequently, this commentary involves quotation from an article or another commentator. It may consist of a parody of a speech or a song. Or it could entail assembling a collage of small pieces of audio, visual, and textual material. Fair use makes this vital form of speech lawful in the United States.

Distinguishing between user-generated content that is infringing or fair use is a complex and uncertain process. Fortunately for web-hosts, Section 512(c) of the DMCA and the parallel provisions of the FTAs provide safe harbors for the entities hosting the user content. With these safe harbors, the web-host does not need to make the difficult determination of whether a specific user-posted item is infringing or not. But these safe harbors provide no shelter for the

⁹ See Jonathan Band, *Interfaces on Trial 2.0* (2011), available at <http://mitpress.mit.edu/band>. In 2004, Singapore amended its copyright law again to include a standalone exception for reverse engineering in addition to the fair use provision. Israel's new copyright law similarly includes separate sections based on 17 U.S.C. § 107 and Article 6 of the EU Software Directive.

¹⁰ Similar language appears in the Korea-U.S. Free Trade Agreement, Article 18.4.1(d)(i) and Article 16.4(7)(e)(i) of the Singapore-U.S. FTA.

user. While a creative user in the U.S. receives some protection from the fair use doctrine, a creative user abroad typically lacks an exception permitting transformative uses.¹¹ This absence of immunity from copyright liability drives down the supply of user-generated content internationally.

D. Fair Use and End-User Copies.

Fair use permits three at least different kinds of end-user copies enabled by digital technology. First, it permits time shifting, where a user records content such as a broadcasted television program to view it at a more convenient time. Digital video recorders such as the TiVo have made time shifting easier and more pervasive than ever. With the press of a button, a user can program a DVR to record a season's worth of episodes of a favorite television program. As noted above, the Supreme Court in *Sony v. Universal* concluded that a user's recording of a television broadcast for later viewing constituted a fair use.

Second, fair use permits "space shifting" – the ability to move content from one device to another so that the user can use the content in different locations. For example, a user can transfer a copy of a song on a compact disc to her MP3 player so that she can listen to the song while exercising at the gym. In *Recording Industry Association of America v. Diamond Multimedia Systems*, 180 F.3d 1072, 1079 (9th Cir. 1999), the Ninth Circuit considered the lawfulness of the Rio MP3 player. The court analogized space shifting to time shifting, stating that:

The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. *Cf. Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455 (1984) (holding that "time-shifting" of copyrighted television shows with VCR's constitutes fair use under the Copyright Act, and thus is not an infringement). Such copying is paradigmatic non-commercial personal use entirely consistent with the purposes of the [Audio Home Recording] Act.

Third, fair use permits the wide range of temporary copies necessary to the digital environment, where even the most basic operations require computers to make copies. For example, for a user to view a website, the user's computer must make a temporary copy of the website in its random access memory. Courts have found these temporary copies permitted by fair use. *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1169 (9th Cir. 2007) ("The copying function

¹¹ Foreign copyright laws may provide an exception for short quotations or parodies, but these exceptions may be too narrow to permit the copying of audio-visual clips.

performed automatically by a user's computer to assist in accessing the Internet is a transformative use.”)

Significantly, these uses have become essential to the conduct of business. Workers access the Internet to locate important information throughout the work-day, making temporary copies of the websites they visit. If an employee finds an item of interest, he might time-shift it by copying it onto his hard-drive so that he can read it later. He also might space-shift it by printing it out or making a digital copy that he forwards to colleagues as an attachment to an email.

Fair use is flexible enough to permit these end-user copies even in the business context. To be sure, a few jurisdictions have adopted explicit exceptions for temporary copies. Thus, Article 5(1) of the European Union's Copyright Directive specifically exempts:

[t]emporary acts of reproduction ... which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject matter to be made, and which have no independent economic significance...

Similarly, the Australian Copyright Amendment Bill 2006 permits temporary copies made in the course of telecommunications or “incidentally made as a necessary part of a technical process of using a copy of the work.” *See* Sections 43A and 43B. However, most jurisdictions currently have no exemption for temporary copies.

With respect to time-shifting and space-shifting, the EU Copyright Directive permits reproductions “by a natural person for private use and for ends that are neither directly or indirectly commercial,” only if “the rightsholders receive fair compensation.” Article 5(2)(b). This “fair compensation” typically is accomplished by means of a levy on the sale of devices or storage media. The levy amounts to a tax on new technology, and it inhibits the technology's adoption.

The Australian Copyright Amendment Bill 2006 contains several sections that permit specific kinds of time-shifting and space-shifting under specific circumstances. For example, one may digitize a photograph in analog format, or make a hard copy of a digital photograph, but one may not make a digital copy of a digital photograph. *See* Section 47J. Likewise, the

exception for the reproduction of books and articles appears to permit only digitizing materials originally in analog format, but not making digital copies of digital works. *See* Section 47C.

In addition, the private use exception in the Copyright Directive and the time- and space-shifting provisions in the Australian Copyright Amendment Act 2006 apply only to copies for personal use, and not to copies made in the workplace. Accordingly, the copies routinely made in the workplace, *e.g.*, forwarding by email an item of interest to a colleague, would not be permitting in the EU or Australia.

