

COPYRIGHT AND FAIR USE

The goal of copyright law and policy is to foster the progress of science, the creation of culture, and the dissemination of ideas. Its best-known feature is protection of owners' rights. But copying, quoting, and generally re-using existing cultural and scientific material can be a critically important part of generating new research and culture and promoting intellectual exchange. In fact, the value of these practices is so well established that it is written into the social bargain at the heart of copyright law. We as a society give limited property rights to creators to encourage them to produce science and culture; at the same time, we guarantee that all works eventually will become part of the public domain and, in the meantime, we give other creators and speakers the opportunity to use copyrighted material without permission or payment in some circumstances. Without the second half of the bargain, we could all lose important new work and impoverish public discourse.

Fair use is widely and vigorously employed in many professional communities. For example, historians regularly quote both other historians' writings and primary sources; filmmakers and visual artists use, reinterpret, and critique copyrighted material; scholars illustrate cultural commentary with textual, visual, and musical examples. Fair use is also healthy and vigorous in broadcast news and other commercial media, where references to popular films, classic TV programs, archival images, and popular songs are frequently unlicensed. Trade and academic publishers regularly rely on fair use to justify the incorporation of third-party material into books they produce. Librarians likewise need fair use to execute their mission on a daily basis.

No group of institutions, no matter how important their cultural function, is immune from the operation of copyright law. Academic and research libraries are not-for-profit institutions, but they still must build collections by buying books and subscribing to journals and databases. Likewise, they get no "free pass" simply because their function is to support education. That said, the United States Copyright Act is particularly solicitous of educational and academic uses in many circumstances. That solicitude is reflected in several structural features that benefit users of copyrighted material in and around the academic or research library. These include the specific exceptions contained in Sections 108, 110, and 121 of the Copyright Act and the special protections granted by Section 504(c)(2). Even when, as is often the case, specific exceptions don't literally reach the proposed library

activities, the policies behind them may help to guide the interpretation of fair use as it applies to schools and libraries.⁴

As legislative history makes clear, these provisions were designed to complement rather than to supplant fair use, which has been part of copyright law for 170 years and remains the most fundamental of such structural features.⁵ Section 107 of the Act, which codified the fair use doctrine in 1976, specifically includes references in its preamble to a number of activities associated with the academic and research library mission, including “criticism, comment..., teaching..., scholarship, [and] research.”

Fair use is a user’s right. In fact, the Supreme Court has pointed out that it is fair use that keeps copyright from violating the First Amendment; without fair use and related exceptions, copyright would create an unconstitutional constraint on free expression. Creators, scholars, and other users face new challenges as copyright protects more works for longer periods, with increasingly draconian punishments and narrow, outdated specific exceptions. As a result, fair use is more important today than ever before.

Because copyright law does not specify exactly how to apply fair use, the fair use doctrine has a useful flexibility that allows the law to adjust to evolving circumstances and works to the advantage of society as a whole. Needs and practices differ with the field, with technology, and with time. Rather than following a prescriptive formula, lawyers and judges decide whether a particular use of copyrighted material is “fair” according to an “equitable rule of reason.” In effect, this amounts to taking all the facts and circumstances into account to decide whether an unlicensed use of copyrighted material generates social or cultural benefits that are greater than the costs it imposes on the copyright owner.

4. See Jonathan Band, “The Gravitational Pull of Specific Exceptions on Fair Use” (Sept. 1, 2011), unpublished manuscript, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966593.

5. See, e.g., 17 U.S.C. § 108(f)(4), (“[Nothing in this section] in any way affects the right of fair use as provided by section 107...”); U.S. Copyright Office, *The Section 108 Study Group Report 22* (2008), (“[S]ection 108 was not intended to affect fair use. Certain preservation activities fall within the scope of fair use, regardless of whether they would be permitted by section 108”); memorandum from Randolph D. Moss, acting assistant attorney general to the general counsel, Department of Commerce (April 30, 1999), (“Section 108 of the 1976 Act does not narrow the protection for fair use provided by the common law doctrine codified in section 107”), <http://www.justice.gov/olc/pincusfinal430.htm>.

This flexibility in the law can lead to uncertainty among librarians (as in other practice communities) about whether specific uses are fair. However, fair use is flexible, not unreliable. Like any exercise of expressive freedom, taking advantage of fair use in education and libraries depends on the application of general principles to specific situations. One way of easing this application is to document the considered attitudes and best practices of the library community as it works to apply the rules.

In weighing the balance at the heart of fair use analysis, judges generally refer to four types of considerations mentioned in Section 107 of the Copyright Act: the nature of the use, the nature of the work used, the extent of the use, and its economic effect (the so-called “four factors”). Over the years, attempts have been made to promulgate so-called “fair use guidelines,” with the goal of reducing uncertainty about the application of this formula—even at a cost to flexibility. Unfortunately, the processes by which most guidelines have been developed are suspect, and the results are almost universally over-restrictive.⁶ In fact, “bright line” tests and even “rules of thumb” are simply not appropriate to fair use analysis, which requires case-by-case determinations made through reasoning about how and why a new use repurposes or recontextualizes existing material.

