FAIR USE: PAST, PRESENT, AND FUTURE OF A CRITICAL RIGHT

Kyle K. Courtney
Copyright Advisor

Fair Use Is A Right
....But we have to maintain that right.
How?
Educate, myth-bust, use it, exercise it, write about it, and build community surrounding it!

FAIR USE
Fair Use is **not** a “judicial trend” – it is 30+ years established legal record of jurisprudence

- Recognized record of common law
- Relied upon to make copyright risk-mitigating decisions by libraries (and other institutions)
- Common law system gives us **certainty**, **uniformity**, and **predictability** in law

**FAIR USE PAST**

*Charles Folsom, former Harvard librarian, then published *The Writings of George Washington*.


*Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass, 1841)*

It claimed to be "in" Washington himself, since it was derived directly from works of Washington's own hand.

Sparks and Folsom brought suit against Upham and Marsh for "piracy of the copyright."

Court inquiries proved that Upham and Marsh copied 353 pages verbatim from *The Writings of George Washington*. 329 of the copied pages had not been published before Sparks’ work.*
Justice Story indicated that had there been a **fair and bona fide abridgment** of the plaintiff’s work, “it might have admitted of a very different consideration.”

Defendant lacked of what will became known as “a **productive or transformative use**,” - some intellectual decision in copying, not just being “clever with the scissors.”

**FAIR USE PAST**

**FAIR USE PAST/PRESENT**

Fair Use is an “**affirmative defense**?”

Hogwash!

**FAIR USE PAST/PRESENT**
Affirmative Defense under the law

But what about its appearance in Harper & Row?

First appearance of “affirmative,” cited on page 37 of a 1967 House Report on Copyright Act

Legislative History

FAIR USE PAST/PRESENT

Legislative History of Copyright Act

Neither on page 37 nor any other page in that House report (or any other House or Senate Report leading up to the Copyright Act of 1976), is the doctrine referred to as an affirmative defense.

House Report: “The committee believes that any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable.”

Scholars maintain that this is an express disavowal of an intent to treat fair use as an affirmative defense.

A mistake? At the Supreme Court? YES!

FAIR USE PAST/PRESENT
Fair Use is a Right

Preamble to fair use statute:

“Notwithstanding the provisions of sections 106...the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching, scholarship, or research” is not an infringement of copyright.

Fair Use is not an “affirmative defense” – it is a Right

Original language of the statute:

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work...is not an infringement of copyright.”

Similar to other areas where parties must give due consideration to other uses authorized by law (such as compulsory licenses)

FAIR USE PRESENT
Fair Use is **not** an “affirmative defense” – it is a **Right**

- Original language of the statute:
  - Section 106 conditions the rights granted to a copyright owner as “subject to Sections 107 through 122”
  - Plus, other sections of the law call fair use a “right”
  - The language of Section 108, identifying the “right of fair use,” textual argument that the statute does not treat fair use as an affirmative defense

FAIR USE PRESENT

- **Lenz** case (2015): “Given that §107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a **misnomer**”:
  - Although the traditional approach is to view “fair use” as an affirmative defense, . . . it is better viewed as a **right granted by the Copyright Act of 1976**...[S]ince the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, **it is logical to view fair use as a right**.

FAIR USE PRESENT
If copyright is a statutory monopoly, fair use should be viewed as a limitation on the monopoly in the public interest, which means that it is an affirmative right, not excused infringement.


Four Factors of Fair Use

1. The purpose and character of the use;
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.

Development of Transformative Fair Use

1. Does the use transform the material, by using it for a different purpose?
2. Was the amount taken appropriate to the new purpose?

*[2.5] Is it absolutely necessary to use that material?
17 USC §504(c)(2): 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....

**COPYRIGHT SUPERPOWERS OF LIBRARIES AND ARCHIVES (PART I)**

Preamble to fair use statute:

“Notwithstanding the provisions of sections 106...the fair use of a copyrighted work...for purposes such as **criticism**, **comment**, **news reporting**, **teaching** (including multiple copies for classroom use), **scholarship**, or **research**" is not an infringement of copyright.

