

## Fair Use Rising: Full-Text Access and Repurposing in Recent Case Law

**Brandon Butler, Practitioner-in-Residence, American University Washington College of Law**

It has been a very good year and a half for fair use. In case after case, from earnings calls about watches to appropriation art about Rastafarians, courts drew a clear line allowing broad and free re-use of copyrighted works for a variety of socially beneficial purposes. Indeed, one trend across all but one of these cases is the broad redistribution of unaltered, full-text documents for new purposes. When a user has a new and socially beneficial purpose that is different from the author's original purpose in creating and publishing the work, courts call such uses "transformative," and give them broad leeway under the fair use doctrine. For obvious reasons, research libraries may be better positioned than almost any other institutions to take advantage of this salutary embrace of re-purposing full-text works. This article describes six fair use decisions handed down in the last 18 months with powerful implications for research libraries' fair use rights.<sup>1</sup>

The Second Circuit's decision in *Cariou v. Prince*<sup>2</sup> provides an example of fair use that is transformative without being critical. The case involved appropriation artist Richard Prince and his use of photographs of Rastafarians taken by Patrick Cariou. In his own work, Prince altered Cariou's work in a variety of ways, including dramatically enlarging the images, cutting and pasting pieces of the photos into collages, and painting over the images. Prince gave coy, ambivalent descriptions of his purposes in re-using Cariou's work, including expressly disclaiming any intention of commenting on or criticizing Cariou or his work.<sup>3</sup> The district court ruled for Cariou, saying Prince's use was not fair because he had no intent to criticize Cariou. The appeals court disagreed, saying the key question was whether Prince's appropriations served new aesthetic purposes and would be received differently by their intended audience. Because Prince's paintings created a radically different impression on the viewer than Cariou's original photos,<sup>4</sup> and served different audiences,<sup>5</sup> the appeals court ruled that Prince's uses were fair.

In *Swatch v. Bloomberg LP*,<sup>6</sup> the Second Circuit court of appeals held that it was fair use for news organization Bloomberg to post the entirety of a recorded Swatch earnings call online as part of its news coverage of the company. Remarkably, the court's initial opinion found that the use was fair use **despite** being "non-transformative and commercial,"<sup>7</sup> but it issued an amended opinion months later removing that description and adding a new section arguing instead that the use was "arguably transformative" because of its novel purposes.<sup>8</sup> Specifically, the court argued that Bloomberg had published the call to a different audience (its subscribers, as distinct from Swatch shareholders) and for a different purpose (to portray objectively the content of the call, rather than to persuade or justify the company's actions). These new purposes, together with the strong public interest in public availability of financial information, led the court to find Bloomberg's use fair.

Novel purposes also led to a finding of fair use in *White v. West Publishing Corp.*, where a commercial database service copied and made available the full text of legal briefs to facilitate research.<sup>9</sup> White, an attorney, sued West and Lexis, alleging that their practice of ingesting appellate briefs into their legal

research databases and making the briefs available to database subscribers violated the copyrights of the briefs' authors, including White. The court disagreed, citing the value added by Lexis and West as well as the publishers' novel purposes relative to the briefs' authors. The court's finding regarding the fair use import of adding value to digital documents may be the most interesting one for libraries considering digitizing and indexing collections materials: "West and Lexis's processes of reviewing, selecting, converting, coding, linking, and identifying the documents 'add[ ] something new, with a further purpose or different character' than the original briefs."<sup>10</sup> The internal quotation is from *Campbell v. Acuff-Rose*, the most recent Supreme Court opinion on the scope of fair use.

A pair of additional cases involving lawyers, this time as the defendants, provides another example of novel purposes and favored public policy playing a decisive role in fair use decision-making.<sup>11</sup> Both cases involve law firms copying the full text of scientific articles in the process of researching, filing, and prosecuting patent applications. The government requires that patent applicants include such articles, known as non-patent literature (NPL), as evidence regarding the originality and novelty of their inventions. Patent law firms file copies of NPL with the US Patent and Trademark Office and retain copies for their clients' files. Citing an earlier case finding Texaco scientists infringed copyright by copying journal articles for their research,<sup>12</sup> scientific publishers demanded that the law firms pay a license to copy NPL. The courts disagreed, finding that using the articles as evidence in a patent proceeding is a transformative use different from the articles' intended use of providing scientists in the field with the latest developments. The *Texaco* case has been widely cited for the proposition that where there is a ready licensing market (in that case, a market operated by the Copyright Clearance Center), all users must pay a license to photocopy. These two recent cases show that a sufficiently novel purpose will trump the presence of such a market.

Last, but certainly not least, the Second Circuit's opinion in the *Authors Guild v. HathiTrust*<sup>13</sup> case sheds more light on when full-text copying and distribution will be considered fair. In *HathiTrust*, the court found that a group of universities were protected by fair use when they digitized millions of in-copyright books in order to create a digital search tool that would help scholars locate books and conduct new modes of text-mining research across the corpus. The court also found that it was fair use to provide robust digital versions of books (including both text and images) to print-disabled library users, citing the strong public policy favoring equal access as well as the near-total failure of the market to serve print-disabled readers. Finally, although the court did not render an opinion regarding use of the database to provide replacement copies as a preservation measure, it seemed to endorse the practice of retaining digitized copies in redundant databases to ensure the works' continued availability long after the expiration of their copyright term.