How judges have interpreted fair use affects the community’s ability to employ fair use. There are very few cases specifically involving libraries.⁷ However, we know that

6. See Kenneth Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” 62 *Ohio State Law Journal* 602 (2001).

7. At the time of this writing, there are no judicial opinions describing in any detail the scope of fair use in a nonprofit educational context. Courts have examined unlicensed copying in for-profit copy shops, but those cases have explicitly distinguished commercial enterprises from nonprofit ones (see, e.g., *Princeton University Press v. Michigan Document Svces*, 99 F.3d 1381, 1389 (6th Cir. 1996), (“We need not decide [the status of nonprofit uses], however, for the fact is that the copying complained of here was performed on a profit-making basis by a commercial enterprise”). Several cases involving fair use were filed against universities in the last year or two. Of these, one has been dismissed without a clear finding on the issue of fair use (*AIME et al. v. Regents of Univ. of Cal. et al.*, No. CV 10-9378 (C.D. Cal. Oct. 10, 2011)). (AIME subsequently filed an amended complaint, which is pending at the time of this writing, while two others await decision.) See *Cambridge U.P. v. Patton*, No. 08-1425 (N.D. Ga. filed April 15, 2008); *Authors’ Guild, Inc. v. HathiTrust*, No. 11-6351 (S.D.N.Y. filed Sept. 12, 2011). The path of litigation is typically long and unpredictable, and even a final decision in one case may not provide clear guidance to users in other judicial districts or whose uses may differ in important ways.

for any particular field of activity, lawyers and judges consider expectations and practice in assessing what is “fair” within that field. Moreover, the history of fair use litigation of all kinds shows that judges return again and again to two key analytical questions:⁸

- Did the use “transform” the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?
- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

These two questions effectively collapse the “four factors.” The first addresses the first two factors, and the second rephrases the third factor. Both key questions touch on the so-called “fourth factor,” whether the use will cause excessive economic harm to the copyright owner. If the answers to these two questions are “yes,” a court is likely to find a use fair—even if the work is used in its entirety. Because that is true, the risk of a challenge to such a use is dramatically reduced.

Fair use ensures that copyright owners do not have a monopoly over transformative uses of their works. The converse is also true. When a use merely supplants a copyright owner’s core market rather than having a transformative purpose, it is unlikely to be fair. Thus, for example, a library clearly cannot acquire current books for its collection simply by photocopying or scanning published editions.

In cases decided since the early 1990s, the courts have made it clear that in order for a use to be considered “transformative,” it need not be one that modifies or literally revises copyrighted material. In fact, uses that repurpose or recontextualize copyrighted content in order to present it to a new audience for a new purpose can qualify as well. The courts also have taught that the more coherent an account the

8. See Neil Netanel, “Making Sense of Fair Use,” 15 *Lewis & Clark L. Rev.* 715, 768 (2011), surveying data about fair use cases decided between 1978 and 2011 and concluding that “the key question” is whether the use is transformative, and, if so, whether the amount taken is appropriate to the transformative purpose.

user can give of how and why the material was borrowed, the more likely the use is to be considered transformative.⁹

A final consideration influencing judges' decisions historically has been whether the user acted reasonably and in good faith in light of standards of accepted practice in his or her particular field. Among the eight other communities of practice that established codes of best practices in fair use for themselves between 2005 and 2012, all have benefited from establishing a community understanding of how to employ their fair use rights. Documentary filmmakers, for example, changed business practice in their field; errors-and-omissions insurers, whose insurance is essential to distribution, now accept fair use claims routinely, as a direct result of the creation of such a code. Groups that followed in creating codes include K-12 teachers, open educational resources providers, dance archivists, film and communications scholars, and poets. No community has suffered a legal challenge for creating a code of best practices in fair use. Nor have members of any community with a code been sued successfully for actions taken within its scope.¹⁰

Exercising fair use is a right, not an obligation. There will always be situations in which those entitled to employ fair use may forgo use or obtain permission instead; people may, for instance, choose easy licensing or a continued low-friction business relationship over employing their fair use rights. Seeking selected permissions from known, reasonable, and responsive rights holders may be an appropriate risk management strategy for large-scale digitization or web archiving projects, for example, even when the fair use analysis seems favorable. But the choice to seek a license or ask permission should be an informed one.

9. Courts also have applied and will continue to apply the fair use doctrine to uses that do not fall neatly into the “transformative” rubric, but are nevertheless important aspects of users’ rights. Examples include the transient digital copies that are incidental to valid uses, as well as time- and space-shifting for personal uses.

10. Documentary filmmakers won a high-profile dispute with Yoko Ono and EMI records over a parodic use of John Lennon’s “Imagine.” Fair use experts collaborated with the filmmakers to vet the film, and ultimately prevailed in a precedent-setting order that held the filmmakers had made a fair use of the song. Ono and EMI dropped their suit in light of the court’s findings on fair use. See *Lennon v. Premise Media*, 2008 U.S. Dist. LEXIS 42489 (S.D.N.Y. June 2, 2008).

Some librarians express concern that employing one's fair use rights in good faith may inadvertently make material available for potential misuse by others. But—just as they must now—all future users will have to engage in fair use analysis for themselves and in their own context. Libraries should of course be prepared to assist students and others who have questions about how to exercise their own rights with regard to library materials, but the ultimate responsibility will lie with the user, not the library. But—just as they do now—libraries that employ fair use responsibly to make material available to students, to researchers, or even to public view are unlikely to have legal liability for uninvited and inappropriate downstream uses.

Perfect safety and absolute certainty are extremely rare in copyright law, as in many areas of law, and of life. Rather than sit idle until risk is reduced to zero, institutions often employ “risk management,” a healthy approach to policy making that seeks to enable important projects to go forward despite inevitable uncertainty by identifying possible risks (legal and otherwise) and reducing them to acceptable levels. This code of best practices should be of great assistance in arriving at rational risk management strategies, as it provides a more accurate picture of the risk (or lack thereof) associated with exercising legitimate fair use rights. Indeed, simply by articulating their consensus on this subject, academic and research librarians have already lowered the risk associated with these activities.¹¹

11. The law bars statutory damages for unauthorized reproduction of copyrighted works where employees of nonprofit educational institutions or libraries have “reasonable grounds for belief” that their use was fair, even if the court ultimately decides the use was not fair. See 17 U.S.C. 504(c)(2).