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THE SCOPE OF FAIR USE

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JANUARY 28, 2014

Serial No. 113–82

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

86–454 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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THE SCOPE OF FAIR USE

TUESDAY, JANUARY 28, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 1:32 p.m., in room 2141, Rayburn Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Conyers, Marino, Smith of Texas, Holding, Collins, Smith of Missouri, Johnson, Chu, Deutch, DelBene, Nadler, and Lofgren.

Staff present: (Majority) Joe Keeley, Chief Counsel; Olivia Lee, Clerk; (Minority) Stephanie Moore, Minority Counsel; Jason Everett, Counsel.

Mr. COBLE. Good afternoon, ladies and gentlemen.

The Subcommittee on Courts, Intellectual Property, and the Internet will come to order. Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

We welcome all of our witnesses today.

And I will give my opening statement at this point. And I think Mr. Conyers is en route, I am told.

Fair use was formally incorporated into our copyright law in 1976 and has been at the heart of a large number of copyright infringement disputes. Disputes over fair use range from cases that only pertain to individual uses of copyrighted works to cases involving high-technology goods, which oftentimes can affect millions of consumers in congressional districts throughout the country.

North Carolina, my state, is home to several large universities that rely upon copyright law to protect their research and innovation at the same time, and through fair use, to make other works available for libraries, scholarship, and other research. Fair use has an important role in our copyright system. And while it offers tremendous benefits, it has also raised some concerns, which is why today's hearing is so important.

Rather than steal thunder from our talented panel of witnesses, I am going to withhold my comments about the pros and cons of fair use, until our expert witnesses have had an opportunity to lay out their arguments of what has worked well and what deserves additional scrutiny.

As many of you know, the strength of fair use is that it is somewhat ambiguous, leaving the courts with the discretion to clarify what is and what is not fair use. This ambiguity is also, unfortunately, its greatest weakness, particularly in the digital era because new technologies develop far faster than disputes are resolved in the courts. We have an important role and many believe that we can do a better job providing the courts with guidance on what we intend and what we do not intend to be fair use, which could help resolve many disputes dealing with fair use.

It is true that fair use can be very controversial. But, I want to assure our witnesses and those in the audience today that all of the extra security you see today on the Capitol complex is due to the State of the Union Address rather than the topic of this hearing. [Laughter.]

So, we can all rest easy about that.

So, please feel free to speak candidly and help us understand how we can improve fair use and protect the rights of authors and creators.

In closing, we welcome our eminently qualified panel of witnesses. Thank you for taking time from your busy schedules to join us today. And we look forward to hearing from you.

I yield back my time and now recognize the distinguished gentleman from Michigan, the Ranking Member of the full Committee, Mr. John Conyers.

Mr. CONYERS. Thank you, Chairman Coble. It is very kind of you to bring us all together again for this first hearing.

Today's hearing provides an important opportunity to examine the scope of the fair use doctrine, as codified in section 107 of the copyright law, fair use is an affirmative defense against infringement, under certain criteria as a starting point. I generally believe that fair use is working as intended. It provides a limited exception to the creator's property rights when certain public interests conflict with those rights.

The current law attempts to strike a delicate balance between the public interests and a creator's ability to earn a living from his or her work. Creators should be able to tell new stories that contribute to public learning by using permitted copyrighted material as historical artifacts to depict real-world scenes and events. Historians, biographers, and filmmakers use these materials in their works to draw meaning and insights about historical events. The use of this copyrighted material is essential to discuss historic events, which is critical to news organizations and public broadcasters. Additionally, current law, while not perfect, provides reliable guidance to copyright holders.

Although we must continue to monitor this area, as digital technology continues to develop and change distribution of content, we must be vigilant in safeguarding the rights of creators. In particular, I want the witnesses today to address whether certain calls for expansion of fair use is due partly to the fact that specific statutory limitations have not kept pace with emerging technologies.

And finally, content owners and user groups should continue to develop best practices to ensure that both of their interests are reflected. To be clear, I believe that the interests in maintaining the fair use's historic role as a flexible doctrine should continue to be

applied in a broad range of contexts. We should also reexamine the application of, quote, unquote, "Transformative use standard." The transformative use standard has become all things to all people. Fair use impacts all types of industry, including filmmaking, poetry, photography, music, education, and journalism. We must continue to encourage these industries to develop best practices.

I too look forward to hearing the witnesses discuss their opinions about the scope of fair use and what steps, if any, they believe we in Congress should take to make the law more effective and efficient.

I thank you, Chairman.

Mr. COBLE. I thank the gentleman from Michigan, Mr. Conyers.

And the Chair is now pleased to recognize the distinguished gentleman from Virginia, the Chairman of the full Judiciary Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you very much, Mr. Chairman.

