"Fair Use in an Era of Competing Copyright Stakeholders"

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This paper is based upon an oral presentation at the "2004 Choices & Challenges Symposium" created and hosted by The Henry Ford. The doctrine of "fair use" can be understood only within the context of copyright law as a whole. This presentation discusses:

- The purpose of copyright law
- The landscape of copyright law
- Teachings from significant cases
- Suggestions for policymaking and procedures

The starting point is to see if you know the purpose of copyright law.

THE PURPOSE OF COPYRIGHT LAW

We will begin with a few questions from my copyright self-assessment. Here is the first question:

Q1. The purpose of U.S. copyright law is to:

(a) Reward authors for their creative efforts.
(b) Provide an economic incentive to write and publish.
(c) Advance public learning.
(d) Provide legal remedies for infringement.

I gave this question to the 70 students enrolled in my Fall 2004 Copyright Law course at The University of Michigan Law School, and asked each of them to ask 10 people the following question. The responses were collected. Ninety five percent (95%) of the people gave the wrong answer.

It is important to understand the purpose of U.S. copyright law because it is the purpose that is both the underpinnings and the framework of copyright law. That purpose helps us understand what is copyrightable and why, what is not copyrightable and why not, the rights of owners, and the important limitations on those rights. In the media we hear so much about copying as stealing, about using the "property" of someone else, and about the "evil" of file-sharing, that we almost reject as absurd the correct answer, which is "(c) Advance public learning."

Imagine this for a moment – the purpose of U.S. copyright law is to create an informed and educated public. Just a few years ago, the Supreme Court, in a unanimous opinion, ruled that the U.S. Copyright Act (the federal statute that governs copyright) does not favor copyright owners, but that the entire underpinning of copyright law was to promote the public interest:

> "The monopoly privileges [meaning, the rights of copyright owners] that Congress has authorized, while intended to motivate the creative activity of authors and inventors by the provision of a special reward, are limited in nature

> and must ultimately serve the public good. The limited scope of the copyright holder's statutory monopoly reflects a balance of competing claims upon the public interest. Private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The ultimate aim is . . . to stimulate artistic creativity for the general public good. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts.' Defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Fogerty v. Fantasy, Inc.,* 510 U.S. 517 (1994).

Next test question:

Q2. U.S. copyright law is derived from the:

(a) Constitutional power of Congress to regulate interstate commerce
(b) Constitutional power of Congress to promote the progress of science and arts
(c) Natural and moral rights of authors
(d) Rights of personal property

The answer is "(b)." The power of Congress to enact copyright law is founded in the U.S. Constitution, which states:

> "Congress shall have the power . . .To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings " U.S. Const., Art 1, § 8, cl. 8.

The title of the first U.S. copyright statute, enacted in 1790, was entitled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." You can see our adoption of the "encouragement of learning" foundation of copyright law.

Starting, then, with first principles, we are all on board with the notion that copyright law exists so that the public can be enriched by its access to information, ideas, and creative expression. Promoting knowledge is the "end" or the "purpose" of copyright law. Granting 'exclusive' rights to copyright owners is just one <u>means</u> by which that <u>end</u> is accomplished.

There are many other means by which that end is accomplished.

To grasp "fair use" you need to keep clear in your own mind the distinction between the purpose (the "ends") and the means by which that end is accomplished.

THE LANDSCAPE OF COPYRIGHT LAW

We often think of copyright law as being directed to the property rights of copyright owners. This is an erroneous understanding of copyright law. Copyright law encompasses what is copyrightable and what is not copyrightable. Copyright law encompasses the rights of copyright owners and the (many) limitations on those rights. They are all a part of the landscape of copyright.

Let's use, as an example, a book published yesterday about the history of medicine. It has drawings, essays, and photographs from the 1800s through 2004. It has charts and graphs from 2004. It has interviews with famous researchers and physicians and medical educators. It has recipes for home-made poultices. It has an introduction by the current Surgeon General of the United States. The title page of that book states "© 2004 by XYZ Publisher. No part of the publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of XYZ Publisher."

So – can you copy any portion of this work? Can you digitize it and send it to a friend? Can you post it on a web site? Hand out copies to your students? Use some of it in a book you are writing? What is the relationship between the notice in the book, placed by the publisher, and the reality of copyright law?

