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BOOK REVIEWS

Surveying Recent Scholarship on Fair Use: A Conversation

moderated by PETER DECHERNEY

Peter Decherney: Fair use is a constantly evolving legal doctrine, and since Judge Pierre Leval introduced the concept of transformative use in 1990, the doctrine has undergone a tectonic shift.¹ Courts, scholars, and increasingly creators and consumers measure fair use by the extent to which a new work has been transformed: Has the context changed significantly? Does the new work repurpose the material it uses? Courts have consistently endorsed the transformative-use standard, finding that recontextualizing a work can make it a fair use even when the entire original work is used and it is used for a commercial purpose.² For the most part, the concept of transformative use has brought a new clarity and, I would suggest, an increased predictability to fair use. At the same time, however, many other technological, cultural, and political factors have also exerted an influence over fair use.

A new wave of books takes account of the post-1990 landscape of fair use and its impact on culture, business, and creativity. Kembrew McLeod and Peter DiCola's *Creative License* examines the mounting restrictions courts have placed on music sampling and the resulting transformation of hip-hop music.³ Patricia Aufderheide and Peter Jaszi's *Reclaiming Fair Use* chronicles and situates the movement they started to create fair-use best-practices documents.⁴ William Patry's *How to Fix Copyright* argues that fair use is an important engine for innovation and job creation that should be adopted beyond the United

1 Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review* 103 (1990): 1105–1136.

2 *Luther R. Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994); *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006).

3 Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Durham, NC: Duke University Press, 2011).

4 Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (Chicago: University of Chicago Press, 2011).

States.⁵ Jason Mazzone's *Copyfraud and Other Abuses of Intellectual Property Law* details copyright holders' adeptness at claiming rights far in excess of those given to them by the law.⁶ And my own *Hollywood's Copyright Wars* argues that the Internet has homogenized fair-use communities that were once treated as distinct groups.⁷ Significantly, these are works by both media scholars and legal scholars, who are often collaborating on the same texts. Other projects, like the Organization for Transformative Works and its journal, also bring together lawyers and media scholars to think about fair use and its impact on culture. What do you think these books (and others) tell us about the changing character of fair use? And what are the implications for scholars, archivists, and media makers?

Jessica Silbey: A common feature of three of the books you mention—*Creative License*, *Reclaiming Fair Use*, and *How to Fix Copyright*—is that they begin from the ground up in making the case for the centrality of fair use in cultural production today. Patry calls for an “evidence-based approach to lawmaking.”⁸ Aufderheide and Jaszi's book is an example of creating norms from within maker and user communities to establish expectations for sound practice. McLeod and DiCola's book is a rich account of hip-hop music, based on hundreds of interviews with actors in the field, explaining how the music got made, when it began, and how it shifted in response to transformations in the law and corporate practice. Each of these books is a readable balance of detailed stories and overarching principles for positive change in creative practices. There is a growing problem with the misfit between intellectual property (IP) law that claims to promote creativity and innovation and the way it works for those doing the making and disseminating. These books are a welcome addition to the conversation insofar as they examine the actual mechanisms and processes of cultural production.

Rebecca Tushnet: I agree that these books are varied and useful contributions to the literature. I'll start with Aufderheide and Jaszi, whose book most actively attempts to create norms. They contend that fair use should be, and descriptively is, readily capable of being applied by ordinary citizens to rework and reframe existing copyrighted material without fear. Thus, Larry Lessig's famous claim that fair use is “the right to hire a lawyer” is overstated to the detriment of fair use.⁹ The common “copyright” language of rebellion and suppression can be dangerous to the potential fair uses of the many people who don't want to be rebels or pirates and who may therefore suppress their own, in fact, unobjectionable, creative, and educational activities. The authors worry that “victim politics” have “the effect of validating powerlessness; as soon as victims gain any agency, they start to look more like the enemy. . . . Exaggerating

5 William Patry, *How to Fix Copyright* (New York: Oxford University Press, 2011).

6 Jason Mazzone, *Copyfraud and Other Abuses of Intellectual Property Law* (Stanford, CA: Stanford University Press, 2011).

7 Peter Decherney, *Hollywood's Copyright Wars: From Edison to the Internet* (New York: Columbia University Press, 2012).