This afternoon the Subcommittee will hear about a crucial component of our Nation's copyright law system, fair use. As a judicial doctrine, fair use has long been part of copyright infringement cases. As a statutory provision, however, fair use is a much more recent part of our Nation's copyright law, codified in section 107 only in 1976. With the exception of the last sentence of section 107 that added in 1992 to address fair use issues related to unpublished works, section 107 has remained unchanged since 1976.

Over the years, fair use has been widely recognized as providing flexibility in the copyright system, flexibility that has enabled commercial parody and flexibility that has encouraged new business models in the tech sector. Fair use has been at the heart of several important Supreme Court cases, such as the *Pretty Woman* and *Betamax* cases. While there is no doubt that flexibility in the copyright system is beneficial, certainty, with regard to our legal provisions, is just as beneficial, both for copyright owners and copyright users. Not every dispute over what is and what is not fair use should require a judicial interpretation.

So, I am interested in learning how the statutory provisions of section 107 have succeeded since their initial codification in 1976. Are these provisions too specific or not specific enough? Are the current four factors the appropriate factors? And, are they defined correctly? How should fair use interact with other provisions of copyright law? And, probably the most important question, how does one define what is transformative?

As several of our witnesses have noted in their written testimony, the test of what is transformative has been widely viewed by Federal judges to be of primary importance. I look forward to hearing—learning more about this and other fair use issues this morning.

And I thank the Chairman and yield back.

Mr. COBLE. I thank the Chairman.

And the statements of other Members of the Judiciary Committee, without objection, will be made part of the record.

Ladies and gentlemen, there is a no taxpayer funded prohibition for funding abortion, and it will be on the floor later today. The Judiciary Committee has been given a timeslot and I think some of the Members, John, maybe will want to participate in that. So,

when that timeslot arrives, we will stand in a brief recess giving—to accommodate those who want to go on the floor. So, we will try to keep this going as quickly as we can, without keeping you all here until dark. [Laughter.]

We traditionally swear in our witnesses——

Mr. NADLER. Mr. Chairman?

Mr. COBLE. Yes, sir.

Mr. NADLER. Mr. Chairman, it is, I believe, the invaluable custom of the House that a Committee or Subcommittee hearing does not occur while a Committee bill is pending on the floor. And that means the entire Committee bill, since I am sure many Members of the Committee will want to be on the floor for debate on the abortion bill, a rather important bill, and should not be and would not want to be there only for a small segment of that debate. And I think that it is improper, under the precedence of the House, to have the Subcommittee reconvene prior to or while H.R. 7 is still being debated on the floor.

Mr. COBLE. Well, I say to my colleague from New York, I don't set the schedule of the floor schedule, nor the Subcommittee schedule for hearings. So, hold me harmless for that.

Mr. NADLER. Well, I will—Mr. Chairman, I don't—I am not seeking to place blame at all. I imagine that the intent was to have H.R. 7 started today, just do the rule and do the bill tomorrow, and have the Agriculture bill, but the AG bill came up. But, that is, nonetheless, where we stand now. And it is, I think, an imposition on the duties of the Members of this Subcommittee who have to participate in the debate on H.R. 7 to try to be in two places at once. And I think it wrong and an adjustment ought to be made in the schedule of the Subcommittee now, since we cannot control the schedule of the House.

Mr. GOODLATTE. Mr. Chairman?

Mr. COBLE. Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman.

Well, first of all, the Committee ordinarily tries to avoid conflicting activities. We did not plan this hearing intending to have a conflict on the floor. We only learned of exact floor timing, for H.R. 7, yesterday. Many of our witnesses have come from out of town. We need to make every effort to complete this important hearing. And this is a very important hearing, one of the most important hearings we will hold on copyright law. And we have the State of the Union Address coming up rapidly later on. So, we have to take the time to get this done. We certainly should recess the Subcommittee during the time that the Judiciary Committee will be managing the bill on the floor.

But, our Committee rules state that the Subcommittee should plan hearings with a view toward avoiding simultaneous scheduling of full Committee and Subcommittee meetings or hearings whenever possible. We scheduled this hearing. We were not aware of a potential conflict with floor activities. Nonetheless, the rule does not prevent us from moving forward today.

And H.R. 7, the bill on the floor, while it is an important bill and we have paid close attention to it in this Committee, is not primarily the jurisdiction of the Judiciary Committee. The Subcommittee will, in my opinion, be best served by moving ahead ex-

peditiously with our witnesses and our questioning of the witnesses and then recessing at the time that our portion of the debate is in close proximity to beginning, allowing enough time for Members to get over there for when it does begin.

And I thank the Chairman and yield back.