The statement from the publisher is false. It is false for many reasons. Some of those reasons relate to the theoretical underpinnings of copyright law. The first underpinning is that no one can claim copyright protection for something they did not author. The fact that an old image happens to be reproduced in their book does not grant them copyright in that image, and does not give them the legal power to control that image. Another underpinning is that copyright law does not protect something merely because it is written down. What is written down needs to rise to the level of copyrightable "expression" (sometimes called "authorship").

Copyright law does not protect all elements of a work, even where we, as a society, might value some of those elements for other reasons. For example:

1. No Copyright Protection for Ideas, Processes, Etc.

The U.S. Copyright Act declares that "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[1] Ideas, methods, and the like are not considered "authorship" or "expression." They are protected, if at all, by patent or trade secret, and then to claim protection under those theories, must meet certain legal requirements. But in no case are they protected by copyright law. So we are free to use the ideas, processes, and concepts we learn from reading books, and we are free to copy the descriptions of those ideas and processes.

[1] 17 U.S.C. § 102(b).

2. No Copyright Protection for Forms.

For a number of reasons, there is no copyright protection for forms.[2] The content and structure of forms are typically dictated by the subject matter of the form, or are representations of systems or methods, thus there are no "creative choices." Giving one person the right to represent data in a particular way gives that person a monopoly, as others will not be able to represent the same categories of information without infringing.

3. No Copyright Infringement Without Access to the Underlying Work.

Copyright protection does not prevent the existence of similar works, or even of identical works, unless one work is copied from the other. A work created independently from another cannot infringe it, even if the contend is identical, and especially where they draw from common sources.

4. No Copyright Protection for Any Fact, and No Copyright Protection For Unoriginal Arrangements of Facts.

For seventy years, the federal courts used copyright law to protect works comprised of arrangements of facts. They invented a doctrine to justify this protection, called "sweat of the brow" or "industrious collection." In 1991, the Supreme Court[3] ruled that the white pages of the telephone book were not protected under copyright law because (1) names, addresses, and telephone numbers were "facts" and facts were not "authored" but were "discovered" thus there was no authorship in *any* fact, *ever*; and (2) arrangement in alphabetical order did not evidence any creative choices.

The Supreme Court must have known that some would feel that it was unfair that people who labored and invested resources to discover facts and to compile those facts would not receive copyright protection for their efforts. The Supreme Court said:

> "It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation . . . however, this is not some unforeseen byproduct of a statutory scheme. It is, rather, 'the essence of copyright,' and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors but '[t]o promote the Progress of Science and useful Arts.' Art. I, § 8, cl. 8. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."

The Supreme Court reminded us of the importance of not protecting facts under copyright law, referring to the fact that even where a person has taken facts and selected,

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[2] *Baker v. Selden,* 101 U.S. 99 (1880).

[3] *Feist Publications, Inc. v. Rural Telephone Service, Co.,* 499 U.S. 340 (1991).

coordinated, and arranged them in such a way as to have created, as a whole, a work of authorship (a "compilation" as that term is used in the U.S. Copyright Act[4]), copyright protection for that compilation extends only to the selection, coordination, and arrangement but will never extend to the facts and data themselves that are selected, coordinated, and arranged. So even with a protectable compilation of facts, copyright law permits us to use and copy the facts, but might not permit the copying of the entire work (or a substantial amount of the work) while it is still under copyright.

This is consistent with a central proposition of intellectual property law: not all workproduct is ownable. Not everything that is written down, or that appears in an original work of authorship, is itself original authorship.

5. No Copyright Protection for Published Research or Historical Theories.

The Supreme Court decision in 1991 holding that facts were never protected by copyright law was consistent with decisions that some courts had handed down over the past forty years (40) dealing with published news accounts, research results, and historical theories.

In ruling that published research was not protected by copyright law, and the author of one book was free to use the research that had appeared in a news story, a court of appeals noted that:

> "the issue is not whether granting copyright protection to an author's research would be desirable or beneficial, but whether such protection is intended under the copyright law." "We cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. . . It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent."
>
> "The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if research is held to be copyrightable."[5]

In another case, this one involving the destruction of the Hindenburg,[6] a court ruled that neither facts, ascertained through personal research, nor theories based upon interpretation of historical facts, were copyrightable:

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[4] 17 U.S.C. § 101, 103.

