

Fair Use in U.S. Copyright: *Meaning & Evolution*



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The Place for Copyright

- Grant of Rights
- Long Term of Protection
- Broad Scope
- Subject to Exceptions and Limitations
- **Not about Money**
- **Not about Property**
- **Not all Rights**



The Structure of Copyright

- Which works are **Eligible for Protection**?
- How do you **Get Protection**?
- How long does the **Protection Last**?
 - What is in the **Public Domain**?
- Who is the Copyright **Owner**?
- Are my uses an **Infringement**?
 - Or are they **Fair Use**?
 - Or something **better** than Fair Use?

The Fair Use Struggle

- Private Rights vs. Social Objectives
- Lack of Definitive Boundaries
- Expanding Media
- Internet Sharing
- Diversity of Copyrighted Works
- Conflict with Automatic Protection
- Exacerbated by Long Term of Protection

Copyright in the Courts

- 1841: *Folsom v. Marsh*
- 1984: *Sony v. Columbia Pictures*
- 1985: *Harper & Row v. Nation Enter.*
- 1991: *Basic Books v. Kinko's Copies*
- 1994: *Campbell v. Acuff-Rose Music*
- 2006: *Bill Graham Archives v. DK Publ.*
- 2012-2016: *Georgia State Case*
- 2014: *Google Books Case*

**Bill Graham Archives v. Dorling Kindersley Ltd.,
448 F.3d 605 (2nd Cir. 2006).**



Lenz v. Universal Music Corp., 801 F.3d 1126, 708 (9th Cir. 2015).



Lenz v. Universal Music Corp., 801 F.3d 1126, 708 (9th Cir. 2015).



BIG WIN FOR FAIR USE

Credits:
www.mirror.co.uk
www.eff.org

Copyright at the Center

- New Intellectual Property
 - Computer Software
 - Digital Images
 - Websites
- New Uses of Intellectual Property
 - Publishing Platforms
 - Derivatives, Revisions, Alterations
 - Copying, Sharing, Distributing
 - Mashups, Indexing, Educating, Entertaining

Exceptions in the EU (2001)

- Paper Reproductions.
- Private Copies.
- Libraries and Archives.
- Broadcasts in Social Institutions.
- Copies for Illustration in Education.
- Serving Persons with Disabilities.
- Needs of Public Security or Governments.
- Religious or Official Celebrations.
- Sculpture or Architecture in Public.



Exceptions in the EU (2001)

- Quotations for Criticism and Review.
- Reproduction by the Press.
- Use of Political Speeches.
- Incidental Inclusion of material in another Work.
- Caricature, Parody, Pastiche.



New York Times, 1976

**FORD DUE TO APPROVE
NEW COPYRIGHTS LAW**

Exceptions & Limitations

- Copyright Exceptions
 - Section 107: Fair Use
 - Section 108: Library Copying
 - Section 109: First-Sale Doctrine
 - Section 110: Displays and Performances
 - Fact-to-Face Classroom
 - Transmissions and Distance Learning
 - Section 120: Architectural Works
 - Section 121: Persons with Disabilities

Exceptions & Limitations

- Constitutional Foundation:
“The Congress shall have power... To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Berne: The Three-Step Test

- Article 9(2): “It shall be a matter for legislation in the countries of the Union to **permit the reproduction** of such works in **certain special cases**, provided that such reproduction does **not conflict with a normal exploitation** of the work and does **not unreasonably prejudice the legitimate interests of the author.**”

Three Rough Steps



What is Fair Use?

- Section 107 of the Copyright Act
- Based on Four Factors:
 - **Purpose** of the Use
 - **Nature** of the Work Used
 - **Amount** and Substantiality of the Portion
 - **Effect** on the Market for the Work



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.

Fair Use and Classroom Copies

- In the Statute: “including multiple copies for classroom use”
- “Classroom Guidelines,” 1976
- Conference on Fair Use, 1998
- “Coursepack Cases,” 1990s
- Georgia State University case, 2012

Fair Use and Photocopying

FedEx Kinko's
Office and Print Center



The Georgia State Lawsuit

- **Electronic Reserves and Teaching**
- New Policy implemented in 2009
- Trial in May-June 2011
- Decision in May 2012
 - Detailed Analysis of Fair Use
 - **Practical Findings:** Of 75 instances of claimed infringement, only 5 instances of infringement
 - **Mostly Upheld by the Eleventh Circuit**

The Georgia State Lawsuit

- **Remand to the District Court (2016)**
- 48 instances of alleged infringement
- Only 4 were infringing
 - 44 were within fair use
- No explicit Mention of:
 - Classroom Guidelines
 - Quantitative Measures
 - “One-Time Use” and other “Rules”

The Factors of Fair Use

Purpose, Nature, Amount, Effect

- Purpose of the Use
 - Educational uses
 - Nonprofit education
 - Transformative use not essential
 - Result: “Strongly Favors” fair use

Policy Implementation

- “Carefully monitored circumstances”
- Passcode for student access.
- Access terminates at end of semester.
- Students must be reminded of the limits of copyright.
- Students must be “prohibited by policy” from distributing the works to others.