- Many library actions fall within these types of uses ↑

- Libraries are often the only entities that provide access to copyrighted works **before** they copyright expires
  - This enables users to exercise their rights under [fair use] limitations to creators' right
  - Libraries also store, exhibit, and share copyrighted material as part of their fundamental mission

**LIBRARIES AND FAIR USE**
Use of a quotation, image, clip or other excerpt is substantially more likely to pass fair use muster if the use is transformative.

- A work is transformative if, in the words of the Supreme Court, it “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.”
- Classic example of transformative use: a quotation from an earlier work in a critical essay to illustrate the essayist’s argument.

TRANSFORMATIVE FAIR USE

Transformative Fair Use Comics:

2 Live Crew & the Grateful Dead poster cases
Is it Fair Use?

Raise Your Hands

Hypo #1

• A photographer who spent six years photographing Rastafarians in Jamaica. In 2000, he published a book of photographs taken during this time titled “Yes, Rasta.”
• An appropriation artist created a series of works titled “Canal Zone” featuring in part or in whole 41 pictures from “Yes, Rasta,” with parts painted over and altered.
IS IT FAIR USE?
VOTE NOW
YES
NO

Answer: Yes, Fair Use

- “...twenty-five of Prince's artworks manifest an entirely different aesthetic from Cariou's photographs.”
- Law imposes no requirement that a work comment on the original or its author in order to be considered transformative
- “as the Supreme Court ha[s] emphasized, to qualify as a fair use, a new work generally must alter the original with ‘new expression, meaning, or message.’”
Transformative Fair Use

• “What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”

• 1st Factor: “Although there is no question that Prince's artworks are commercial, we do not place much significance on that fact due to the transformative nature of the work”

Transformative Fair Use

• 3rd Factor: “The law does not require that the secondary artist may take no more than is necessary.”

• Rather, “The secondary use ‘must be [permitted] to conjure up at least enough of the original' to fulfill its transformative purpose.”
Transformative Fair Use has helped a number of projects, companies, and publishers:

- Bloomberg News
- Dorling Kindersley Publishing
- “Jersey Boys” Broadway production
- HathiTrust
- Google Books
- MOOCs
- Library/Archives Digitization Projects

Without transformative fair use we would have trouble:

- Quoting from an article for comment and criticism
- Text/Data mining for new modes of scholarship
- Viewing thumbnails of images on the internet (Google indexes the web every single day)
- Utilizing movies and music in classroom settings, both online and on-ground
- Creating Digital Humanities works
- Mount online exhibitions from libraries, archives, and museums

Hypo #2

- Commercial news organization disseminates to 315,000 customers an audio recording made of a company's earnings report conference call and also a transcript of the call
- The earnings call included senior executives and approximately 132 financial analysts from around the world
- No journalists or press organizations were invited to participate
- Company hired a vendor to record the entire call, and the vendor’s operator informed all analysts who participated that no recordings were permitted for publication or broadcast (“others should not record the call for publication or broadcast.”)
IS IT FAIR USE?
HAND VOTE NOW
YES
NO

Bill Graham Archives v. Dorling Kindersley
Author’s Guild v. Google Books

Transformative Fair Use

Google books
Hypo #3

- Quincy Neri designed a glass sculpture, which she calls "Mendota Reflection," that was installed in the vaulted ceiling of the entrance way at Linda Hughes' condominium in Madison, Wis., as part of a renovation of the residence by the Architectural Building Arts.
Hypo #2

• Ferguson (photographer) photographed the “before, during and after” of the renovation, ultimately capturing two images of the sculpture.
• The Architectural Building Arts ran the photos on its website and in an application for an architectural award.
• Neri sues the ABA
1st Factor