[5] *Miller v. Universal City Studios, Inc.,* 650 F.2d 1365 (5th Cir. 1981).

[6] *Hoehling v. Universal City Studios, Inc.,* 618 F.2d 972, *cert. denied,* 449 U.S. 841 (1980).

> "The line drawn between uncopyrightable facts and copyrightable expression of facts serves an important purpose in copyright law. It provide a means of balancing the public's interest in stimulating creative activity, as embodied in the Copyright Clause, against the public's need for unrestrained access to information. It allows a subsequent author to build upon and add to prior accomplishments without unnecessary duplication of effort.
>
> The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works. Nevertheless, the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain."

These cases may seem disappointing to some scholars and researchers who desire to possess their research, but once that research is published, we (the public, society) have the same rights to the information and theories (not the article, but the information, data, facts, and theories) as do the researchers.

6. No Copyright Protection For Any Work of the U.S. Government.

The U.S. Copyright Act specifically prohibits any copyright protection for any "work of the United States Government." A "work of the United States Government" is defined as "a work prepared by an officer or employee of the United States Government as part of that person's official duties."[7] Thus we may freely copy, adapt, distribute, perform, display, and transmit a report from the EPA, or the Centers For Disease Control and Prevention, or a speech by the President, or a photograph from Hubbell, or a report from the Attorney General.[8]

This is an example of how copyright law not only enables the citizenry to be more informed and educated, but is pivotal to a free society. Otherwise, "the government" could meaningfully limit participation by those it governed. One of the disturbing trends in the area of library government collections are companies and organizations that digitize government documents (remember, no copyrights are obtained by mere digitization of uncopyrightable content) and then bundling the material with proprietary software, claiming a copyright in the software and seeking (usually through shrink wrap licenses) to limit the ability of the user to upload, copy, and distribute the government content. No institution should agree, ever, to limit

[7] 17 U.S.C. § 105.

[8] Although there is not a corollary provision in the Copyright Act dealing with works created by state governments, there are judicial decisions finding that state statutes, judicial decisions, minutes of meetings of state officials, reports of state officials, regulations, and other written workproduct that are the framework for official accountability and citizen participation in a democracy, are not protected by copyright law.

its use of government documents. There are good legal arguments as to why such so-called "contracts" are unenforceable, but institutions should avoid accepting them in the first place.

7. Copyright Notices and Copyright Warnings.

Notices of copyright should be used any time copies of a copyrightable work are distributed to the public, or offered for public distribution. The notice of copyright for a published work consists of the symbol "©" or the word "copyright," the year the work was published, and the name of the copyright owner (*e.g.*, © 2005 Susan M. Kornfield).

The notice of copyright does not mean that copyright exists in a work (the telephone book contains copyright notices, as do many works that are later found not to be copyrightable). A notice of copyright means that copyright protection is being asserted to the extent it exists. It preserves the rights of owners to defeat certain defenses from a party who later claims that they had no idea copyright was being claimed in a work.

Thus, as users of a work, we should not assume that the existence of the notice has any bearing as to whether a work is protected by copyright law. The proper question is whether the work contains authorship that is still under the term of copyright protection. The copyright in a work still under the term of copyright protection does not extend to the portions in which copyright has expired.

The warnings that appear in the front of most literary works, CDs, and DVDs, to the effect that no copying is lawful, are patently false. I have a book entitled "The American Intellectual Tradition" which contains essays from 1630 – 1865. None of those essays are still under copyright protection (indeed, many predate the existence of the country, much less the existence of its copyright laws), although the copyright notice, from Oxford University Press warns, in the scariest language possible, that no portion of the work may be reproduced. Statements such as this are used routinely by publishers to limit the uses that people might otherwise make of the material – indeed, material in which there exists no copyright whatsoever! Those warnings are false and may be ignored when the portion to be copied is not under copyright.