The Fair Use Policy

- Written Policy
 - Based on the Four Factors
- Faculty Assess with a Fair Use Checklist
 - Or other Resources
- Role of Legal Counsel
- Role of Libraries
- Importance of Education



The E-Reserve Policy

- Who is making the Copies?
- Who controls the System?
- What is the Perspective on Fair Use?
- What Risks can You Absorb?
- Who makes the Initial Review?
- Who makes the Final Decision?
- How have you Educated Colleagues?
- How do you Respond to Challenges?

Google Books case

***The Authors Guild v. Google Inc.*, 254 F.Supp.2d 282 (S.D.N.Y. 2013).**

- Scanning and search of millions of copyrighted books within fair use.
- Transformative Uses.
- Limited Search and Access.
- Affirmed by the Second Circuit.

“Google provides the **libraries with the technological means** to make digital copies of books that they already own. The purpose of the library copies is to **advance the libraries’ lawful uses** of the digitized books consistent with the copyright law. The libraries then use these digital copies in **transformative** ways. They create their own full-text **searchable indices** of books, maintain copies for purposes of preservation, and make copies available to **print-disabled individuals**, expanding access for them in unprecedented ways. Google’s actions in providing the libraries with **the ability to engage in activities that advance the arts and sciences constitute fair use.**”

Google Books case

***The Authors Guild v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015).**

- Affirmed the District Court
- Transformative Use
- Information about Books

“Google’s making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information *about* Plaintiffs’ books without providing the public with a substantial substitute for matter protected by the Plaintiffs’ copyright interests in the original works or derivatives of them. The same is true, at least under present conditions, of Google’s provision of the snippet function.”

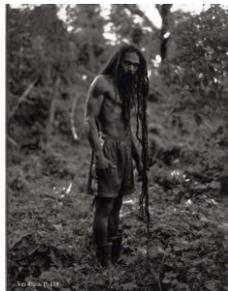
“In other words, transformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge.... The word “transformative” cannot be taken too literally as a sufficient key to understanding the elements of fair use. It is rather a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author’s original text will necessarily support a finding of fair use.”

“We recognize that the snippet function can cause some loss of sales. There are surely instances in which a searcher’s need for access to a text will be satisfied by the snippet view, resulting in either the loss of a sale to that searcher, or reduction of demand on libraries for that title, which might have resulted in libraries purchasing additional copies. But the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original. There must be a meaningful or significant effect upon the potential market for or value of the copyrighted work.”

Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013). [Thanks to Prof. Matthew Sag]



Graduotioh_Collage_inkjet.and.acrylic.on.canvas. 72.314" x 52.112"



P.118 of the Patrick Cariou Photograph(s) in Yes Resto

Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013).



Pp. 83-84 of the Patrick Cariou Photograph in Yes Rasta

Charlie Company, Collage, inkjet, and acrylic on canvas, 131" x 100"

The List Continues:

- Fox News Network, LLC v. TVEyes, Inc.
 - Recording of news broadcasts.
 - Indexing and accessing news clips.
 - Wide social and public benefit.
 - Uses did not compete with original purpose.
- Warner Bros v. RDR Books
 - Blocked a "Harry Potter Lexicon."
 - Competed with authorized Encyclopedia.

Where is Fair Use Heading?

- **Purpose: No Presumption**
 - Even for Commercial Uses
- **Nature: No Presumption**
 - Even for Unpublished Works
- **Amount: No Presumption**
 - Even for Entire Works
- **Effect: No Presumption**
 - Even for Commercialized Works

New Directions

- **Open Access**
- No barrier to Access
- No restrictions on Downloading
- No restrictions on Uses
- **Creative Commons**
- Exercise of Copyright Ownership Rights
- Sharing of Rights with the Public



Making Sense of Fair Use

- Working with Fair Use
 - Base decisions on the Four Factors.
 - Discern principles from leading cases.
 - Develop written standards.
- Do not Work in Isolation
 - Public Domain.
 - Permissions and Licenses.
 - Specific Statutory Exceptions.



Thank You!

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