

EXPANDING THE UTILITY OF FAIR USE IN COPYRIGHT: THE BEST PRACTICES MODEL

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Introduction

Being able to access copyrighted material is fundamental to freedom of expression. This is ever more acutely obvious in a digital environment, in which exchange of quoted and often remixed copyrighted material is a daily feature of media use and social networking. But it is a basic right that requires better public education to balance the censorship effects of monopoly ownership rights.

Quoted copyrighted material is rocketing around the Internet at increasing rates. Online video is one bold indicator. By April 2009, according to ComScore, almost 80 percent of the U.S. public watched online video, 40 percent of them on YouTube and 20 percent on the social networking site MySpace.¹ Much YouTube content incorporates copyrighted material. People on social networks communicate using a vast array of copyrighted culture—video of themselves at concerts, clubs and at wedding dances, signs they find funny or ambiguous, and videos they love. Quoting copyrighted work is thus a nearly ubiquitous phenomenon in social networking, with many posts pointing back to online video. Witness for example, the popularity of ‘keyboard cat’, a widely used bit of video that now acts as a commentary on works on popular culture. (Go ahead, enter ‘keyboard cat’ on YouTube.)

But the link between access to copyrighted material and freedom of expression is not new. Such access has always been key to freedom of expression, and has been so recognized in copyright policy. If copyright holders maintained an absolute monopoly, as some authors and publishers have argued for, then copyright holders would become private censors. Every copyright policy has exemptions and limits built in to the monopoly right of copyright holders, as an acknowledgement of this necessity. The permission for unlicensed use is part of copyright policy's mission to generate cultural production.

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¹http://www.comscore.com/Press_Events/Press_Releases/2009/6/Americans_Viewed_a_Record_16.8_Billion_Videos_Online_in_April (accessed in October 2009).

I. Fair Use Is Flexible and Useful

That fact was recognized recently in U.S. law, in the Supreme Court decision of *Eldred v. Ashcroft*.² In that case, the plaintiffs argued that extended copyright terms so threatened freedom of expression that they were unconstitutional. In ruling that extended copyright terms did not violate the U.S. Constitution's First Amendment guaranteeing no government interference with freedom of speech, the Supreme Court argued that Americans had the option of employing the copyright doctrine of fair use. This was the escape hatch from the monopoly of the copyright holder.

Previously, of course, in the U.S. there had been more (and arguably better) escape hatches. Copyright terms were originally so short that material quickly fell into the public domain and became available to all. Not all work was copyrighted; one needed to register for a copyright, and to renew it as well. Derivative works were not covered under copyright. However, all these escape hatches are, for the purposes of any kind of reference to popular or current culture, gone today. Fair use is the only one left.

Fair use is the right to use copyrighted material without permission or payment if, generally speaking, the social benefit is greater than the loss to the copyright holder. While activated only when used as a defense, it is nonetheless (as recognized by the Supreme Court in *Eldred*) a right.

There are two kinds of fair use: passive and active. The passive kind is the right to reuse copyrighted material in the process of consuming it (again). For instance, you can whistle along with the tune you're listening to on your iPod. You can invite your friends over to watch the movie you downloaded on Netflix. You can make a few copies of your favorite poem and give it to your book club. You can donate the mystery you're done reading to the Boy Scouts. That kind of fair use was just taken for granted for many years, partly because no copyright holder could easily monitor or collect upon it. It has become murkier as digital culture has started zooming around the Internet, and large copyright holders have grown more worried about how copying cuts into their profits. Content companies have worked hard to keep their products from circulating for free. Shrink-wrap licenses, digital rights management, and deals with hardware firms to keep recording features off DVDs are some of the ways that private business has taken action to limit people's private and passive fair use rights. The U.S. Digital Millennium Copyright Act passed in 1998 supports the interests of copyright holders in limiting reuse by criminalizing de-encryption of copyrighted work.

The other kind of fair use, active or 'productive' fair use, is re-use of copyrighted material in the process of making something. This kind of fair use is very common, although often invisible to consumers. For instance, in broadcasting copyrighted material is quoted in the news daily without

² *Eldred v. Ashcroft*, 537 U.S. 186, 2003.

licensing. Fair use also flourishes in academic texts, where scholars feel free to quote other scholars (they are scrupulous, you'll note, about giving them credit while doing so).

The fair use standard - whether social benefit is greater than private loss - is deliberately vague in the law. The law recommends (without excluding other considerations) considering the character of the use, the nature of the original work, the amount you are taking and whether it's the central part, and effect on the market/value of the work. These are often called, with a solemnity that belies their status, the Four Factors. In current practice, these four factors can be distilled into four questions:

- Was the use of copyrighted material for a different purpose, rather than just reusing it for the original purpose? (If so, it probably adds something new to the cultural pool.)
- Was the amount of material taken appropriate to the purpose of the use? (Like in the story of Goldilocks, not too much and not too little, but just enough for the purpose.)
- Was the use in good faith? (If so, you probably want to acknowledge in some way that this work is not yours, for instance by crediting the original work.)
- Was it reasonable within the field or discipline it was made in? (Standards and practices documents, such as the kind TV networks created for their news divisions, or the codes of best practices in fair use that various creator and user communities have made, do a good job of making clear what normal practice is.)