8. No Copyright for Digitizing Public Domain Text

Digitization of texts and images has become very popular. Some people think that they can own the copyright in the material they have digitized. This question is directed to that issue:

Q3: Digitizing public domain text into electronic format:

(a) results in a public domain work
(b) results in the creation of a derivative work

(c) results in copyright ownership by the digitizer(d) requires permission of the publisher of the print work

If the material that has been digitized is out of copyright, then the act of transferring the content from one format to an electronic format does not, in and of itself, constitute authorship. Thus, digitization does not, in and of itself, create copyright in the digitized work by the digitizer. This is the part of copyright law I sometimes call "Thank you, we'll take that now." By that I mean that copyright law permits the copying of workproduct that someone else has gone to the trouble and expense of digitizing (again, assuming that the digitized version embodies only technical choices and not creative choices).

If you think this is unfair, go back and read the quote from the U.S. Supreme Court in the Feist decision, involving the white pages of the telephone book (""It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation . . . however, this is not some unforeseen byproduct). If you are still fighting the correctness of this outcome, go back and read the quotes about the uncopyrightability of research and historical theories ("It is just such wasted effort that [copyright law is] designed to prevent"). Are you still unhappy? Think back to the copyright "bargain" discussed earlier – you give us something original to you and that embodies creative choices, we give you certain exclusive (and limited) rights to the work for a limited period of time. If you don't keep your part of the bargain, THEN THERE IS NO BARGAIN. You can't limit me from using what you didn't author.

Now, if the digitizer otherwise adds new authorship to the digitized material (annotations, color) they can likely claim ownership in the new portions, but can never claim ownership in the preexisting material.

In *Bridgeman Art Library, Ltd. v. Corel Corp.,* a 1999 decision from a federal court in New York, Bridgeman has created transparencies from photographs of public domain artwork. Corel used the images to create digital files of the artwork. Bridgeman testified it took considerable skill to reproduce transparencies that were as true to the original work as possible, and that had to go from one medium to another.

The court said "Slavish copying," although doubtless requiring technical skill and effort, did not qualify as authorship. "Creative spark" is *sine qua non* of originality. Copyright is not available in these circumstances."

A good example of a court knowing "authorship" or "expressive choices" when it saw them is a Supreme Court decision from a hundred years ago. In *Burrow-Giles Lithographic Co. v. Sarony*[9] the Court had to decide if a particular work (a photograph) made through the use of a machine (a camera) could be entitled to copyright protection. The Court described the photograph itself as "a useful, new, harmonious, characteristic, and graceful picture" and identified the creative choices, the "authorship," in the photograph as having begun with an "original mental conception" to which the photographer "gave visible form" by posing the subject, writer Oscar Wilde, "in front of the camera, selecting and arranging the costume,

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[9] *Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53 (1884).

draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression." It found the photograph to be copyrightable because it embodied those creative choices. The fact that the photographer used a machine as a part of the process to create the physical photograph did not rob the photograph of its creative authorship.

9. No Copyright in Slogans.

Slogans are protected, if at all, by trademark. They are not considered "works of original authorship" as required by the U.S. Copyright Act. This is based upon the requirement that, to claim copyright, you must give us a corpus of material, a workproduct, something of sufficient substance that it is a "work of original authorship" and not just a thought, a fragment, or quantitatively insignificant.

10. No Control Over the Right of Fair Use.

Now we turn to the original focus of our presentation – the doctrine of fair use.

One of the most important limitations on the right of a copyright owner is the right of fair use. Fair use is a right of users. The purpose of the fair use doctrine is to assist copyright law in achieving its Constitutional purpose – "promoting broad public availability of literature, music, and the other arts." While sweeping in their philosophical reach, these words do not give carte blanche permission for someone to copy whatever they want and justify that copying by claiming he or she was fostering greater access to works. The fair use calibration is not so easy (as you know), or else there would end up being no protection for works used in the educational and academic environments.

