The Common Sense of the Fair-Use Doctrine

Commentary

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The Common Sense of the Fair-Use Doctrine

By Patricia Aufderheide

While checking final edits on their new book, two media-studies scholars are informed by their publisher that they must secure permission to use a magazine cover as an illustration of one of their assertions. Instead of dropping the graphic or making cold calls to the magazine, the scholars explain their fair-use rights under copyright—and the publisher’s general counsel agrees.

A researcher asks a librarian if the librarian can provide her with a clip from a major motion picture, relevant to the researcher’s presentation at the annual meeting of her academic association. When the librarian demurs, the researcher explains her fair-use right to show the work.

MIT’s OpenCourseWare designers, who develop free online curriculum materials, are preparing a course on sound engineering. The professor has included in the lecture several audio examples—all of them copyrighted. Instead of stripping out the examples and turning the material into a skeleton course, the designers include the material under fair use, allowing consumers worldwide to benefit.

Those users and many others in academe were able to employ their rights because they learned them from their peers who had created codes of best practices in fair use. They are re-establishing the normalcy of a longstanding free-speech right.

The right of scholars to use unlicensed material for research and publication purposes is clear under the U.S. doctrine of fair use. Fair use—a broad, flexible part of copyright policy determined on a case-by-case basis—permits users to repurpose, or transform, an appropriate amount of original material. If it’s so easy, why are so many smart people so scared of fair use? In the work that the legal scholar Peter Jaszi and I have done since 2004, and have synthesized in our new book, Reclaiming Fair Use, we have seen members of many professional and creative communities express that same anxiety. And we believe we understand why: They lack a common-sense understanding of their rights.
Twenty-five years ago, fair use was widespread and uncontroversial. Journalists, scholars, and documentarians employed it regularly. Publishers and other distributors routinely issued works rich with fair-use claims. But increasingly over the last two decades, that has changed, as large media and software companies have fought for greater copyright protections and ramped up their public-relations campaigns and legal actions. Meanwhile, their critics, including academics and artists, have often made alarmist claims about the dangers of overreach by copyright owners, causing further confusion. Many scholars, as well as members of various professional, creative, and research communities, simply misunderstand their rights, whether they seek to use or protect a work.

Now that codes of best practices are returning fair use to normalcy, it is time for scholars to reclaim fair use. Some dos and don'ts:

- **Do exercise your fair-use rights to teach and research using copyrighted materials, just as your peers are doing.** Insist on your rights with publishers and librarians. Learn about codes of best practices assembled by communications scholars, film-studies scholars, and poets to find out what other academics regard as normal. If your field has not yet developed a code, consider crafting one.

- **Do teach best copyright practices.** You are both a model to your students and a crucial source of current information. Students often come to us weighed down with a lifetime of misinformation, mixing up file-sharing (sometimes a clearly illegal use) and fair use (entirely legal when properly reasoned). They will enter a world where gatekeepers are often misinformed as well. Educate them about their right to help combat fear-mongering by copyright holders. Students and scholars who understand the basic logic of fair use have nothing to fear.

- **Don't mix up fair use and educational exemptions.** Teachers and scholars have significant rights within copyright law, but they are limited to mostly traditional educational settings. As both students' and professors' work moves outside the classroom, whether in a video posted on YouTube or a slide presentation on SlideShare, they'll need to employ their fair-use rights to participate in 21st-century education.

- **Don't expect to get a pass on fair use because your use is noncommercial, but don't be afraid of fair use in commercial settings, either.** Noncommerciality is a consideration in fair use, but a minor one. The key issues are transformativeness and appropriate amount matched to the transformative purpose. Litigation is almost universally on commercial uses, and judges tilt heavily in favor of transformative, appropriate fair use.

- **Don't confuse fair use with the open-source movement or Creative Commons.** The open-access movement works to expand the amount of material available on either a copyright-free or a copyright-light basis, such as a Creative Commons license. The impulse to share scholarly research more freely is an admirable impulse for any creator who wants to do so. Fair use, however, focuses on a different issue—specifically, when new creators and researchers want to use work that its creators do not want to give away. It permits unauthorized use of material that is normally closely guarded. It keeps copyright holders from becoming private censors of future culture by denying access to building blocks of new work.

Scholars in all disciplines need access to copyrighted work to enrich their research, their courses, and their public presentations. They must be able to effectively and economically publish and present their findings. Anxiety about whether their use of copyrighted material will get them, their institutions, or their presses in trouble is an obstacle to the creative and scholarly process. Worse, when scholars and others do not employ fair use, they shrink its
effectiveness as a right. Fair use is like a muscle; the more it is exercised, the stronger it becomes. Robust scholarship requires robust fair use.

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