Mr. COBLE. I thank the gentleman——

Mr. CONYERS. Mr. Chairman?

Mr. COBLE. The gentleman from Michigan?

Mr. CONYERS. May I add to this discussion? First of all, I want to commend Jerry Nadler for initiating this discussion. I think that this conflict of an important bill coming out of Judiciary, being on the floor and we being overlapped with important hearings and distinguished witnesses at the same time, that this should serve as an example for all of us that this should not happen again under any circumstances for the remainder of the 113th Congress.

Mr. COBLE. Well, I thank the gentleman.

After having said all of that, I think we need to move along because we have out-of-state witnesses here. And as I say, I don't want to keep you all here until the last dog is hanged tonight.

So, we traditionally swear in our witnesses.

[Witnesses sworn.]

Mr. COBLE. And I now am pleased to recognize our witnesses.

Our first witness today, Mr. Peter Jaszi, Professor of Law at American University of Washington's College of Law and Faculty Director of the Glushko-Samuelson Intellectual Property Clinic. Professor Jaszi teaches domestic and international copyright law as well as Law in Literature. Professor Jaszi received both his J.D. and his A.B. degrees from Harvard University.

Our second witness is Ms. June Besek. Correct pronunciation, Ms. Besek?

Ms. BESEK. Besek.

Mr. COBLE. Lecturer in law at Columbia School of Law and Executive Director of the Kernochan Center for Law, Media, and the Arts. In her position she oversees studies on national and international intellectual property issues. Professor Besek received her J.D. from New York University and her B.A. from Yale University.

Ms. Novik, our third witness is author and cofounder of the Organization of Transformative Works. Ms. Novik is best known for her fantasy and alternative history series of novels. She received her Master's in Computer Science from Columbia University and B.S. in English Literature from Brown University.

Our fourth witness, Mr. David Lowery is a singer and songwriter and lecturer at the Terry College of Business at the University of Georgia. As a guitarist, vocalist, and songwriter, Mr. Lowery founded the alternative rock band Camper Van Beethoven and cofounded the rock band Cracker. He received his B.A. in mathematics from the University of California, Santa Cruz.

Our final witness is Mr. Kurt Wimmer, General Counsel for the Newspaper Association of America, a nonprofit organization representing publishers of more than 2,000 newspapers in the United States and Canada. Mr. Wimmer received his degree—his law degree and Master's degree from Syracuse University and his Bachelor's from Missouri School of Journalism.

We welcome you all. And, in view of the time restraints, we would appreciate your confining your statements, if you can, in or about 5 minutes. There is a panel on the table that will reflect green, amber, and red. When the red light appears, the ice upon which you are skating will become thinner and thinner. [Laughter.]

You won't be keelhauled, but you—we will ask you to—and we try to comply with the 5-minute rule as well.

So, if—we will start, Professor, with you. You will be our first witness.

Mr. JASZI. Thank you, Mr. Chairman. And thanks to the Members of the Committee——

Mr. COBLE. Mike.

Mr. JASZI [continuing]. For this invitation.

Mr. COBLE. Thank you, John, for your comments.

Mr. CONYERS. No, thank you, sir.

TESTIMONY OF PETER JASZI, PROFESSOR, FACULTY DIRECTOR, GLUSHKO-SAMUELSON INTELLECTUAL PROPERTY CLINIC, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. JASZI. Thank you, Mr. Chairman. And thanks to the Members of the Committee for this invitation.

The fair use doctrine helps guarantee the continued international permanency of the United States as a site of innovation. After a rocky start, the courts now are doing an excellent job of implementing the legislative direction contained in section 107, which, itself, restated more than a century of case law. Fair use doesn't need reform, but it could use legislative support. For example, Congress could exempt noncommercial creators of derivative works from potentially onerous statutory damages, which today chill the exercise of fair use. Congress could further enable fair use by amending section 301, which deals with Federal preemption of state law to bar some or all contractual waivers of the fair use right.

In my written testimony, I tried to describe the current unified field theory of fair use that informs decisions from every part and at every level of the Federal court system today. As already noted, that unified field theory is keyed to the notion that uses that advance transformative ends, those that repurpose and add value to copyrighted material they employ, deserve special consideration.

Yesterday, a Second Circuit Court of Appeals panel provided an illustration. The Bloomberg Professional Service had posted the recording of a conference call between executives of the Swatch Group and hundreds of registered financial advisors on its site, and Swatch had complained. In finding fair use, the court noted that, "In the context of news reporting and analogous activities, the need to convey information to the public accurately may, in some instance, make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work. In such cases," the court continued, "courts find transformation by emphasizing the altered purpose or context." The court also made it clear that Bloomberg's use of the entire recording was reasonable, in light of its purpose of disseminating important financial information to American investors and analysts. The point, again, and I want to

stress this, was that Bloomberg was serving the collective public interest in access to information, without working great harm to any competing private interest.