A. The Language of the U.S. Copyright Act.

First, note that the doctrine of fair use exists as a part of the U.S. copyright statute. Fair use is not some afterthought. FAIR USE IS NOT AN EXCEPTION TO COPYRIGHT LAW, IT IS A PART OF COPYRIGHT LAW. Fair use is found in Section 107 of the U.S. Copyright Act. The entirety of that section states:

> "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> 2. the nature of the copyrighted work;

3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

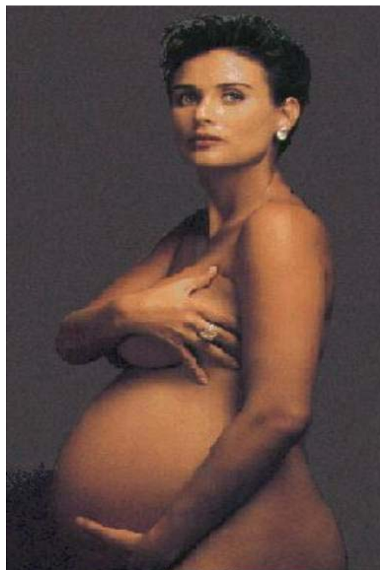
4. the effect of the use upon the potential market for or value of the copyrighted work.

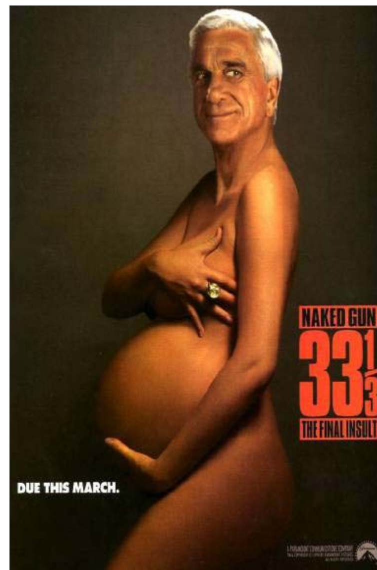
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."[10]

B. Some Important Fair Use Threshold Issues.

Fair use is not an infringement. The Copyright Act expressly states so. Fair use is a limitation on the rights of copyright owners. According to the Supreme Court, fair use exists notwithstanding the copyright owner's attempt to prohibit it, or to charge a fee for such use.[11]

Courts have grown increasingly comfortable with the notion that copying a work for purposes of parody, criticism, and commentary, is likely to be a fair use.[12] Example are the copying by Paramount Pictures of the famous Annie Leibovitz photograph of Demi Moore (with the face of actor Leslie Neilsen instead of the face of Demi Moore – see below) in order to parody what the court called the "pretentious seriousness" of the Moore expression.





[10] 17 U.S.C. § 107

[11] *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994) (commercial use of a copyrighted work can be a fair use).

[12] Part of the rationale for finding criticism and parody to be allowed a greater scope of copying is that the copyright owners of those works are not likely, or less likely, to grant permission. Thus, where you are asked to copy something for the purpose of enabling criticism or parody, the right of fair use may be broader.

The copying by Paramount Pictures was found to be a fair use even though almost the entire work was copied and the use was commercial.[13] The federal court deciding the *Leibovitz* case was applying a fair use framework that had just been announced by the U.S. Supreme Court in the famous "2 Live Crew" case. The musical group 2 Live Crew had decided to do its own rap parody version of the song "Pretty Woman." Two Live Crew asked permission from the Estate of Roy Orbison (the copyright owner of "Pretty Woman") to do a rap parody version. The Estate said "no." Two Live Crew did it anyway. The Estate sued for copyright infringement. The trial court ruled that 2 Live Crew's version was parody, that parody is a type of commentary and criticism, and is thus a type of protected speech under the fair use doctrine.

The court of appeals overruled, stating that every commercial use was presumptively unfair. On appeal, the U.S. Supreme Court, in 1996, ruled that parody is indeed a type of commentary and criticism; that we can use creative works for purposes of parody, we can make a commercial use of those works, and that we do not have to seek permission from the copyright owner, or pay fees to the copyright owners, when the uses are fair uses.[14] In the 2 Live Crew decision, the Supreme Court stated that there was still an unresolved fact question, and the parties then settled their dispute.

An important aspect of the Supreme Court's decision in 2 Live Crew was that it decimated the rationale of the 1991 *Kinko's* decision.[15] In *Kinko's* a New York trial court ruled that a for-profit copy shop could not reproduce coursepacks for students at the request of their professors, a practice that had been in existence for decades. That decision, which was poorly analyzed and failed to grasp fundamental copyright fair use issues, stayed at the trial court level and was never ruled upon by the U.S. Supreme Court. However, because of the heavy promotion of the *Kinko's* decision by the trade association for the publishing industry (the Association for American Publishers), universities, businesses, copyshops, and others somehow got the impression that the decision in *Kinko's* was the law of the land.

