

# Flexible Copyright

## Can EU Authors' Right Accommodate Fair Use?

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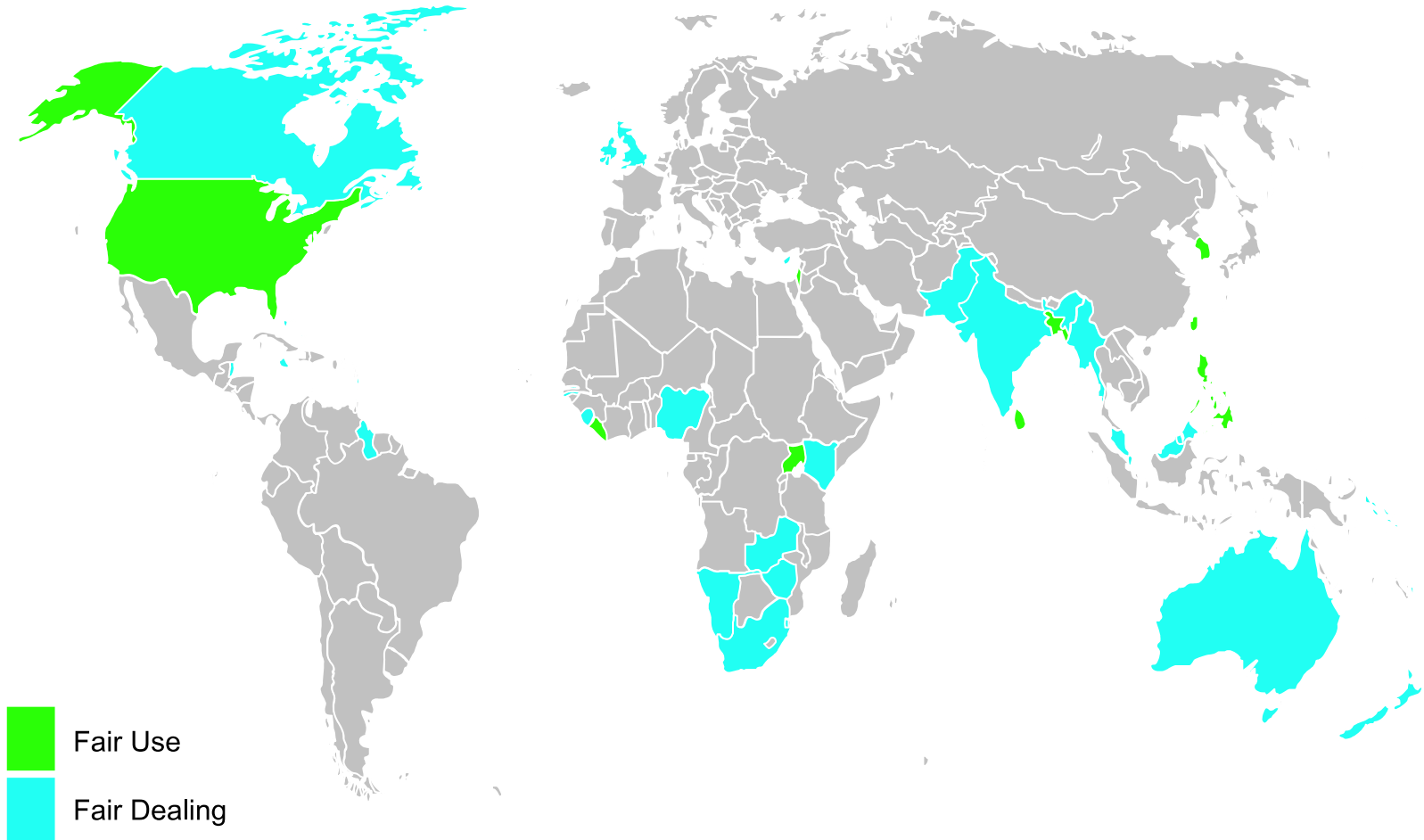
Prof. P. Bernt Hugenholtz



Fordham IP Conference  
New York, 24 April 2014

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# Fair Use and Fair Dealing Around the World



Based on Band & Gerafi, *The Fair Use/Fair Dealing Handbook*; map prepared by Amy Bulgrien.

# Typology of Limitations and Exceptions

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- *Copyright* systems (common law countries)
  - Fair use: open norm allowing range of ‘fair’ uses
  - Fair dealing: list of L&E’s with some flexibility
- *Authors’ right* systems (civil law + EU):
  - Closed list of L&E’s
  - EU InfoSoc Directive (2001): exhaustive list of (optional, but one) L&E’s

# Increasing Need for Flexible, Open Norms

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- Accelerating pace of technological change
- Legislature cannot respond, must anticipate → more abstract, open norms
- EU harmonization requires extra cycle of law making
  - Total legislative response time > 10 years!

# Why Authors' Rights Systems are Suspicious of Fair Use

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- *Civil law* made by the people, not the courts  
→ judge is “mouth of the law”
- Authors' rights based in natural law, favors authors over users → narrow ‘exceptions’
- Concerns over legal certainty (‘floodgates’)
- Fears of US legal imperialism (“Fair US”)
- EU (or int'l) law does not permit fair use

# Authors' Right Systems Can Accommodate Flexibilities

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- Civil law has moved to more open norms
- AR systems moving away from natural law
- Legal certainty?
  - FU is fairly predictable (Beebe, Samuelson, Netanel)
- EU legal framework has left 'breathing space'
  - Hugenholtz & Senftleben, 'Fair use in Europe'
- No conflict with 3-step test if test becomes part of national norms

# European Copyright Code (Wittem Group)

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## **Art. 5.5 – Further limitations**

Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.