It is not surprising to see fair use at work in the journalism sector given that the Supreme Court has stressed the intimate connection between the fair use doctrine and the First Amendment. More broadly, however, we have seen, over the past 20 years, how the fair use doctrine is experienced as an important positive right by readers and publishers, movie producers and remix artists, tech incumbents and startups, teachers, developers of educational materials, artists, scholars, librarians, providers of disability services, filmmakers, and other contributors to the kind of progress that our IP laws serve. Of course, not every person in every sector likes every fair use decision. But, we have all benefited, collectively, from this general, pro-innovation trend in our copyright law.

The pattern of decisions, of which this Bloomberg case is the most recent example, articulate no a priori limits on the range of situations to which the doctrine is potentially applicable. They don't limit it to situations involving the creation of new copyrightable works or anything of the kind. And, given the ultimate goal of copyright, which isn't to favor any particular form of expression over others, but to promote the production and dissemination of useful knowledge, there is no apparent practical, non-ideological reason why such limitations would be desirable. At the very least, those who would now seek to rein in the future development of the fair use doctrine, have a heavy burden of persuasion to demonstrate why doing so would be in the public interest.

We value fair use for its flexibility and dynamism, which allow courts to adapt the doctrine to new social, economic, and especially technological circumstances. This isn't to denigrate the value of static specific exceptions in copyright law, like sections 108 for libraries or 110 for education or 121 for the print disabled. Where these apply, they are valuable, highly valuable, to particular groups of users, because they provide high levels of certainty. They are, in effect, safe harbors even though never comprehensive and often not up to date. As Congress and the courts have recognized repeatedly, these provisions do not supplant fair use, rather they are supplemented by it.

As Mr. Coble noted, one common critique of fair use is that its commendable flexibility gives rise to unacceptable levels of uncertainty. In fact, however, recent scholarship tends to show that fair use jurisprudence is both patterned and predictable. Lawyers and their clients actually have relatively little real difficulty forecasting likely fair use outcomes in areas where there are direct or even analogous precedents. Also contributing something to the predictability of fair use is the work of professional organizations that are developing fair use best practices, documents to guide their constituents in exercising their fair use rights responsibly and constructively, a tendency to which Mr. Conyers referred earlier.

Finally though, the greatest credit for the healthy state of fair use law belongs to users large and small who invest time and thought in making sound fair use decisions, thus helping to assure the condition of cultural flourishing, which is the constitutional objective of copyright in the United States. I should add, then, that

we at American University have been very pleased and proud to be involved, to some extent, in the work of developing fair use best practices. And have, over the last decade, been able to collaborate with a wide range of different professional organizations beginning with documentary filmmakers——

Mr. COBLE. Pardon?

VOICE. Are you going to——

Mr. COBLE. Yes.

Mr. JASZI [continuing]. Moving over the decade through a number of different areas of practice to a present day when we are working with the College Art Association on developing a comprehensive code of best practices——

Mr. COBLE. Professor——

Mr. JASZI [continuing]. For future use——

Mr. COBLE [continuing]. Your time is expired.

Mr. JASZI [continuing]. For instance in visual arts.

Mr. COBLE. Your time is expired.

Mr. JASZI. Thank you.

[The prepared statement of Mr. Jaszi follows:]

Prepared Statement of Peter Jaszi, Professor, Faculty Director, Glushko-Samuelson Intellectual Property Clinic, Washington College of Law, American University

I teach copyright law at the American University law school here in DC. For last decade or so, most of my work as a scholar, an activist and (occasionally) a litigator has focused on the fair use doctrine, which provides that under certain conditions, unlicensed uses of copyrighted material should be considered non-infringing because they contribute significantly to cultural progress and innovation in the information economy—a doctrine that the recent Commerce Department copyright Green Paper referred to as "a fundamental linchpin of the U.S. copyright system."[1]

Over this period, I've come to the conclusion that fair use is definitely alive and well in U.S. copyright law, and that, after a rocky start, the courts are doing an excellent job implementing the congressional direction contained in Sec. 107. Fair use doesn't need legislative "reform," but (as I'll explain) it might benefit from certain kinds of legislative support in years to come—especially relief from the operation of other statutory provisions (such as the current law of statutory damages) that have the unintended consequence of discouraging its legitimate exercise.