The chart, below, shows how the 1994 U.S. Supreme Court fair use decision in 2 Live Crew exploded the bedrock of the 1991 *Kinko's* decision.

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[13] *Leibovitz v. Paramount Pictures Corp.,* 137 F.3d 109 (2d Cir. 1998).

[14] *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994) (commercial use of a copyrighted work can be a fair use).

[15] *Basic Books, Inc. v. Kinko's Graphics Corporation,* 758 F. Supp. 1522 (S.D. N.Y.1991).

FAIR USE FACTOR	KINKO'S TRIAL COURT	U.S. SUPREME COURT
COMMERCIAL USE	Every commercial use of a copyrighted work is presumptively an unfair use.	It was reversible error to rule that a commercial use is presumptively an unfair use.
TRANSFORMATIVE USE (One way that fair uses can educate and inform us is where the use takes the underlying work and portrays it so that we see it differently. Such a use is sometimes referred to as "transformative." Transformative uses further the Constitutional goals of copyright law.)	A use must be transformative to be fair.	Rejected the proposition that a use must transform the underlying work in order to be a fair use. Noting the express language in the copyright law, the Court declared "The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution."
USE OF THE "HEART OF THE WORK" As to the issue of the qualitative and quantitative amount of the copying from the underlying work, courts have sometimes asked whether what was used was "the heart of the work." This is another way of asking if the user used more than was necessary to accomplish the task, and if the use is likely to simply act a market substitute for the underlying work.	Whatever the professors selected for copying must have been the heart of the work or else the professor would not have selected it; thus whatever was selected was too much and unfair. (Note circularity of that reasoning.)	A fair use may include copying the "heart" of a work; the proper inquiry looks to the purpose for the use and the effect of the use on the market for the work.
THE RELEVANCE OF PERMISSION FEES	If the publishers have a system for charging fees for uses, then your failure to pay those fees economically injures the publishers.	A court may not consider, as economic injury to a copyright owner, claimed injury to the fair use market.

One of the most damaging things about the 1991 *Kinko's* decision is that the court, in its attempt to find clarity in the mist of fair use, relied upon what are called the "Classroom Guidelines." The Classroom Guidelines were prepared by trade groups and certain institutional representatives during the twenty years of negotiations leading up to the 1976 amendments to the U.S. Copyright Act. The groups could never agree upon a bright line definition of fair use so Congress enacted § 107 with its list of factors, and allowed the group to file their "guidelines" as part of the public record of the negotiations. Congress never enacted the guidelines.

The guidelines state that the do not expand or limit the scope of fair use, and that use within the guidelines might still be infringing. The guidelines are much, much narrower than the types of uses that courts have already found to be fair. Yet, many institutions rely on them, and many web sites post them and state that they are the law.

They are most certainly not the law because they have never been enacted. However, I must tell you that some courts, desperately seeking bright lines, have referred to them as expressing some sort of Congressional intent. This is one of those times when a good conservative court is needed to tell these lower courts, and to tell institutions "Look, you knucklehead. If it hasn't been enacted into law, then it is not the law. Period. The law is not what some *ad hoc* group made up of representatives of various industries and constituencies wrote as a part of a twenty year negotiation. Congress tells us what the law is when it passes laws. The Constitution tells us what the law is. *Ad hoc* groups do not." Justice Scalia authored the *Dastar* decision. I have confidence he will straighten us up when this issue gets before the Supreme Court. Until then, be prepared to have people wave those guidelines in front of your face and tell you they are the law.

IMPORTANT DECISIONS IN COPYRIGHT LAW

Here are examples of some interesting copyright cases that highlight the challenges in fair use and copyright infringement cases.