If the answer to these questions is yes, a court is likely to find a use fair. Because of this, such use is unlikely to be challenged in the first place. Courts have overwhelmingly supported fair users when they carefully use this reasoning to make their decisions. The vast majority of fair uses are never challenged, of course. But in the rare instances when they are, judges and juries usually find for them, and against the content owners. A recent case in which fair use was boldly asserted is *Bill Graham Archives v. Dorling Kindersley Ltd.*, involving the unauthorized reproduction of concert posters in a book about the career of the Grateful Dead.³ This support for fair use is hardly surprising, given the long history of the fair use doctrine and its strong constitutional roots.

II. Fair Use Is Underutilized

Fair use is thus highly flexible, adaptable to circumstance, and strongly supported in the courts. It is far more useful as an exemption than the listing

³ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir.).

approach of fair dealing in many Commonwealth countries, in which specific kinds of uses are precisely itemized, often in ways that create new limitations as conditions change. It is vastly more ample than the right of quotation, typically exercised in highly specific circumstances.

However, many people, and especially professionals whose work must pass through many gates guarded by lawyers protecting the interests of the institution, are reluctant to employ fair use, even though it is the major available exemption to them. This occurs for several reasons. U.S. statutory damages are extraordinarily high and are leveled per infringement, making any legal loss prohibitive. Court costs themselves are high. Copyright holder organizations have zealously campaigned against 'piracy' and copying in an effort to deter erosion of their business models, and have accidentally or on purpose discouraged fair use in the process.⁴ And finally, even if people do know about their rights under copyright law to use unlicensed copyrighted material, they doubt their own judgment. They face the 'four factors' with trepidation. Case law is of no particular help to them, since lawsuits regarding fair use are extremely rare.

III. The Best Practices Model

In this situation, the legal scholar Peter Jaszi developed an alternative approach to lower the risk of using fair use: the best practices model. Since judges take into consideration the practice of any creator or user community in fair use litigation, identifying a community's norms and values has great utility. This approach had been tested in the 1990s when Jaszi worked with the Society for Cinema and Media Studies to develop a code of best practices in the use of frame grabs and movie stills.⁵ The code convinced both scholars and their publishers that reproductions of images from films, if used in context of scholarly discussion, would clearly enough be a fair use to allow publishers to assume the risk of using them.

From 2004, Peter Jaszi and I have worked together to create other codes of best practices. The first one was the Documentary Filmmakers' Statement of Best Practices in Fair Use.^{6,7} We first documented the actual creative practice of filmmakers given their understanding of copyright, and discovered

4 T. Gillespie, 'Characterizing copyright in the classroom: the cultural work of antipiracy campaigns', *Communication, Culture and Critique* (September) 2009, pp. 274-318.

⁵ Now updated at

<http://www.cmstudies.org/documents/SCMSBestPracticesforFairUseinPublishing.pdf>
(accessed on 29 October 2009).

http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/ (accessed on 29 October 2009).

7 P. Aufderheide, 'How Documentary Filmmakers Overcame their Fear of Quoting and Learned to Employ Fair Use: a Tale of Scholarship in Action', *International Journal of Communication* (winter) 2007. (<http://ijoc.org/ojs/index.php/ijoc/article/view/10/26>) (accessed on 29 October 2009).

substantial amounts of self-censorship as well as routine altering of reality.⁸ Filmmakers, convened through five national filmmaker organizations, developed the principles and limitations with our guidance, and with some great doubts about the efficacy of creating a non-legal document to address fair use questions. Their conclusions were vetted by a bank of five lawyers and legal scholars. The Statement was released on Nov. 18, 2005.

Within eight weeks three films used the Statement to clear films to be shown at the Sundance Film Festival, the most important U.S. event held annually for documentary film debuts. All three of them were works that couldn't be made without fair use. *This Film Is Not Yet Rated*⁹, Kirby Dick's exposé of the Motion Picture Association of America's flawed ratings system, used more than a hundred clips from Hollywood and independent films—all under fair use. He never had an alternative. The licensing contracts for Hollywood films included clauses saying that he would not criticize either the film or the film industry with them. *The Trials of Darryl Hunt*, by Ricki Stern and Anne Sundberg used video from two decades of local television to document the history of a prisoner falsely charged with murder. Upon the overturning of his conviction, the local TV station had suddenly decided that it would under no circumstances license any of the material; the TV station was apparently considering making a film of its own. Finally, *Hip Hop: Beyond Beats and Rhymes* by Byron Hurt critiqued misogyny in hip-hop by quoting and commenting on hip-hop lyrics, music and videos. Hurt never even considered asking hip-hop stars for permission to use their material to criticize them.

