

Consumers and Digital Content

Copyright and Exceptions for Personal Use

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Outline

Personal uses and copyright

- The basics

- Remuneration of personal uses?

Threats to personal use rights

Application

- An old example: DVDs

- The future

Recommendations

- Solutions

- Conclusion



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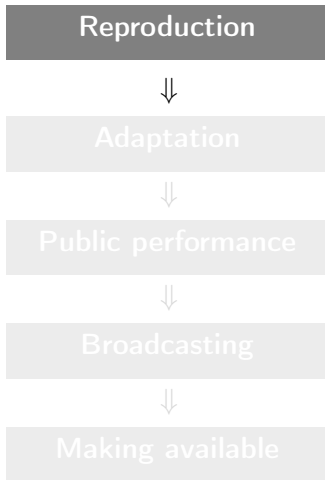
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Copyright never covered *all* uses of works

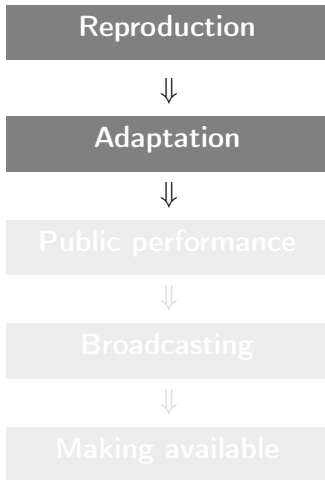
Though the list of uses it *does* cover has been growing over time





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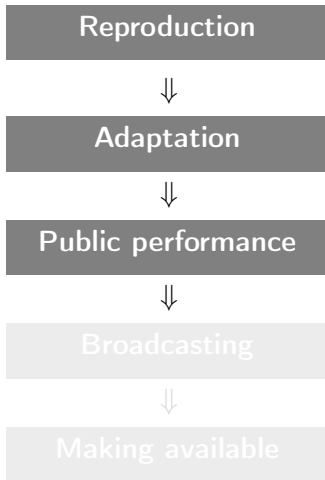
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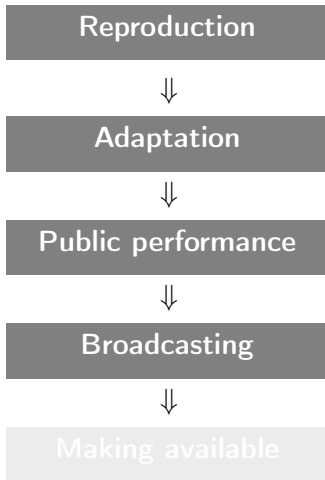
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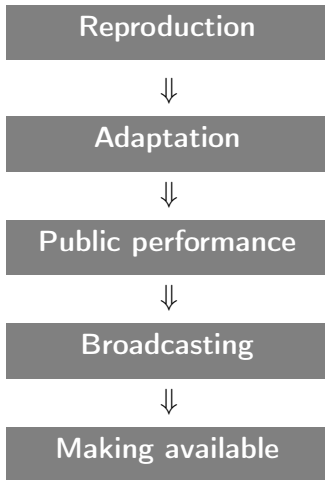
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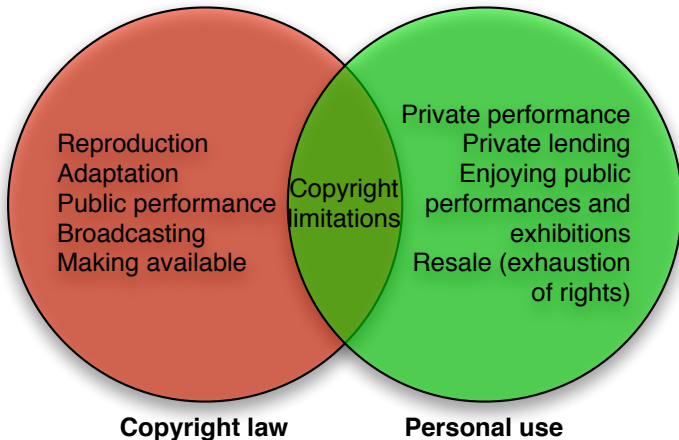
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Personal uses that copyright *doesn't* cover

(Example only: exact boundaries vary from country to country)





So where do personal use rights come from?

- Some come from copyright law
 - *Limitations* delimit the scope of rights and are often *implicit*
 - *Exceptions* carve out specific permitted uses (eg. quotation)
 - *Licences* may be given gratuitously (eg. Creative Commons), implicitly (copying computer software into memory) or compulsorily
- Some *technically infringing* personal uses are *tolerated*
 - Forwarding emails, backing up hard drives, format shifting
 - *De minimis* – courts may refuse to grant substantive relief
- 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
- Some are *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

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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).