8 Patry, *How to Fix Copyright*, 11.

9 Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (New York: Penguin, 2005), 187.

or misrepresenting the acts of fair users, and their consequences, can unnecessarily deprive people of the agency to accomplish routine acts of cultural expression.”¹⁰ I like this characterization of their project: “Fair use does not usually require courage. It should be something that elementary schoolchildren can do without drama.”¹¹ There’s a really interesting dynamic here about radicals versus liberals in a movement sense; the Organization for Transformative Works, Aufderheide and Jaszi, and I are all clearly on the liberal-reformist side, though I think for rhetorical reasons of their own the authors downplay the important contributions the radicals make to getting the liberals’ claims heard and taken seriously. Eduardo Peñalver and Sonia Katyal’s book *Property Outlaws* does a good job on this last point.¹²

Bill Herman: These books stand as a testament to the degree to which fair use has become the rallying cry for a political movement. In the early phase of this movement, roughly 1996 to 2002, there was a great deal of consciousness raising and organization building—proper first steps in bringing an issue to the public’s attention. That message has gotten out and become part of the online ethos, priming the pump for overtly political action such as the explosive reaction to the anti-piracy bills known as the Stop Online Piracy Act and the Protect IP Act. It was defensible but regrettable when, nearly ten years ago, Lessig spread the message that fair use is “the right to hire a lawyer.” This reaffirmed the idea of fair use as an esoteric legal doctrine to be interpreted by experts or explained with an apology to the public before boredom set in. Fair use has come a long way since then, in both visibility and outside-the-courtroom viability. Every time I offer my undergraduate class on copyright, it fills to capacity with students who support a broader vision of fair use. As a copyright wonk, I love and cannot wait to assign Patry’s book, but—and this is no slight—it is a lucid clarification of and argument for a pro-fair-use legislative agenda that the Internet public already supports. Fair users cannot wait for their agenda to pass into statute, however, which is where the other books make such valuable contributions. While also supportive of calls for reform, they help people understand how to survive the copyright system we have now. In this way, they are just another component of the broader push to bring fair use out of the courtroom and into the public’s hearts and hands—especially into the creative process.

PD: Do I detect a different narrative emerging from Rebecca’s and Bill’s comments than the one I started with? Rather than a revised judicial conception of fair use that started with Leval and snowballed, is the story of the last few decades the story of radical opposition that paved the way for liberal reforms like best-practices statements, Creative Commons licenses, exemptions to the Digital Millennium Copyright Act, and journals like *Transformative Works and Cultures* and the *International Journal of Communication* that push the boundaries of fair use? It’s not that radicals preceded the liberals—they coexisted—but one group helped create support for the other?

10 Aufderheide and Jaszi, *Reclaiming Fair Use*, 68.

11 Ibid.

12 Eduardo M. Peñalver and Sonia Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (New Haven, CT: Yale University Press, 2010).

That may be the case, but I don't want to downplay the boldness of all three books in the context of the current environment. I also don't want to suggest that the more radical scholarship and activism has disappeared. There are also new books that call for more revolutionary change, like Yochai Benkler's *The Penguin and the Leviathan*, which proposes a new regulatory system that assumes humans are altruistic rather than self-motivated.¹³

BH: Yes, activism is an important part of how fair use is defined today, and that has only become more true over time. This cuts both ways, actually. The Recording Industry Association of America's Mitch Bainwol and the Motion Picture Association of America's Christopher Dodd are just the most visible members of a vast coalition that pushes the copyright-as-property trope for anybody who will listen. Others include academics, think tanks, members of Congress, other policy makers, and your TV at the start of every DVD you rent. So yes, activists have helped create a wider berth for fair use in recent years—Jaszi and Aufderheide in particular—and this has been a direct counter to the activists who have sought to narrow fair use. This is not to diminish the importance of judges who (except in cases involving musical sampling) are quite often willing to stand up for fair use. *Reclaiming Fair Use* is right to point out the history of judges standing up for fair use, whether in the Bill Graham Archives case or the “Barbie in a Blender” case.¹⁴ This is really what their title is about: fair use the legal doctrine is alive and well, but reasonable would-be fair users have been scared out of our rights by a combination of industry rhetoric and horror stories. It takes time to clear the detritus and make room for fair use.