At the outset, I should mention that whatever else can be said about it, my preoccupation with fair use and its benefits has an honorable pedigree. Like many copyright lawyers of my generation, I was introduced to the doctrine at a time when it did not loom as large as it does today—perhaps because copyright wasn't such a strong presence in our individual and collective cultural lives. Nonetheless, Professor Benjamin Kaplan, from whom I learned the basics of the subject in the early 1970's, was prescient about the importance of fair use—as he was about so much to do with the future of copyright and its coming engagement with new technology. Later in that decade it was Professor L. Ray Patterson who caught or attention by pointing out how much more important user-friendly copyright doctrines like fair use were likely to become in the aftermath of the Copyright Act of 1976.

It's been 40 years, more or less, since I first spoke in public about fair use doctrine. In 1983, just prior to the *Betamax* decision,[2] the doctrine (which traces its origins in our courts back to 1841) wasn't in particular good shape. After its codification in 1978, a bad decade or so of false starts in judicial interpretation had ensued.[3] In the midst of it I took the unconventional step—more out of naiveté than

[1] Department of Commerce Internet Policy Task Force, "Copyright Policy, Creativity, and Innovation in the Digital Economy" (July 2013), *available at http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf.*

[2] *Sony Corp. Of Amer. v. Universal* City Studios, Inc., 464 U.S. 417 (1984).

[3] Today I'll draw a veil across this unfortunate historical episode, which is happily and firmly behind us; I've written about it elsewhere should anyone be interested, in "Getting to Best Practices: A Personal Journey Around Fair Use," 57 J. OF THE COPYRIGHT SOC'Y OF THE U.S.A. 315 (2010).

as a matter conscious choice—and referred to fair use as a "right," I was promptly taken to task by my more experienced co-panelists.

Today, in a very different legal environment, I'd like to make four points about fair use, of which **first** is that the proposition that citizen's ability to make some socially and economically positive uses of copyrighted material without permission *is* a right, and now widely recognized as such—including acknowledgements by both the Congress[4] and the Supreme Court, which has stressed the connection between fair use and the freedom of expression secured by the First Amendment:

> Copyright contains built-in First Amendment accommodations . . . [T]he "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.[5]

In a procedural setting, fair use typically is invoked (like other rights) as a affirmative defense, but in daily life, it's experienced as a important positive right by readers and publishers, movie companies and remix artists, tech giants, start-up innovators, teachers, developers of educational materials, artists, scholars, librarians, filmmakers and a long list of other contributors to the condition of "cultural flourishing" that our copyright system exists to support.

My **second** point grows directly from this one. Today, fair use is working! For this we have two groups to thank—the federal courts and the "user community" (which means, of course, just about all of us, from time to time and situation to situation). The courts, with a big push from Judge Pierre Leval's classic law review article of 1990,[6] managed to extricate the doctrine from the morass into which it had sunk in the 80's, and set it on a new course—the critical lever here being (of course) the notion that certain cases of productive unlicensed use, should be deemed fair and noninfringing because of their transformative purposes—a determination that, once made, cascades through the other statutory factors defined in Sec. 107.

A word more may be in order here about the "new" jurisprudence of fair use and its implications. It arose, at least in part, as a result of two critical insights. The first was that, while many of the most characteristic forms of fair use in our daily cultural life (as acknowledged in the preamble to the statutory section) were private and/or non-commercial, most of the value-added uses that had been recognized as fair in decided cases were both public *and* commercial—and that would continue to come before the courts. The other insight was that, at least in potential, any use of a copyrighted work can be licensed (and that, with new technology, more or less frictionless licensing was an ever more real possibility). So if the fourth fair use factor—harm to an actual or potential market—were to continue to dominate judicial analysis, the right often would lose out, and the public would go without the benefit of the innovation that was foregone or suppressed, whether a hard-hitting new documentary or a refinement of Internet search technology.

The effect of the new jurisprudence of fair use has been to decenter the fourth fair use factor and to install in a central position the first factor inquiry into the purpose of the use, with an emphasis on whether the use can be considered a "transformative" one—that is, one that, as the Supreme Court put it in 1994, whether a use "merely 'supersede[s] the objects" of the original . . . or instead

adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message[.]"[7] We've now had more than two decades of experience with this approach, and—as University of California–Los Angeles Professor Neal Netanel has noted—the courts have arrived at a point where the standard fair use analysis, which incorporates by reference all the considerations highlighted in the statute, has effectively been reduced to a two-stage inquiry: Does the use have a transformative purpose, and is the amount of copyright material used appropriate to that purpose?[8] This development makes the doctrine more widely available and (as I'll discuss below) easier to predict.

Recently, judicial decisions also reminded us that there may be more to the interpretation of the public-facing fair use doctrine than the four enumerated statutory factors, which by the terms of the stature clearly were not intended to exhaust the range of considerations that a court could take into account in making its deter-

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[4] 17 U.S.C. § 108(f)[4] ("Nothing in this section . . . in any way affects the right of fair use. . . .")

