Fair Use and its politics, at home and abroad

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*Homage to Edward Tufte, The Cognitive Style of Powerpoint*
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Berne Convention Article 9(2)
It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

TRIPS Article 13 - Limitations and Exceptions
Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.
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Is the American fair use doctrine as embodied in 17 USC 107 compliant with the three step test (of Berne, TRIPS, WCT, WPPT, and Beijing)?
“The U.S. fair use doctrine is seeming rather cavernous of late. Does its recent expansion exceed the bounds set by the three-step test for Berne-, WCT-, and TRIPS-compatible exceptions?

Jane C. Ginsburg

*Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms – Part II (fair use)* [December 2014]

“An increasingly expansive fair use exception risks violating each of these three steps [of TRIPS Article 12, Berne Article 9(2)].”

June M. Besek,

Testimony in Hearing on “fair use” Committee on the Judiciary, U.S. House of Representatives [28 January 2014]
"Translation has not yet been recognized as a form of transformative use under U.S. copyright law, but arguably it should be."

Lea Shaver, Copyright and Inequality, 92 Wash. U. L. Rev. 117, 157 (2014)
“Translation has not yet been recognized as a form of transformative use under U.S. copyright law, but arguably it should be.”


Berne Convention, Article 8
Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.
Is the American fair use doctrine as embodied in 17 USC 107 compliant with the three step test (of Berne, TRIPS, WCT, WPPT, and Beijing)?
Fair use is not AN exception and it is not A limitation.

Fair use IS a *mechanism* to establish exceptions and limitations.
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“The author may not prohibit the reproduction or communication of the work in the form of a parody, where the rules of the genre are observed.”

Senegal Law No. 2008-09 of January 25, 2008 on Copyright and Neighboring Rights, Article 43

“The right conferred in respect of a work by section 5 of this Act does not include the right to control . . . (b) the doing of any of the aforesaid acts by way of parody, pastiche, or caricature”

The Copyright Act of Nigeria, Second Schedule
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Yes.
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**Yes.** Sri Lanka (2003); Singapore (2004); Israel (2007); South Korea (2011); Philippines (2012)
Vienna Convention of the Law of Treaties
Article 31

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . .”
Fair Use – transformation at home, proliferation abroad
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What was the transformation?

“using [the clip] as a biographical anchor”
“using the clip for its biographical significance . . . has imbued it with new meaning.”

What was the transformation?

“using [the clip] as a biographical anchor”
“using the clip for its biographical significance . . . has imbued it with new meaning.”

So, originally what was the clip?

“the clip conveys mainly factual information—who was about to perform”
“Sullivan simply identifies the group that is about to perform . . . .”

The first factor supports a finding of fair use because of the transformative nature of Defendant's publication. The photographs were used not in their original context as documentation of Plaintiff's wedding night but as confirmation of the accompanying text challenging Plaintiff's repeated public denials of the marriage.

*Monge v. Maya* 96 USPQ2d 1678
(C.D. Cal, September 30, 2010)
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_Monge v. Maya_ 96 USPQ2d 1678
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Transformation from “documentation of [a] wedding” to “confirmation” that a wedding happened?
The first factor supports a finding of fair use. The Court finds that West and Lexis's use of the briefs was transformative. While White created the briefs solely for the purpose of providing legal services to his clients and securing specific legal outcomes in the Beer litigation, the defendants used the brief toward the end of creating an interactive legal research tool.

Fair Use – transformation at home, proliferation abroad

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“Transformation” simply from inclusion in a database?
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Foreign countries might “cite the fair use doctrine as the justification for their own derogations . . . notwithstanding that their local judicial institutions may not be developed enough to exercise a balanced application of the doctrine.”

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“‘[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.’”

Murray v. The Schooner Charming Betsy
Supreme Court, 1804
“It’s a poor sort of memory that only works backwards”

The White Queen to Alice
Lewis Carroll
*Through the Looking Glass* (1872)