JS: I think one of the strengths of these books is how they make real the problems of engaging in creative work for a profit. I think a reason for the failings of the pro-fair-use agenda over the past several decades—and the reason why copyright reform has gone in the opposite direction, toward longer and stronger copyright protection—is because legislators and courts fail to see the costs of long and strong copyright. Do these books provide more than anecdotal evidence of the real cost—preventing ongoing creative and innovative work—or will these books be perceived as more of the same: a collection of complaints about paying for other people's stuff? Some of the financial realities in these books stunned me. *Creative License* includes a breakdown of the hypothetical licensing of *Paul's Boutique*, which would have left the Beastie Boys in debt to the tune of \$20 million, with the group going further into debt with every copy sold to the public because of licensing royalties owed.¹⁵ Patry's book describes the financing of major motion pictures as a strategic and convoluted game of risk avoidance where substantial profits are earned through product placement and sale-leaseback

13 Yochai Benkler, *The Penguin and the Leviathan: How Cooperation Triumphs over Self-Interest* (New York: Crown Business, 2011).

14 *Mattel v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003). Mattel sued artist Thomas Forsyth for copyright and trademark infringement over his *Food Chain Barbie*, a series of photographs in which nude Barbie dolls are shown in danger of being mangled by kitchen appliances. Mattel not only lost the suit but also was ordered to pay Forsyth's legal expenses on remand.

15 McLeod and DiCola, *Creative License*, 208.

transactions to take advantage of tax reliefs and international licensing fees in foreign countries that provide substantial subsidies to the film industry.¹⁶ Patry admits these arrangements take place against a background of copyright, but their overly complex financing structures and reliance on “remakes” to avoid the risk of a “good new idea” demonstrates that copyright is not working.¹⁷

One way to think about books such as these is whether they—as accumulated data and persistent argument—will change people’s minds about the importance of a leaner copyright to achieve the constitutional goals of “progress.” Another way to think about *Creative License* and *How to Fix Copyright* is that they may not be targeting the audience whose minds need to be changed (although certainly Patry is not an outsider to the legislative reform movement). *Reclaiming Fair Use*, by contrast, targets the communities whose collective practices could in fact bring positive change to the way fair use is applied.

Coming into work today, I ran into a lawyer friend who works in a big law firm structuring licensing deals. His take on intellectual property and fair use was simple: if you can get the fees for the use of your client’s stuff, you should. Why is that bad? He is a strong-property guy, a “I made it, so it’s mine” kind of person, and he doesn’t see evidence of lack of innovation or creativity around him. He has lots of friends. And I thought, “Which of these books would most influence his views on the need for copyright reform?” I am not sure whether any of them would. Certainly Benkler’s more revolutionary approach would not. The same folks who believe strong property rights are natural and necessary also believe that human beings are inherently self-interested (within the scope of narrow family and community associations). And so when considered this way, it may not be a question of facts and persuasion but an ideological divide of the kind we see in US politics today. That depresses me.

PD: Patry, McLeod and DiCola, and Aufderheide and Jaszi all emphasize the need for empirically driven fair-use policy and practice. And now thanks to these books and others, there is mounting evidence that fair use enables both creativity and commerce. Whether new empirical evidence can change policy is another story. For every study suggesting that the creative economy benefits from fair use, there is a study suggesting that piracy is killing traditional media businesses. Like choosing between Fox News and *Democracy Now*, you can filter out any part of the copyright universe that you want to. Can new empirical evidence change minds and policies?

RT: To people with the resources to license and continue to accrue IP rights, the system often looks fine, except for the regrettable persistence of “piracy.” So there’s good reason to appeal to other citizens, from educators to individual artists to “consumers,” as Aufderheide and Jaszi and Patry do. Peter Decherney’s own book quotes Fred von Lohmann from when Fred was at the Electronic Frontier Foundation: his job was to keep consumer-freeing technology in the market long enough that it couldn’t practically be taken away, and I think that’s a similar impulse. Aufderheide and Jaszi

16 Patry, *How to Fix Copyright*, 23–25.

17 *Ibid.*, 24.

in particular aspire to change facts on the ground to make it harder to eliminate legitimate fair uses.