Here are some key takeaways for research libraries from these six cases:

1. **Making entire, unaltered works available for reading may be found fair where the user's purpose differs sufficiently from the original purpose of the work, and the amount taken is justified by that novel purpose.** In all but one case (*Cariou*) an original, unaltered work was published to a particular

audience to serve a defined purpose, and fair use permitted copying and distribution where the purpose and/or the audience was distinct from the original purpose or audience for the work.

2. **Copying and distribution that is conducted *systematically and at a large scale* can be found fair where the use is for a new, favored purpose.** Lexis and West ingested millions of legal briefs from appellate courts around the country. HathiTrust contains millions of digitized books, made available to thousands of print-disabled users. Patent attorneys file applications with hundreds of journal articles as a routine part of their practice. This provides further evidence that the 1976 *Classroom Guidelines*, which include requirements that uses be spontaneous, isolated, and never of complete works, have now been completely eclipsed by the case law, and have become obsolete as fair use guidance documents.
3. **A new use need not criticize or comment on an existing work in order to be fair, if its purpose is sufficiently novel.** Because the Supreme Court's most recent fair use decision involved a parody, some have said that all fair uses must be critical of the works they reuse. The most recent cases show that this simply is not true. Each of the uses above involves re-use that is neither criticism nor commentary, and yet the courts still found them to be transformative due to their novel purposes.
4. **Processing activities that are common in libraries—"reviewing, selecting, converting, coding, linking, and identifying...documents"—can be part of a compelling case for fair use.** Libraries invest substantial time, money, and expertise adding value to their collections in these ways, and a court has now recognized that such activities constitute the kinds of value-adding activities that fair use favors.
5. **Even non-transformative use of entire works can be fair where the purposes are sufficiently favored and the markets have failed.** While these cases show, yet again, the courts' strong preference for "transformative use," that is, uses for new purposes, in new contexts, with value added, and so forth, the *HathiTrust* case also shows the continuing relevance of market failure. Where there is strong evidence of a public policy favoring access from the courts, from legislative history, and from other laws favoring the activity, **and** where the market has apparently failed completely to serve a given community, courts can invoke fair use to protect an institution that provides access to otherwise inaccessible works. This should give libraries comfort as they work to meet their mission (and their legal responsibility) to provide equitable access to all users.

## Endnotes

- 1 Another very important fair use decision, the 11th Circuit's opinion in *Cambridge University Press et al. v. Becker*, also known as the Georgia State University (GSU) e-reserves case, was issued in late 2014. Although the case also has important implications for research libraries and their users, it does not involve full-text repurposing, so it is outside the scope of this article. Unlike the uses described in this article, the court found Georgia State's uses to be non-transformative, so the amount of the original work that could be reused was substantially limited compared to uses described below.

- 2 714 F.3d 694 (2nd Cir. 2013).
- 3 *Id.* at 707 (“The district court based its conclusion that Prince’s work is not transformative in large part on Prince’s deposition testimony that he ‘do[es]n’t really have a message,’ that he was not ‘trying to create anything with a new meaning or a new message,’ and that he ‘do[es]n’t have any... interest in [Cariou’s] original intent.’”).
- 4 *Id.* at 706. “Where Cariou’s serene and deliberately composed portraits and land-scape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince’s crude and jarring works, on the other hand, are hectic and provocative.”
- 5 *Id.* at 709. The opinion contrasts the low sales figures and moderate price of Cariou’s photo book with the celebrity buyers and higher prices of Prince’s works to show that Prince’s work “appeals to an entirely different sort of collector than Cariou’s.”
- 6 2014 WL 2219162 (2014).
- 7 742 F.3d 17, 27 (2014) *amended by* Swatch Management Group v. Bloomberg LP, 2014 WL 2219162 (2014).
- 8 2014 WL 2219162 at \*9.
- 9 *White v. West Pub. Corp.*, 2014 WL 3057885 12-civ-1340-JSR (S.D.N.Y. 2014).
- 10 *Id.* at \*2.
- 11 *Am. Inst. of Physics v. Winstead PC*, 3:12-CV-1230-M, 2013 WL 6242843 (N.D. Tex. Dec. 3, 2013) (journal article used in patent process “is transformed from an item of expressive content to evidence of the facts within it”); *Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A.*, CIV. 12-528 RHK/JJK, 2013 WL 4666330 (D. Minn. Aug. 30, 2013), appeal dismissed (Feb. 19, 2014) (finding “there is no reasonable dispute that Schwegman did not use the Articles ‘for the same intrinsic purpose as [the Publishers.]”).
- 12 *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).
- 13 *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2014).

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