[5] *Eldred v. Ashcroft,* 537 U.S. 186, 219 (U.S. 2003)

[6] "Toward a Fair Use Standard," 103 HARV. L. REV. 1105.

[7] *Campbell v. Acuff-Rose Music,* 510 U.S. 569, 579 (1994), quoting *Folsom v. Marsh,* 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (this being the decision by Justice Story that launched fair use in the courts).

[8] "Making Sense of Fair Use," 15 LEWIS & CLARK L. REV. 715 (2011).

mination. Thus, for example, in his recent decision in the *Google Books* case, Judge Denny Chin make clear reference to the "public interest" that would be served by allowing this digitization project to go forward under the rubric of fair use—as an independent consideration supporting the conclusion of his transformativeness-based analysis of the four factors.[9]

But no amount of forward looking judicial interpretation of the doctrine would have been enough had the constituent parts of what we describe with the ungainly designation of the "user community" not been willing to step up and make their own contribution to develop fair use by employing it and—where necessary—defending its exercise. Many groups deserve credit here: on the one hand, of course, libraries and tech startups, but also their occasional sparring partners commercial publishers and entertainment companies. All have made investments in "growing" the fair use doctrine, and those investments have paid off. [10]

Fair use, one might say, is like a muscle—it will grow in strength if it is exercised, and atrophy if it is not. But, by the same token, fair use is hardly unusual or exotic today. Everyone who makes culture or participates in the innovation economy relies on fair use routinely—whether they recognize it or not. Participants in the U.S. entertainment and information industries have well-established standards and norms relating to fair use; some, like book publishers, have long been accustomed to relying on the doctrine explicitly, both in and out of court, while others, like journalism, would not necessarily recognize their time-honored practices of unlicensed quotation from source material as falling under that legal designation. Something similar can be observed in the arts: for example, while there is a lively argument about the outer limits on "appropriation art" practices that should be sanctioned under fair use,[11] most working artists will acknowledge that they rely extensively on their ability to quote the work of others in less flamboyant ways. What's notable about the current situation is that more and more business and practice communities are actively acknowledging the ways in which their contributions to our collective cultural and economic life depend on the ability to exercise the right of fair use in appropriate circumstances.[12]

Which brings me to my **third** point. As recently as a decade ago, critics of fair use on the left and the right were calling attention to what they described as its "vagueness" and unpredictability. Today, even those critics have come to recognize the desirable flexibility of an open-ended fair use doctrine, but this grudging acknowledgement has linked to continuing expressions of doubt about the doctrine's uncertainty of application. The current state of the law is proving those critics wrong. Although, like any other legal doctrine, the application of fair use may sometimes be uncertain in true cases of first impression, lawyers (and their clients) have little real difficulty forecasting likely outcomes in areas where there are direct or analogous precedents.

Scholars have demonstrated that fair use law is in fact more patterned, more predicable, and hence more reliable than the critics have claimed. Recently, New York University Professor Barton Beebe and Loyola University of Chicago Professor Matthew Sag, have employed rigorous empirical methodologies to arrive at this conclusion [13] Two other comprehensive studies of the fair use doctrine in the United States, which emphasize its internal consistency and predictability, also deserve special mention—one by University of Pittsburgh Professor Michael Madison and another by University Of California, Berkeley, Professor Pamela Samuelson.[14] Samuelson, one of the most respected figures in United States Copyright law, surveyed the entire landscape of fair use case law and grouped the decisions into 'policy relevant clusters'. She concluded that "once one recognizes that fair use cases tend to

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[9] *Authors Guild, Inc. v. Google Inc.,* 2013 U.S. Dist. LEXIS 162198 (S.D.N.Y. 2013), at *10–14 & 27–29 ("In my view, Google Books provides significant public benefits").

[10] Thus, for example, what is arguably the most significant single fair use decision after *Campbell, Bill Graham Archives v. Dorling Kindersley Ltd.,* 448 F.3d 605 (2d Cir. N.Y. 2006), was the direct outcome of arguments present by a commercial publisher.

[11] As evidenced by responses to the decision in *Cariou v. Prince,* 714 F.3d 694 (2d Cir. N.Y. 2013).

[12] A eloquent example—Georgetown Law School Professor Rebecca Tushnet's 2013 submission to the Commerce Department copyright task force—is to be found at www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf.

[13] Beebe, Barton Beebe, *An Empirical Study of United States Copyright Fair Use Opinions,* 1978- 2005, 156 U. PA. L. REV. 549, 574–5 (2008); Matthew Sag, *Predicting Fair Use,* 73 OHIO ST. L.J. 47 (2012).