I'm not really the audience for Patry's book, but I do like Patry's focus on copying as a central element of creativity. He focuses mostly on copying as training before the development of one's individual style, but he notices that individual styles still retain a bunch of copying, necessarily. One way to defend fair use, then, is to emphasize the virtuous circle: copying and access are how we get more things to copy and access in the future, counterbalancing the "incentive" story that posits that exclusive rights are all that's needed.

Creative License then does a case study, though it's worth emphasizing that fair use isn't the most prominent solution it offers for music sampling. In fact, the authors put most of their emphasis on a simpler clearance system, with only vague suggestions about who might create it or how it might be funded. Nonetheless, I agree with Jessica that the book does a great job of countering the "you're just copying because it's easy" trope. As one sampler explained, the work was laborious and extensive. "You typed the track numbers into this little Commodore computer hooked up to the mixing board. And each time you wanted a new track to come in, you'd have to type it in manually. It was just painful. It took so long. And there was so much trial and error."¹⁸ Likewise, the work involved in compilation was both arduous and creative. As feminists have long argued, we could do a better job of identifying where "work" is hidden or devalued.

BH: I think empirical data is making a difference in a lot of ways, to a lot of differing degrees, for different audiences. Obviously, the research reports by the RIAA and MPAA show little regard for social scientific and statistical soundness, and the empirical data showing that they are way off the mark is of little interest to this group specifically. But the trade groups are not coextensive with the industry. I think the data can have more of an impact on the folks who actually produce creative works. (For instance, the creative types in the record industry have embraced the artistic and commercial value of mash-ups to the point that Budweiser used a mash-up in their Super Bowl ad in 2012; it is so true to form that it could pass for an excerpt from a Girl Talk album.)¹⁹ And *Reclaiming Fair Use* takes an empirical approach to establishing what kinds of uses the documentary filmmaking community needs to do their work, and the resulting document transformed the whole documentary industry's view of fair use—even including the lawyers and insurers. Whether we can get past what Patry describes as a "faith-based approach to legislating" and make more empirically grounded policy choices is a different matter.²⁰ Here, I think the audience for this research could be the industry executives who are overpaying the trade group lobbyists—and the executives in other industries (such as technology) who undervalue the role fair use plays in their bottom lines.

18 McLeod and DiCola, *Creative License*, 21.

19 *Ibid.*, 178–179.

20 Aufderheide and Jaszi, *Reclaiming Fair Use*, 76.

JS: Another reason that fair use is underclaimed is because of the strength of the incentive story to justify intellectual property rights. This goes along with the “I made it, so it’s mine” claim, which together with the incentive story, strongly supports the right-in-gross-property claim. One of the responses to the latter, as made well in these books, is, “Actually, you didn’t make it—at least not alone.” This is the collective creativity argument, which is so obviously true, yet which is fundamentally resisted because of the ubiquity of possessive individualism in US culture.

We can also provide strong evidence to undermine the incentive story, as these books start to do, but on a more anecdotal and less systematic basis. *Reclaiming Fair Use* makes the point that the incentive theory only represents the owner’s interests, which is the wrong focus when discussing the purpose of copyright: promoting creation. Strong ownership is not an end in itself. And although it may be one way to promote creation, as these books demonstrate, it is not the only way, and it may not be the most optimal way in our digital age. McLeod and DiCola’s interviews with music artists reinforce the notion that ownership and control do not necessarily drive creation. They write that “interviewees from the underground music scenes . . . resist a fundamentally economic and property-based view of music.”²¹ Sage Francis, for example, says, “When I first started putting out music, it was to other people’s beats that they sampled from somebody that they didn’t get permission for. I mean, that slows down the process of creativity, when you’re so consumed with the legalities of your art, you know, that’s no place for an artist to be in. And it will never happen; it will never take precedence over what people do to create. I will never write a song and fear that someone’s going to steal it, or [that] I need to hurry up and copyright this stuff.”²²

Patry gets into this debate as well. He argues that copyright protection is so overbroad that it covers things that do not require property rights to be created in the first place: legal briefs, employee manuals, e-mails. He says quite baldly, “Copyright is neither the basis for creativity nor for culture. Copyright’s actual role is more limited: it ensures that works once created and successful can be protected against free-riding.”²³ I think this is true for the most part; I see very little evidence that works originate because of the promise of exclusivity, except in limited fields.