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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)

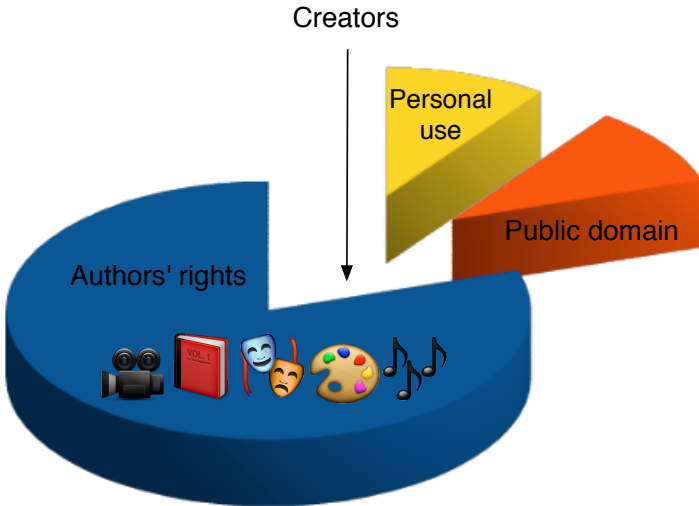
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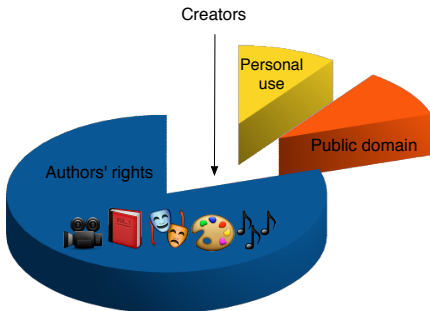
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Philosophical differences – the rights-holder view



Assumptions of the rights-holder model

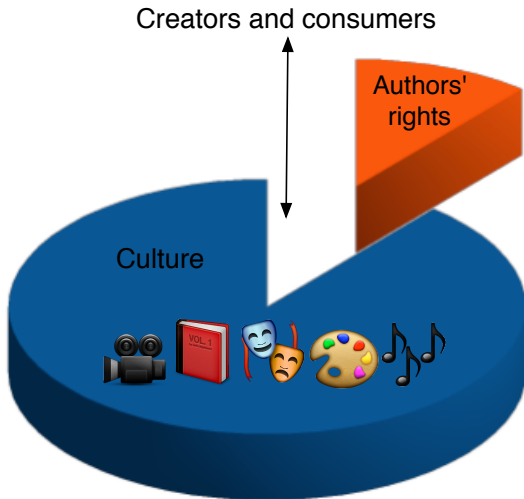


- Creation as authorship
- Authors' rights the default position
- Private copying is a “loss” to authors

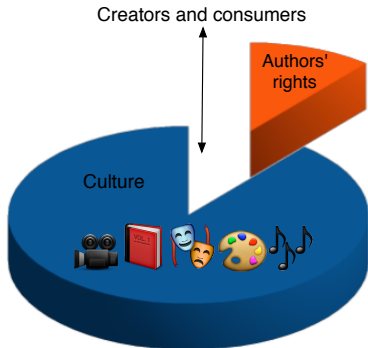
“As an exception to copyright, it deprives rightholders of their right to authorise these copies” – Society of Audiovisual Authors

- Uncompensated sharing is “theft” or “piracy”

Philosophical differences – the consumer view



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 (eg. reading aloud e-books)
- How?
 - *Technical* and *legal* means and through *intermediaries*



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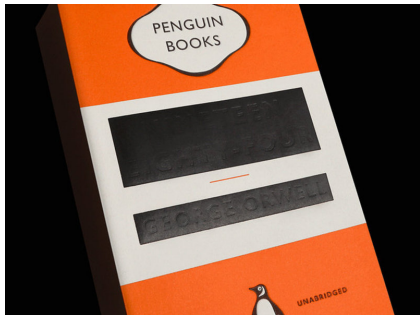


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Technical limits on personal use rights

- 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

A photograph of Judge Nancy Gertner, a woman with dark hair, wearing a black judicial robe, smiling. She is standing in a courtroom with wooden paneling and rows of law books on shelves behind her.

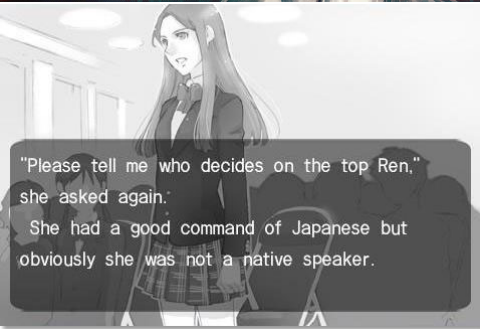
There is something wrong with a law that routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood.

– 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 rojedia.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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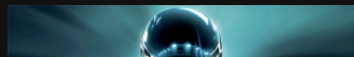
TV FANART

Our TV Fanart section maintain high standards. This section is the original fanart with transparent backgrounds. We provide a transparent background thumbs (TV Thumbs) to make the process to ensure quality.



MUSIC

Our Music Fanart section is stunning in your media collection. We provide cds with transparent backgrounds and a lot of skins in different styles playing.



MOVIE



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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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