

Fair Use: A Double-Edged Sword

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Exploring the definition of 'fair use' as a facet of copyright law in the United States, Sanford Thatcher examines the inherent tension caused by this legal notion in scholarly publishing, particularly in the new electronic era. Libraries, and, by extension, universities, increasingly advocate a stronger assertion of fair use in higher education to cope with diminishing funds. University presses, in contrast, view broader definitions of fair use as a threat to the already decreasing market potential for scholarly monographs, despite recognizing that their interests are closer to the aims of higher education than they are to the aims of commercial publishers. As an example of this double-edged sword, Thatcher discusses photocopying and electronic journals and their economic and legal effects on publishers. Without due consideration of university presses and their mandate to publish scholarly research, aggressive fair use will constrain those publishers and adversely affect the careers of the authors fair use is designed to assist.

'Fair use' as a part of copyright law in the United States is meant to ensure a balance between the right of authors to benefit sufficiently from the way others use their work to provide motivation for continuing creative activity and the right of the public (including other authors) to use that work in ways that will 'promote the progress of science and useful arts' (in the US Constitution's language) but not interfere with or undermine the author's incentive to create.

In higher education, where most writing done to disseminate the results of research is so specialized as not to be of interest to people outside the academy and where publications (apart from basic text-

books) have historically tended not to have a large enough market to interest commercial publishers, universities have taken it upon themselves to provide a mechanism, through university presses, for the distribution of new knowledge. Typically these presses serve as agents for their academic authors, handling all the rights transferred to them by the authors. Since direct monetary rewards from scholarly publishing are usually small or non-existent, authors look more to the benefits that accrue to them in career advancement than to royalties as compensation for their labours. Accordingly, the economic impact of fair use on them in any direct way is negligible. University presses, however, must operate as businesses, just as commercial publishers do, and the impact on them can be considerable if fair use is carried too far.

'Fair use' as a judicially created doctrine was originally applied (beginning with the classic case of *Folsom v. Marsh* in 1841) to the situation where one author quoted another author for purposes of comment or criticism, thus using the copyrighted work of an earlier author in a manner that added value to it. There was here no duplication of the earlier work for its own sake; any such copy of a merely duplicative kind was proscribed as piracy. When photocopiers began to proliferate in the 1950s, however, it became easy for anyone to make any number of copies of an original work, and the cost of doing so – as with most modern technology – continued to decrease over time. Thus the stage was set for a new examination of the meaning of fair use.

The US Congress, in passing the 1976 *Copyright Act*, acknowledged the possibility in section 107 (where 'fair use' was for the first time codified in statutory form) that the making of 'multiple copies for classroom use' might qualify as fair use, within limits. An attempt to define those limits took the form of the Classroom Guidelines that were negotiated by a group representing both publisher and user interests and that Congress sanctioned by including the guidelines in its report accompanying the new legislation.

When photocopying grew into a commercial business providing a service to teachers who wanted to create the customized anthologies we now call 'coursepacks,' publishers challenged this practice. In the most notable case to date, publisher plaintiffs won a nearly \$2 million settlement in 1991 in an infringement suit brought against Kinko's Corporation. A similar case, involving Michigan Document Services as

defendant and Princeton University Press as one of the publisher plaintiffs, was decided by a vote of 8–5 against MDS by the Sixth Circuit Court of Appeals sitting *en banc* in 1996.

The judge in the Kinko's case ruled in no uncertain terms that coursepack copying done by Kinko's far exceeded the limits envisioned by Congress; it merely multiplied copies, in direct competition with the publishers' market, adding no value to them. This lack of any 'transformative' use played a key role also in the successful suit brought by over eighty publishers against the Texaco Corporation, decided in 1995. Also clarifying Congress's intent was a ruling by the Supreme Court in 1994 that emphasized that 'the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement.'

A lesson to be learned from these court cases is that the type of copying done by technological means that simply produces more copies – not only with photocopy machines but also now with networked computers – needs to be distinguished from copying that is truly transformative. The latter is what fair use was always meant to protect; the former runs the risk of undermining the market that needs to exist if authors – and, in the academic community, university presses as their agents – are to continue providing their service to scholarship. As Judge Newman put the point in writing the majority opinion in the Texaco case,

We would seriously question whether the fair use analysis that has developed with respect to works of authorship alleged to use portions of copyrighted material is precisely applicable to copies produced by mechanical means. The traditional fair use analysis, now codified in section 107, developed in an effort to adjust the competing interests of authors – the author of the original copyrighted work and the author of the secondary work that 'copies' a portion of the original work in the course of producing what is claimed to be a new work. Mechanical 'copying' of an entire document, made readily feasible and economical by the advent of xerography ... is obviously an activity entirely different from creating a work of authorship. Whatever social utility copying of this sort achieves, it is not concerned with creative authorship.

Failure to keep this crucial distinction between transformative and non-transformative copying in mind has plagued discussions of fair use in recent years, leading to much confusion and obfuscation, not

only among students and scholars who know little about copyright law but even among professionals in universities and outside who have a responsibility to be familiar with copyright law and how it is applied.