And so Patry’s statement that “to fix copyright” we need to “drill down into the kind of creativity we want to foster and then figur[e] out how we can empirically foster that creativity” sounds right to me.²⁴ Patry’s attention to the conditions of production for creativity would lead us to think about fair-use certainty, as *Reclaiming Fair Use* does, as well as relationships with intermediaries and employers, as *Creative License* does. This becomes a question of employment law and agency and partnership law, as Catherine Fisk’s work demonstrates.²⁵ Exposing copyright as a tool to build corporate wealth (as

21 McLeod and DiCola, *Creative License*, 102.

22 *Ibid.*, 215.

23 Patry, *How to Fix Copyright*, 16.

24 *Ibid.*, 19.

25 Catherine Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800–1930* (Chapel Hill: University of North Carolina Press, 2009).

Julie Cohen's new work is doing) rather than as an incentive to foster diverse cultural production may be one way to substantially change the conversation.²⁶

PD: I want to return to Rebecca's discussion of music sampling in *Creative License*, because I'm wondering why music is—and always has been—the exception to the rule. As Rebecca points out, fair use is not the primary solution that McLeod and DiCola endorse. Instead, they seem to favor new forms of licensing. (In the spirit of full disclosure, I should say that I was a reader for the press on this book. I wasn't an anonymous reader, however, since I revealed myself to the authors.) In any case, I happen to know that fair use came to the project very late in the revision process. Fair use for music sampling, I think, just seemed too far from precedent and industry practice to imagine as a viable solution. Aufderheide and Jaszi corroborate this. They refer to music sampling as “the big exception,” and citing Siva Vaidhyanathan and McLeod, they say that “this combination of bad law and bad practice has been toxic for musicians, and it has made it difficult for them even to imagine applying fair use to their practices.”²⁷ At one point, faculty members and students at American University were working on a fair-use best-practices statement for music sampling to complement the many others, but the project stalled. To cite another example, in my book, when I talk about the fair-use myths that shaped avant-garde filmmaking from the 1960s to the 1990s, most of the examples of stories about fair use that circulated among filmmakers involved the use of music. Why is music an outlier in the history of fair use? Does it have something to do with the language used to discuss musical use and allusion? Or is it more because of the effectiveness of music industry lobbyists?

RT: One interesting feature of the accounts of actual music creation in *Creative License* is that they are like accounts of creation in other media. I was struck, in fact, by the way that some artists interviewed deliberately referenced technique bleed. Public Enemy “wanted ‘to blend sound. Just as visual artists take yellow and blue and come up with green, [they] wanted to be able to do that with sound.’ Hank Shocklee adds, ‘We would use every technique, no different than in film—with different lighting effects, or film speeds, or whatever. Well, we did the same thing with audio.’”²⁸ This ties into one of the overall lessons of creativity research, which is that innovation often comes from applying techniques of one field to another field's problems.

So music is not hermetically sealed from other types of creative production. It has to be made different, legally speaking. I think part of the reason this move has been so successful is judicial discomfort with music—judges and lawyers distinctively write as their mode of production, and writing about music, as they say, is like dancing about architecture. So explaining why music is fair use, or even what parts of music are protectable expression and what are unprotectable ideas, has proved extremely difficult,

26 Julie Cohen, “Copyright as Property in the Post-Industrial Economy: A Research Agenda,” *Wisconsin Law Review* 141 (2011): 141–165.

27 Aufderheide and Jaszi, *Reclaiming Fair Use*, 90. See Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001).

28 McLeod and DiCola, *Creative License*, 24.

and it has seemed easier to punt to experts on similarity determinations or to simply lecture, “Get a license or do not sample.”²⁹ Listening to artists’ own perspectives on how meanings are made and changed might help, whether this is through codes of best practices or otherwise.