- Ferguson images were “highly transformative,” noting the *promotional purpose* of the pictures.
- The court said:
  - “Neri's sculpture is art for art's sake. It is a three-dimensional, impressionistic composition of multiple colored pieces of translucent glass designed intentionally to cast spiral-shaped shadows on the vaulted ceiling, providing an aquatic quality to the entire space.
  - Purpose? “[I]s to beautify condominium and provide visual and aesthetic pleasure to those who view it as they walk under it through the entryway.”
1st Factor

- “Ferguson's photographs, on the other hand, are two-dimensional, realistic photographs of an interiorspace.”
- “They have a commercial [aesthetic]. Their purpose is not to beautify but to document and to inform the public about the remodeling work performed by ABA on Hughes's condominium, in order to showcase the firm's design and construction work.”

2nd and 3rd Factors

- 2nd factor—nature of the work—weighed against a finding of fair use because the work was a creative one.

- 3rd factor—amount and substantiality of the work used—the court noted that none of the photographs included the entire work in one single image.
  – Photographs constituted copying of Neri's work?
3rd Factor

- The court said, this was copying “only in the most ephemeral sense: no one interested in viewing or purchasing a glass sculpture like ‘Mendota Reflection' would be satisfied by mounting a copy of one of Ferguson's photographs to his or her ceiling.”

4th Factor

- The court found no evidence that the photographs had any effect on the market for Neri's works.
- To the extent that Neri herself might want to sell photographs of her works, the court found no evidence that she had entered such a market.
Is it a fair use to create digital versions of a library’s (special) collections and/or archives, and to make these versions electronically accessible in appropriate contexts?

- Careful w/ published works (market, #4)
- Full citation and attribution w/ contact info (good citizenship)
- Stronger fair use where items to be digitized consist largely of works which are not exploited commercially or orphans (i.e. personal photographs, correspondence, or ephemera) (market #4 again)
- Bonus: Adding criticism, commentary, extended metadata, and other transformative uses (#1 and #3)

Hypo #4

- PhD candidate is using images from the internet, various books, quotes from journals, and other 3rd party sources for inclusion in her thesis.
- The thesis is on “Comparative Musical Trios in History” - comparing various cultures and studying the musical differences in instrumentation and style.
- Question as to the use of this 3rd party copyrighted work:
Pablo Picasso (1881–1973)
Three Musicians
Estate of Pablo Picasso, 1927

IS IT FAIR USE?
HAND VOTE NOW
YES
NO
Same Hypo

• But, the thesis is on “Comparative Musical Trios Represented in Modern Art”

• Is it Fair use?

• The painting itself or Picasso’s art is a good candidate for fair use

Transformative, not decorative

• Using Picasso’s *Three Musicians* to illustrate a point being made about the painting itself or Picasso’s art is a good candidate for fair use.
• Use of the image to spice up a lecture on musical trios is not.
Subject to Scholarly Analysis and Critique
The copyrighted material is the subject of the author's or instructor's analysis, clearly critiquing or explaining the material in depth.

Illustrating an Important Point
The copyrighted material illustrates a compelling point or makes it more comprehensible in a written paper or presentation.

Re-Purposed for a Significant Teaching Point
The copyrighted material is being re-purposed to significantly advance the author's pedagogical point.

Hypo #5

- Richards undertook to develop a “textbook dictionary,” aimed at improving the reading comprehension of its users.
- Richards began by converting an electronic copy of the Merriam Webster Dictionary into a set of Microsoft Word files.
- He then modified the dictionary entries by increasing the font size, underlining words for emphasis, increasing spacing between entries, redacting some etymological history, and inserting examples of how words might be used in sentences.
- Richards did not, however, make modifications to Merriam–Webster's definitions for each word.
- In total, Richards copied approximately 70% (109,725) of the Dictionary's entries.
- The 30% of entries that Richards deleted were words that he believed to be rare or anachronistic and therefore less helpful to a textbook user.
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NO

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@KyleKCourtney

http://kylecourtney.com/

http://scholar.harvard.edu/kcourtney