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'Fair use' could be getting a 21st century face-lift this summer

One of the most popular phrases in copyright law today is "fair use."

In lockstep with ever-advancing technology, fair use has become the most resonant legal defense in global IP, especially when it comes to copyright infringement.

People who download music, films and other copyrighted works without permission always claim what they are doing is a "fair use." Authors, artists and musicians who incorporate another's work into their own claim they are involved in fair use. It is probably the most often relied upon, yet least predictable, doctrine in copyright law.

Since the 1830s when Justice Joseph Story created the doctrine in *Folsom v. Marsh* to deal with the unauthorized publication of George Washington's letters, fair use has garnered praise for promoting socially beneficial uses. It has also been simultaneously criticized for being so expansive that it threatens to eliminate authors' rights to control the use of their works, particularly on the Internet.

The one thing that both sides seem to agree on is the need for reform. If a draft treaty involving the access of visually impaired persons to copyrighted works is accepted at a June diplomatic conference in Marrakech, Morocco, both sides may get their wish. They may also discover that the old adage "be careful what you wish for" applies even in international copyright law.

Since 1886, with the first Berne Convention, socially desirable uses such as reporting the "news of the day" (Article 7) have been a constant source for fair-use exceptions to copyright protection. Similar to its domestic equivalent, fair use under international law has expanded over time. Later versions of the Berne Convention specifically required additional exceptions to cover teaching and the use of quotations for purposes of comment or criticism.

The current international test

for fair use, referred to as "the three-step test," forgoes specific categories of protected uses and instead allows countries to create new "certain special cases" for fair use. These "certain special cases" must not "conflict with a normal exploitation of the work" and must not "unreasonably prejudice the legitimate interests of the right holder."

In its first appearance in Article 9 of the Berne Convention in the era of print publication, this three-step test only applied to the then-valuable right of reproduction. In 1994, when the World Trade Organization (WTO) introduced Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the three-step test had morphed into an exception applicable to all rights under copyright. Thus, in today's incarnation, the three-step test applies not only to the creation of parodies but also to the personal-use rights to download music.

With its broad balancing approach, the three-step test allows each country to create its own categories of fair use. This liberal application has come under increased challenge, particularly in the area of access to copyrighted works for the visually impaired. At present, there is no international obligation to provide special access to copyrighted works for this disability.

Some countries, such as the United States, have a specific statutory exception that allows an "authorized entity" to "reproduce or to distribute copies ... of a previously published, nondramatic literary work if such copies ... are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities." (17 U.S.C. Section 121)

However, over two-thirds of the other countries provide no equivalent exceptions. A draft treaty dealing with fair-use exceptions in connection with the provision of copyrighted works to visually impaired persons (Treaty to Facilitate Access to Published Works by Visually Impaired Persons and



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Persons With Print Disabilities, referred to informally as VIP) is set for a diplomatic conference in June in Marrakech.

VIP arose from efforts by the World Blind Union to create a categorical fair-use exception for the creation and distribution of copyrighted works in "accessible formats" for persons who are blind, visually or perceptually impaired or physically impaired to the extent that they are unable to read printed works to "substantially the same degree" as those suffering no such impairment.

Beyond this narrow exception, however, VIP promises to change the face of international fair use by altering the long-standing three-step test.

Proposed Article 1 of VIP would impose changes to the three-step test that would put a thumb on

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the scale in favor of end users and open access paradigms. It calls for the addition of a fourth step, one that specifically adds into the mix "the legitimate interests of third parties." It further specifies that the "interests" which should be considered include "interests deriving from human rights and fundamental freedoms ... and other public interests, notably in scientific progress and cultural, educational, social or economic development."

The "other public interests" language often serves as code for those seeking to expand public access and use rights for copyrighted works. The phrase frequently appears as part of the rhetoric of those who believe that copyright should be reduced in favor of virtually unlimited (and uncompensated) access to copyrighted works, including personal use rights to access copyrighted works of any form and from any source, including even rogue websites.

This rights language clearly goes beyond the narrowly crafted access exception that is the primary focus of VIP. If adopted, it would unalterably change the present balance of power in fair-use determinations. It would plainly place access to information and personal use demands on an equal footing with the copyright owner's interest. It would not, however, guarantee any particular outcome in connection with these demands, since the treaty provides no guidance on how such demands should be ranked.

More problematically, it will not provide more predictable outcomes in fair-use cases, or guarantee that a particular use necessarily qualifies as "fair" in all countries.

Even if this new third-party interest language does not survive VIP, the renewed focus on fair-use guarantees that VIP will not be the last chance for a fair use touch-up. We can only hope that whatever face-lift fair use ultimately receives is seen as an improvement by everyone impacted. We'll learn more in June.