JS: As Rebecca says, it has to be the case that borrowing and montage is present in almost every creative field, both in terms of techniques and forms. I can’t think of a single creative practice that isn’t indebted in some way to neighboring fields and which creates products that don’t resemble in some form those of other genres. (Most histories of art forms start by describing how they have “bled” or evolved from others and retained some of those techniques and forms.) Music is often described as nonrepresentational, which, as Rebecca points out, makes it difficult for judges to analyze. (As she and I have both written, judges and many lawyers demonstrate regrettable blindness when it comes to analyzing visual images as well.) Might this help us understand better why music does seem to be “the big exception” when it comes to fair use?

BH: Here I think the case law and its aftermath is almost the whole story, and in this instance, that means the language and ideology of romantic creativity and ownership of property. In *Creative License*, the authors get it exactly right in explaining the direction the music industry took: “*Grand Upright* Sets the Tone.” The case effectively ended the practice of sampling music without a license. It would be hard to overstate the degree to which *Grand Upright* was a bad decision; Judge Duffy asserts that sampling is infringement but provides not a word of logic supporting it, and the Bible is literally the only source he cites.³⁰ Even though *Grand Upright* was just a district court case, it set the music industry on an unhealthy path from which it has never recovered.

After *Grand Upright*, clearing samples became absolutely mandatory, and, as the authors note, labels even started using some of their most musically knowledgeable people to listen for samples that musicians had tried to sneak in without the labels’ knowledge. This is a big problem with the fourth standard of fair use—effects on the copyrighted work’s market value—as it is defined to include licensing markets. In principle, every unlicensed use could be paid for via a license. Why don’t we have a licensing market for textual quotations or brief excerpts of compositions during live musical improvisations? I think it is only because these practices predate the contemporary obsession with copyright as property, so they’ve been grandfathered in. Of course, effectively banning new ways of creating works because they were not yet invented when federal judges were young is terrible cultural policy.

PD: It seems clear that different media have different fair-use histories, even if the underlying principles of fair use should apply across media. This is in part, I would suggest, because we have differing accounts of artistic production. When I have my humanities students read copyright decisions, one thing that we always look for is the theory of artistic creation that is sometimes explicit in the decisions but is more often

29 *Bridgeport Music v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

30 *Grand Upright Music v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991).

implicit. So I am happy to hear both of the lawyers in our discussion emphasizing the fact that copyright policy and case law is always based on theories of how art is made. I don't think that judges or creators can make fair-use decisions without some version of the collectivity argument, as Jessica puts it. You can have factors for determining fair use, but at the root you still need a conception of when giving creators too much control begins to hamper the creativity of others. And I completely agree with Rebecca that courts have treated musical creativity too hermetically; drawing analogies to other art forms would help to return fair use to sampling and to the use of music in multimedia works more generally.

For the remainder of our discussion, I would like to turn to the implications of fair use for teaching, research, and publishing, as I know that this is a question that most of our readers will be particularly interested in. What do these books and the past few decades of fair-use evolution tell us about the future of teaching, research, and publishing?

RT: I think all of the books, in various ways, point to how up for grabs copyright policy is, not just for entities with the money to spend on campaign donations but for people and institutions who shape practices on the ground. Different industries have reacted in different ways to changes in legislative and judicial sympathies for copyright owners. There is a great deal of flexibility that educators and writers can use to explain why their particular practices make sense within a coherent community of user-creators. Whether such appeals succeed judicially will depend a great deal on whether we can resist an account that says that education, like everything else in the world, is simply about money. If education is merely an input into production, then educational institutions can be made to pay (and to charge students) based on expected—or hoped-for—economic benefits. If education is part of a thicker account of human flourishing, then a pay-for-every-use theory is less persuasive.

JS: There are both literal answers to Peter's questions as well as more conceptual ones, as Rebecca draws out. As for literal, the Georgia State e-archives case is going to be hugely important for library practice and cost of education going forward. And recently the Code of Best Practices in Fair Use for Academic and Research Libraries was released by American University's Center for Social Media, which is a code that is needed and welcome by nearly every librarian I know.³¹ I also understand that slowly many university copyright policies are being redrafted to reflect (and direct) publication and research to online repositories and to provide more helpful guidelines for faculty and staff when it comes to disseminating educational materials and scholarly work. (Harvard's policy requiring open access to faculty's production with some exceptions is a notable one—MIT has been pushing this policy as well, and has had OpenCourseWare for years.)