[14] Michael J. Madison, *A Pattern-Oriented Approach to Fair Use,* 45 WM. & MARY L. REV. 1525 (2004); Pamela Samuelson, *Unbundling Fair Uses,* 77 FORDHAM L. REV. 2537 (2009).

fall into common patterns", the "fair use is both more coherent and more predictable than many commentators have perceived".[15]

Also contributing to the predictability of fair use are groups like the team I've helped to organize at American University, in collaboration with Prof. Patricia Aufderheide, have been helping groups of practitioners to develop fair use Best Practices documents to guide their constituents in exercising their fair use rights responsibly and constructively.[16] And –most important of all—users, large and small, have been investing time in making sound fair use decisions, and resources in carrying them through to successful conclusion.

Here I'd also stress a **fourth** point: Although there may be aspects of the copyright law that could benefit from modest updating to make them more appropriate to the new conditions of digital information exchange, fair use is not one of them. In fact, the last decade has seen a proliferation of decisions applying this flexible, purpose-based doctrine to uses in the digital domain, from the development of interoperable software products and Internet search technology, to the practice of remix culture, though mass digitization in the promotion of access to knowledge. Until recently, some had argued that the federal courts were developing two competing (or at least potentially inconsistent) cultures of transformative fair use—one in the Ninth Circuit, where most cases specifically involving new digital technologies had been litigated, and another in the Second, the long-time home of fair use decision-making involving more traditional forms of culture-making. But (putting aside the unlikely chance of significant revision on appeal), the recent decisions of Judge Harold Baer in *Authors Guild v. HathiTrust* and Judge Denny Chin in *Authors Guild v. Google Books,* both from the Southern District of New York,[17] demonstrate otherwise by relying significantly on relevant Ninth Circuit precedents with no direct counterparts in the Second. In effect, in only a few short decades, the courts have developed a robust "unified field theory" of fair use which is fully capable of meeting the digital challenge and should be allowed to do so, just as fair use doctrine has been allowed, over more that 170 years, to adapt to other changes in circumstance.

I'd add here that the adaptation of fair use to the networked information environment has been significantly enhanced by the work of Congress and the agencies. Many of us were concerned in 1998 that the new anti-circumvention provisions of the DMCA might spell the effective end of fair use in the Internet environment, but these concerns were met, in part, by Congress' foresight in incorporating the Sec. (a)(1) triennial rulemaking into the DMCA, and the fair and conscientious manner in which the U.S. Copyright Office, the NTIA, and—ultimately—the Librarian of Congress have exercised the authority delegated under this provisions. No rulemaking can ever satisfy everyone, and those of us who have unsuccessfully proposed exceptions in this process would, of course, prefer that they had been granted, and hope that they will be in the future. That said, the procedure as it stands is unnecessarily cumbersome. and imposes considerable costs on the often poorly funded NGO's who bear the primary burden of proposing and justifying exceptions. One modest reform would be to create a procedure through which exceptions that have been renewed, in substantially the same form, over a series of triennia, could be incorporated into the statutory text itself.

I'll conclude, if I may, with a pair of suggestions, a trio of recommendations, and a question for this subcommittee.

The first suggestion is simply this: Don't mess with fair use. After a rough start post-1978, the doctrine has now been recognized for the essential feature of copyright doctrine that it is, and tweaks or improvements (whether intended to broaden or narrow the doctrine) could have serious and adverse unintended consequences—discouraging exactly the kind of new creativity that copyright is supposed to promote. The doctrine works in practice, as already described, and it is also theoretically sound.

One theoretical critique is that the new transformativeness-based jurisprudence of fair use is somehow in conflict with the reservation to the copyright owner, in Sec. 106, of an exclusive right to prepare "derivative" works (a category defined in the Act to include works in which preexisting materials are "transformed" through re-use). This argument misses the mark in two different ways. Most important, it fails to recognize that *all* the Sec. 106 exclusive rights are made specifically subject to exception in Sec. 107, which provides for fair use. In addition, it overlooks the fact that the word "transform" means different things in different contexts: Thus,

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[15] *Id.* at 2541.

[16] Patricia Aufderheide and Peter Jaszi, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011)

[17] *Authors Guild v. HathiTrust* and *Authors Guild, Inc. v. Google Inc.,* 2013 U.S. Dist. LEXIS 162198 (S.D.N.Y. 2013).

any slight adjustment to an existing work renders it a "derivative" one within the meaning of Sec. 101, but according the courts a "transformative purpose" that can qualify a use as fair demands far, far more in the nature of value added.