All of these films were picked up by television programmers, in spite of the fact that they contained huge amounts of unlicensed, copyrighted material. Cablecaster IFC took *This Film Is Not Yet Rated*. HBO took *The Trials of Darryl Hunt*. Public television, via ITVS, took *Hip-Hop*. Each distribution outlet now faced the challenge of dealing with a film that faced challenges getting the insurance required for television release: errors and omissions insurance, against any mistakes in licensing. Errors and omissions insurers had not routinely accepted fair use claims for at least 15 years. They typically would insure films for licensed material but would leave filmmakers to accept risk for fair use on their own. Many broadcasters and cablecasters rejected films that did not have a complete insurance 'blanket'. These distributors were now going to accept these films without such a blanket.

We then held a meeting in New York with leading cable and broadcast programmers to acquaint them with the Statement. In the ensuing months,

8 P. Aufderheide and P. Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, Washington D.C.: Center for Social Media/Project on Intellectual Property and the Public Interest, American University 2005, p. 35.

http://www.centerforsocialmedia.org/resources/publications/%20untold_stories_creative_consequences_of_the_rights_clearance_culture/ (accessed on 29 October 2009).

⁹ All the films mentioned in this paragraph are played at the 2006 Sundance film festival.

several of those executives quietly found a reason to employ the Statement to justify decisions to acquire or start new projects. One of them convinced IFC to make a commitment to fair use that would almost immediately have a dramatic effect in lowering costs. IFC immediately used the threat of fair use to bargain with Hollywood studios as it prepared a documentary about road movies, *Wanderlust* (2006), for air. It reduced its clearance costs by more than 75 percent. Word began to spread that fair use could be good for business.

We followed that with a meeting with insurers. Simon Kilmurry, co-director of public TV series *P.O.V.*—a haven for documentary filmmakers—helped Peter Jaszi coordinate a meeting of representatives from the only four companies that handled such insurance for documentaries in the U.S. Insurers sat at the table poker-faced during the presentation. But negotiations for *Hip-Hop* immediately won competitive bids, and within weeks of that decision by insurers every insurer of errors and omissions in the U.S. publicly announced that it was routinely accepting fair use claims. The fact that all the insurers were doing so, and willing to put that news on their websites, lowered prices as well since filmmakers could now get competitive bids.

Finally, there were actually test cases, although they were resolved summarily and thus did not leave much of a paper trail. In 2007 Chicago filmmaker Floyd Webb posted clips to YouTube, and a trailer of a film he was making about Count Dante, a martial arts expert who founded Chicago's Black Dragon Fighting Society. A leader in the martial arts group sued Webb for using the Count's image. Webb defended himself using the principles and limitations of the Statement, and with the help of Stanford's Fair Use Project. The case was summarily decided for Webb.¹⁰ The makers of *Expelled* (2008), a pro-creationist documentary, quoted a John Lennon song, 'Imagine'. Yoko Ono sued, only to find the case dismissed because the judge believed the lawsuit would not have merit.¹¹

Documentary filmmakers demonstrated the clear link between freedom of expression and the assertion of fair use. When they regained their fair use rights, they made new work that could not have been made before, lowered the cost in time and money of producing work, and circulated it more widely than previously possible.

IV. Building on the Model

Since documentary filmmakers pioneered this new approach to changing copyright policy, with facilitation from Peter Jaszi and me at American University, we have worked with several other communities to create similar codes, with similarly liberating educational effects. They include media

¹⁰ <http://www.law.stanford.edu/news/pr/71/> (accessed on 29 October 2009).

¹¹ [www.law.stanford.edu/news/pr/88/Stanford Law School's Fair Use Project: Yoko Ono's Injunction Against "Expelled" Producers Denied/](http://www.law.stanford.edu/news/pr/88/Stanford%20Law%20School's%20Fair%20Use%20Project:%20Yoko%20Ono's%20Injunction%20Against%20'Expelled'%20Producers%20Denied/) (accessed on 29 October 2009).

literacy educators, open course ware curriculum designers, dance archivists, and online video makers.¹²

We have noted great interest internationally in this best practices approach, especially in the documentary film world. In countries that do not have fair use it may be much harder to expand access to exemptions. Fair use is uniquely flexible. However, in every case, expanding access to exemptions to copyright holders' monopoly rights is crucial to freedom of expression. A good place to start taking action is in the exploration of what exemptions exist, how they are currently being used (or not), and what the consequences are for freedom of expression and the creation of new culture. This documentation can fuel any later policy action.

Conclusion

The link between freedom of expression and understanding of copyright policy is clear. Often the actual terms of copyright policy are underutilized, because of intimidation, ignorance, confusion and fear. In the U.S., where fair use is a highly flexible aspect of copyright policy, and highly favored in the courts, codes of best practices can address these problems, as highlighted in the unique situations of documentary filmmakers in the U.S. European and other international filmmakers may well be able to use exemptions and limitations of their own copyright policies to address similar problems. Research into public understanding of copyright exemptions is an important first step to taking any such action.

- The Amsterdam Law Forum is an open access initiative supported by the VU University Library -

¹²The ongoing work to expand access to fair use is available at: http://www.centerforsocialmedia.org/resources/fair_use. (accessed on 29 October 2009).