© The unanimous ruling of Supreme Court in 2003 in *Dastar Corp. v. Twentieth Century Fox Corp.*, 539 S.Ct. 23 (2003) upheld the existence and importance of the public domain. Dastar had copied large portions of a television movie that had fallen into the public domain. Dastar then labeled the video cassettes as products of Dastar. Twentieth Century Fox sued, claiming that Dastar could not claim the new videos as originating from Dastar because the copyright in the original TV movie was owned by Fox. The Supreme Court reversed the decision of the Ninth Circuit Court of Appeals that had ruled against Dastar and assessed significant damages, fees, and expenses. The Ninth Circuit could not get over the fact that Dastar (shock!!) copied something that it had not originally created. The Supreme Court reminded us that Fox didn't own it now, either.

© The unanimous Supreme Court ruling in 1994, *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994), that a commercial use of a copyrighted work could be a fair use, reversed a divided panel of the Court of Appeals for the Sixth Circuit, which itself had reversed the district court's finding of fair use.

© The unanimous Supreme Court decision in 1994, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), holding that meritorious defenses in copyright cases advance copyright law as much as meritorious claims and that attorneys' fees should be awarded using the same criteria for victorious defendants as plaintiffs, reversed the Court of Appeals for the Ninth Circuit, which had joined the Second, Seventh, and D.C. Circuits in the erroneous conclusion that the copyright law favored meritorious plaintiffs over meritorious defendants.

© The unanimous Supreme Court ruling in 1991, *Feist Publications, Inc. v. Rural Telephone Service Co.,* 499 U.S. 340 (1991), reversed the decision of the Court of Appeals for the Tenth Circuit, which had ruled that there was copyright protection for telephone listings because of the money and effort that went into creating them, a doctrine that had been (erroneously) followed for over 70 years.

© The Supreme Court's 6-3 decision in 1985, *Harper & Row Publishers, Inc,. v. Nation Enterprises*, 471 U.S. 539 (1985), that it was not a fair use to publish portions of a stolen manuscript, reversed the decision of the Second Circuit, which had itself reversed district court's finding of infringement.

© The 5-4 decision of the Supreme Court in 1984, *Sony Corp. of America v. Universal City Studios*, *Inc.,* 464 U.S. 417 (1984), holding that home videotaping was fair use and not copyright infringement, reversed the decision of the Ninth Circuit, which had itself reversed district court's finding of fair use.

© The district court in the Ann Arbor copyright coursepack case, *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996), *cert. denied,* 117 S.Ct. 1336 (1997), ruled that the copying of excerpts for students and professors was willful copyright infringement. The Court of Appeals for the Sixth Circuit reversed, in a divided opinion, holding that it was fair use. The Sixth Circuit vacated that decision, reheard the case *en banc* and voted 5 in favor of fair use, 8 against fair use, but all 13 sitting judges agreed that, as a matter of law, the infringement could never be willful.

When it comes to applying fair use, there is good news and bad news. Good news – it is a flexible doctrine. It takes into consideration policies and values, such as whether the use furthers the goals of a democratic society, whether it furthers the goals of copyright law (to have an informed and educated public), whether it acts as an incentive or a disincentive for authors to create new works, whether it merely acts as a market substitution, and the like. No one factor is dispositive. Even one fact can make a difference as to the outcome of a particular case. The court is to engage in a sensitive balancing of the interests involved. A core inquiry for fair use is whether the use is likely to supplant (*i.e.,* replace) the functioning market for the underlying work because the fair use copy acts as a substitute for the public purchasing a copy of the underlying work. Even if a relatively small amount of copying is a substitute for having the students purchase their own copy of the work, the copying is likely to be an infringement and not to be fair.

The bad news. Because the fair use doctrine is flexible, because even one fact can make a difference (and because courts really do not understand copyright law very well), it is often very difficult to predict the outcome in any particular set of facts. There isn't a client on the face of the earth that wants to hear a lawyer answer a question with "it depends" but fair use is an area where even copyright experts would admit it *really* depends.

Nonprofit libraries, archives, and educational institutions have a special protection under U.S. copyright law. If they have a good faith belief that their use was fair, a judge can eliminate any threat of statutory damages where the library, archive, or nonprofit educational institution was found to have infringed the copyright:

> **§ 504. Remedies for infringement: Damages and profits**
>
> "In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was:
>
> (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords . . .

So nonprofit institutions have a vested interest in developing policies that are rational but not overly conservative, because an overly conservative and narrow statement about the proper use of copyrighted works will undermine a claim later that you had reasonable grounds for believing that your use was fair.

Thus, in this final part of our discussion today, I would like to identify a wide variety of factors that some courts have considered when calibrating a fair use equation.

►Here are examples of factors that weigh in favor of fair use:

(1) The purpose for the copying is for one of the uses identified in the fair use section of the Copyright Act, namely criticism, comment, new reporting, teaching (including multiple copies for classroom use), scholarship, or research.

(2) The intended use is personal, as opposed to commercial.

(3) The intended use is nonprofit, as opposed to for profit.

(4) The intended use is educational and nonprofit.

(5) Understand that copying a work in order to create merchandise is a different use than copying a work for an educational exhibit, especially where the copyright owner has a legitimate claim to the merchandise market.

(6) Only so much of the work is copied as is needed to accomplish that purpose.

(7) The amount assigned is not a substitute for purchase of a copy of the work.

(8) The author is properly identified (if known).

(9) The publisher is properly identified (if known).

(10) The underlying work is otherwise not available (out of print).

(11) The material to be copied has not been stolen.

(12) The material to be copied is more in the realm of factual as opposed to highly imaginative (this does not work for the humanities, and may not even be relevant in light of the Supreme Court's decision in 2 Live Crew).

(13) The work has been published, so that the copying will not deprive the copyright owner of the right of first publication.

(14) If the work has not been published, then either the term of copyright protection has expired (see attached chart), the copyright owner or author cannot be located (the work is an "orphan work"), or the entity requesting the copying is likely a fair user (not for profit entity making a socially useful copy).

(15) The copyright owner is difficult to locate, even after a good faith search.

(16) In circumstances where the copyright owner is hard to locate or unreasonable but you have been able to locate the author, the author gives you permission.

(17) There is no ready market for permissions.

(18) The type of copying, if it were widespread, would not have an appreciable effect on the market for the work.

POLICY MAKING

Some of you will be involved in developing copyright policies for your institutions. Please give careful thought to what you do. It is tempting to take positions that are not really copyright policy decisions, they are positions that your boss, or your management, or your board, or some other constituency wants to adopt. They may be based upon avoiding liability at all costs, or based upon avoiding calling lawyers for advice, or they may be based on the assumption that if they are good enough for ABC institution, they are good enough for you.

They might be, they might not be. You may have different goals than ABC. You might have broader rights under U.S. copyright law. You may have better practices in place to manage risk. You may have insurance. You might have indemnification agreements in place with third parties. The court of appeals in your circuit may have a different interpretation of the law.

- At least “do no harm.” If you can’t create a rational copyright policy, please do nothing. Please do not issue policy statements such as “it is against the policy of this organization to ever copy anything without written permission from the copyright owner.” It depends upon what you are using (you might be using the uncopyrightable elements), the copyright in what you are using might have expired, or it might be a fair use.

- Get real legal advice from attorneys who understand the law and your circumstances. Don’t use someone else’s antibiotics and don’t use their legal advice, either.

- Understand when you are getting legal advice and when someone is making a risk management decision cloaked as legal advice. It is amazing how often attorneys or managers answer a question with “because the law says so” when the law does not say so, or does not exactly say so, or when we really are not sure what the law says. Anyway, the law changes, new cases come down, new practices evolve. Stay on top of this ever-changing area.

- Educate your team, your boss, your board of trustees. Otherwise, they will make decisions anyway, even if they wildly guess what the law requires.

- Understand the rights of owners and the limitations on those rights. While you have to respect the rights of copyright owners, you have to understand that those rights come with built-in limitations.

- Understand when your use of materials is outside control of copyright owner.

- Understand the rights of users.

- Don't narrow your rights of fair use. On the other hand, don't assume that because you mean well, and you are a nonprofit, your use will be fair.

- Don't accept contracts that narrow your rights.

- Don't assume every copyright decision applies to you.

- Copyright owners overstate their rights.

- Nonprofit users sometimes overstate their rights.

- Look for organizations with balanced policies.

- Exercise good faith.

- Stop worrying about going to jail! Jail is for copyright pirates, not for those who make a mistake in good faith.

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