In sum, fair use permits end-users in the United States to engage in time-shifting, space-shifting, and the making of temporary copies. The lawfulness of these activities, in turn, stimulates a robust market for the provision of devices that enable these copies. Conversely, the uncertain legal status of these activities in other markets, or the taxes imposed upon them, has a chilling effect on the market for these products.

IV. The TPP Agreement Should Include a Fair Use Provision.

Recent U.S. FTAs require parties to provide authors with “the right to authorize or prohibit all reproductions of their works, in any manner or form, permanent or temporary (including temporary storage in electronic form).” Chile-U.S. FTA at Article 17.5(1).¹² While giving authors these broad and precise rights, the FTAs vaguely instruct parties, consistent with the Berne Convention’s “three-step test,” to “confine limitations or exceptions . . . to certain special cases which do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.” *Id.* at 17.7(3).¹³ However, almost every activity on the Internet involves the making of a copy: viewing a website; printing out an interesting article; responding to an email; compiling a search index. Thus, in the absence of robust exceptions, Internet service providers are large-scale direct and secondary infringers. Likewise, the providers of the devices employed by users to make these copies are secondary infringers if these copies are treated as infringements.

¹² Similar language appears in the Korea-U.S. FTA at Article 18.4(1) and the Singapore-U.S. FTA at Article 16.4(1).

¹³ Similar language appears in footnote 11 of KORUS and Article 16.4(10) of the Singapore U.S. FTA.

Presumably the TPP agreement will contain a grant of rights and remedies as broad as that of recent FTAs.¹⁴ Given this likely broad grant of rights and remedies, and the inevitability of copying on the Internet, limiting the TPP agreement's exception language to the Berne Convention three-step test is too ambiguous. Safe harbors for ISPs based on the DMCA are helpful, but they do not go far enough to permit the full range of activities in which Internet and other technology firms routinely engage.¹⁵ Only a broad, flexible exception similar to the fair use doctrine will provide a country's copyright law with sufficient flexibility to respond to evolving technology. The inclusion of fair use language in the TPP agreement will provide this flexibility, thereby facilitating the growth of the technology sector in all TPP countries.

Footnote 11 of KORUS states that "each Party may adopt or maintain limitations or exceptions ... for fair use, as long as any such limitation or exception is confined" to the Berne three step test. However, this language is only voluntary: "each Party *may* adopt limitations or exceptions ... for fair use...." The TPP agreement must contain *mandatory* fair use language to ensure that Internet companies can operate safely in the Pacific region.

It has been suggested that a flexible fair use standard is incompatible with foreign legal systems. But, as discussed above, three other jurisdictions in the Pacific Rim have already adopted exceptions based on the four factors of 17 U.S.C. § 107: Singapore, Hong Kong, and the Philippines.¹⁶ Additionally, other British Commonwealth countries have fair dealing provisions that in certain respects provided judges with even more discretion than section 107 because they do not specify the factors judges should consider in assessing the fairness of the dealing.

¹⁴ The free trade agreements require the adoption of "pre-established damages." In the United States, courts may award statutory damages of up to \$150,000 per work infringed. This means that a technology companies can face draconian liability exposure. If YouTube loses its pending litigation with Viacom, it could be liable for more than a billion dollars of statutory damages, even in the absence of any showing of actual damages.

¹⁵ For this reason, the language contained footnote n. 17 of the Chile-U.S. FTA, inspired by Article 5(1) of the EU Copyright Directive, is too narrow: "Article 17.7(3) permits a Party to carry forward and appropriately extend into the digital environment limitations and exceptions in its domestic laws which have been considered acceptable under the Berne Convention. Similarly, these provisions permit a Party to devise new exceptions and limitations that are appropriate in the digital network environment. For works, other than computer software, and other subject-matter, such exceptions and limitations may include temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a lawful transmission in a network between third parties by an intermediary; or (b) a lawful use of a work or other subject-matter to be made; and which have no independent economic significance."

¹⁶ Israel also has adopted a statutory exception based on section 107.

Moreover, judges in all jurisdictions routinely apply standards at least as vague as whether a use is fair. Article 2 of the World Intellectual Property Organization Copyright Treaty provides that “copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.” U.S. courts have long recognized that “drawing the line between idea and expression is a tricky business.” *Computer Associates v. Altai*, 982 F.2d 693, 704 (2d Cir. 1992). Judge Learned Hand stated that “nobody has ever been able to fix that boundary, and nobody ever can.” *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). Judge Hand also noted that “obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be *ad hoc*.” *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). If a judge can make *ad hoc* decisions concerning the metaphysical idea/expression dichotomy, then surely she can assess the fairness of a use.

All judges must apply uncertain standards in other cases. Many countries have “unfair competition” statutes that provide courts with little or no guidance. In tort cases, judges must evaluate whether a party was negligent. In criminal cases, a court must determine the defendant’s *mens rea* – whether the defendant acted with criminal intent. It is unavoidable that the judiciary must apply flexible, general rules to specific facts. In short, judges in all TPP countries are capable of applying flexible fair use standards.