Since the Second World War, there has been one market (besides textbooks) that commercial publishers, following the lead of pioneer Robert Maxwell, entered with vigour, realizing the potential for great profits: scientific, technical, and medical journals (known in the industry as STM publishing). This has been a readily exploitable market for two reasons: first, the US federal government invested huge resources in supporting scientific research in the Cold War era, often providing as part of grant money sums allowed to be used as 'page charges' for publishing in STM journals; and, second, library budgets also expanded in tandem with this massive investment in scientific research, at least for a while.

The key to success for commercial publishers was simply selling scientists on lending their prestige to the new journals that these publishers launched. As Maxwell himself described the workings of this system, 'I set up a perpetual financing machine through advance subscriptions as well as the profits on the sales themselves. It is a cash generator twice over ... If Pergamon could win the trust of scientists it could establish the standard journal in each specialization, and that would give it a series of publishing monopolies ... scientists are not generally as price-conscious as other professionals, mainly because they are not spending their own money.'¹ This system operated successfully for commercial publishers for several decades, encouraging them to launch 30,000 new science journals during the 1980s alone, but began breaking down when library budgets could no longer absorb price increases at double the rate of inflation or more along with the ever more rapid proliferation of new journals.

Librarians, pressed to the wall, began the difficult process of cutting back on journal subscriptions but also increasingly called for more vigorous assertion of fair use within higher education, for altered behaviour by academic authors in transferring their rights to publishers (in what some have called the 'take back the copyrights' movement), for creation of new electronic journals to provide alternative outlets for publication of scientific research (as supported by the Scholarly Publishing and Academic Resources Coalition launched in 1998), and even for changes in the copyright law (as with the initial proposals to allow virtually unlimited copying for distance education in some

early bills leading up to the *Digital Millennium Copyright Act* of 1998). One major initiative along these lines was the *Report of the AAU Task Force on Intellectual Property Rights in an Electronic Environment* of the Association of American Universities (in conjunction with the Association of Research Libraries, or ARL), issued in mid-1994.²

What is not sufficiently recognized in efforts like these is the effect that implementing such proposals would have on the ability of university presses, as the long-established publishing arm of higher education, to continue their business. Already struggling to continue publishing scholarly monographs in the humanities and social sciences, the institutional market for which eroded in direct proportion to the increase in library expenditures on STM journals from the early 1970s on, university presses have viewed calls for more extensive fair use and changes in copyright law as direct threats to their own enterprise, the contribution of which they believe to be equally in the best interest of the future of scholarly communications.³ At the same time, presses recognize themselves to be integral parts of their own universities and the system of higher education generally and thus to have goals different from those of commercial publishers. For that reason, the Association of American University Presses has sometimes parted ways with the Association of American Publishers (even though their memberships overlap) on copyright issues, most notably in their different positions on the proposed fair use guidelines for electronic library reserve systems (where, interestingly, the ARL also parted company with some other library associations by not supporting the guidelines) that were an outgrowth of the Information Infrastructure Task Force's 1995 White Paper⁴ and the Conference on Fair Use (CONFU) pursuant to its recommendations. University presses, just because of this dual identity they have that straddles the commercial business world and the higher education community, can play a mediating role in debates over fair use between the for-profit and non-profit sectors, but unfortunately their voice is seldom sought or heard in these debates, particularly where it counts most, in the halls of Congress and the groves of academe.

Fair use is thus a double-edged sword that can be wielded responsibly to make sure that the rights of users in the higher education community are not eroded in this new electronic era and that the potential benefits of technology for enhancing dissemination of knowledge are fully realized, but that can also easily be wielded irresponsibly

in such a way as to undercut the very economic basis on which universities' own publishing operations depend to continue providing their service to scholarship. More aggressive fair use may benefit teachers in the short term, but if its effect ultimately is to constrain university presses from publishing new scholarly monographs, the interests of those teachers who are also authors seeking career advancement through publication will not be well served.⁵

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- 1 As quoted by Dennis P. Carrigan in 'Commercial Journal Publishers and University Libraries: Retrospect and Prospect,' *Journal of Scholarly Publishing* 27, 4 (July 1996): 210
- 2 The Report of the AAU Task Force on Intellectual Property Rights in an Electronic Environment is available on-line at <http://www.arl.org/aau/IPTOC.html>.
- 3 For a fuller discussion of how university presses uniquely contribute to the system of scholarly communication, see Sanford G. Thatcher, 'The "Value Added" in Editorial Acquisitions,' *Journal of Scholarly Publishing* 30, 2 (January 1999): 59-71.
- 4 *Intellectual Property and the National Information Infrastructure: Report of the Working Group on Intellectual Property Rights* is available online at <http://www.uspto.gov/web/offices/com/doc/ipuii/index.html>.
- 5 This is not to say that scholars (and publishers) should not be more aggressive in making transformative uses of existing work under the fair use doctrine. For a cogent argument supporting this position, see Harold Orlans, 'Scholarly Fair Use: Chaotic and Shrinking,' *Change* 31, 6 (November/December 1999): 52-60.