Pushing against this are aggregators and journal publishers who say they cannot stay in business when competing with SSRN [the open access Social Science Research

31 The code is available from American University's Center for Social Media, at <http://www.centerforsocialmedia.org/libraries> (accessed July 9, 2012).

Network], for example, and that they perform an important filtering and quality control function for research. And some university policies, while becoming more open in some ways, are becoming more grabby in others: work-for-hire clauses are being added to employment agreements at some research institutions, and staff are being directed to refuse photocopying requests by faculty for liability purposes. At the K–12 level, the pressures on cost of access to excellent educational materials in light of the publishing industry’s inability to evolve into digital media is alarming. This occurs at lots of levels: the same old musical every four years because rights to others cannot be cleared or are too expensive; outdated textbooks and workbooks because new volumes are too expensive (and are updated regularly to compete with the resale market); a dearth of scanners and printers in elementary schools for fear of institutional liability for educators’ downloading and copying. And what do I see coming home with my own children on a weekly basis? Photocopies (or manually copied on a word processor) of workbook problems and textbook pages, which I am guessing were made for the entire class (or grade?) to save costs. A lot of good could come from developing robust fair use in K–12 education and working on putting pressure on the publishing companies to open up their products. As a side note, I have spoken with many of these educational publishers, and many of them do not rely primarily on copyright for profits. Market share, first-mover advantage, and brand and legislative mandates in several key states drive the building of the products and their sale. They would be (and are) making a lot of money without the “insurance” of copyright protection.

BH: Here, *Reclaiming Fair Use* is the most clearly relevant, because creating statements of best practices for scholarly communities is the most feasible way to build a fair-use shield against the angry, swinging sword of copyright litigiousness.

I am optimistic that the codes will continue to inform the practices of others and (when necessary) to stand up in court. These can have a clear and direct impact on the academic community. The new Code of Best Practices in Fair Use for Academic and Research Libraries could help stanch the bleeding of fair-use privileges in the classroom. That said, these codes are not a cure-all. For instance, academics continue to have difficulties making fair-use claims with intermediaries. Chris Bolton, the University of Massachusetts PhD student who was the first mover behind the International Communication Association code, has had at least one publisher who was not persuaded by the code; the publisher still tried to tell him to license every quotation of popular media sources. Still, community statements are powerful, both organizationally—they serve, in a legitimate way, something like the role of a push poll—and legally, so I think we can put some hope in them leading the way in publishing, teaching, and research.

I think pressuring publishers is also a good strategy, as Jessica notes, and mathematicians’ publishing and editorial boycott of the large science publisher Elsevier is a good example of how we can do this. Unfortunately, abstaining from the top publishers in one’s field is generally a luxury for the (proportionally ever-smaller share of) tenured faculty.

JS: A plausible way to pressure publishers—outside the growing robustness of best practices, about which I share optimism—is for technology companies and online

intermediaries to develop platforms for access, interaction, and distribution. Tablet computers should replace textbooks in classrooms, and web communities (blogs, boards, et cetera) can supplement real-time, in-person learning groups. Access to and productive as well as consumptive interaction with learning materials in these forms is the future of education. It requires publishers to evolve and innovate in substantial ways and for the legislative reform and federal common law not to hold it back.

PD: Thank you all for your thoughtful and insightful comments on the recent literature on fair use. I think we have dug down to some of the larger forces that have changed the landscape of fair use: legal decisions, activism, industry practices, consumer norms, and technology. For readers coming to this literature for the first time, I would emphasize that all of these books are highly readable and excellent places to start.

In closing, I think that Jessica's final comment points to some important questions for the future. As reading, listening, and viewing move online and into a purely digital environment, fair use is undoubtedly being affected. On the one hand, fair use is platform agnostic; if using a clip in a video is fair use in a theater, it is also fair use online. But on the other hand, we are moving away from an environment in which we own our media. Increasingly, we live in a rental society in which we have to agree to new terms before we can access a Netflix video or download a book. Often the cost of admission to this society is to leave fair use at the door. *

Contributors

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