Finally, let me suggest—in the strongest terms—that you approach with extreme caution any proposal to facilitate short-form, non-precedential determinations of fair use disputes—whether by administrative or judicial means. Fair use decisions belong in the Article III courts, and the continued development of the doctrine, over time, has been the result of the accrual of precedents from the federal judiciary. Tampering with this proven scheme could only work mischief with the functioning of this important doctrine.

My recommendations are these:

- **One.** Although "transformative" fair use is thriving in the courts, the same cannot be said of another branch of the same doctrine—that is, private use. Once we took for granted that members of society who had legitimate access to information products could do a wide range of things with their content, including uses for study, research and personal entertainment. Increasingly, however, this understanding is threatened in the digital environment, by contractual provisions (often included as "boilerplate" in terms of service offered to consumers on a take-it-or-leave-it basis). Congress should consider taking action, perhaps in the form of amendments to Sec. 301 of the Copyright Act, that would insure that fair use survives such attempts at contractual override.
- **Two**. I mentioned earlier that, all in all, Sec. 1201(a)(1) of the Copyright Act has produced an imperfect compromise between the concerns of content owners who employ technological protection measures to secure their content, on the one hand, and legitimate users, on the other; not even that much can be said of the so-called notice-and-takedown provisions of Sec. 512, also introduced under the DMCA. As the provision now stands, ISP's have every incentive to remove from their services and platforms whatever on-line content that has been designated, on no matter how superficial a basis, as potentially infringing. By contrast, the provisions of Sec. 512(g), which describe a procedure by which such content can be replaced on line at the demand of the individual or company who originally posted it, are cumbersome and largely unworkable. Clearly, Congress should consider the fact, documented in several studies,[18] that the public at large is losing access to legitimate fair use expressions by virtue of Sec. 512—a cultural problem that deserves congressional consideration, and probably requires a legislative solution.
- **Three**. By raising the apparent stakes for would-be fair users, the current law of statutory damages has the effect of significantly discouraging reliance on the doctrine by just those individuals whose cultural contributions it is designed to foster. Creative artists, independent scholars, filmmakers and others sometimes forego fair use because they do not understand or feel they cannot predict the application of the "innocent infringement" provisions of Sec. 504(c)(2) to their situations. I'd suggest that a more straightforward, "fair use-friendly" approach would be to bar statutory damages in all actions for non-willful infringement brought against non-commercial users—and to make clear that a good-faith belief in the fairness of a particular use negates willfulness.

The question I'll leave you with requires a preamble. As already noted, we know that in the United States the fair use doctrine adds materially to our cultural choices, our learning opportunities, and our access to innovation. We can only wonder (with some bemusement) why some of our most important foreign competitors, like the European Union, haven't figured out that fair use is, to a great extent, the "secret sauce" of U.S. cultural competitiveness.[19] But that's their loss and our gain. The position may be different where some of our other trading partners are concerned. In trade-based agreements that are designed, in part, to "harmonize" national copyright laws between the U.S. and less developed countries, limitations on copyright protection (and especially fair use) typically go unaddressed. These agreements often leave lingering and often crippling doubts in these countries about

[18] *See* Dena Chen, Musetta Durkee, Jared Friend, and Jennifer Urban, "Updating 17 U.S.C. § 512's Notice and Takedown Procedure for Innovators" (Public Knowledge, 2011), *available at* http://www.publicknowledge.org/files/docs/cranoticetakedown.pdf.

[19] For a sense of the value that fair use (and allied doctrines) contribute to the U.S. economy, *see* Thomas Rogers and Andrew Szamosszegi, ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE, (Computer & Communications Industry Ass'n 2001).

whether (from the U.S. perspective) they are free to follow our example and adopt a flexible, dynamic approach to transformative uses in their national legislation. The presence of such doubts may, I suppose, work to the short-term competitive advantage of the U.S. But given the dependence of our national economy on the success of the world economy, I would ask whether this one-sided approach is really in our national interest—and (beyond that) whether it is ethically defensible?

Mr. COBLE. I failed to tell you folks, when the illuminated red goes to illuminated yellow that is your 4-minute warning.

But, Miss—Professor Besek, you are next.

Ms. BESEK. Thank you, Mr. Chairman—is that on?

Mr. COBLE. Mike.

Ms. BESEK. This one?

TESTIMONY OF JUNE M. BESEK, EXECUTIVE DIRECTOR, KERNOCHAN CENTER FOR LAW, MEDIA AND THE ARTS AND LECTURER-IN-LAW, COLUMBIA SCHOOL OF LAW

Ms. BESEK. Thank you, Mr. Chairman and Members of the Committee, for giving me the opportunity to be here today.

In early 2008, Columbia Law School sponsored a daylong symposium titled Fair Use: Incredibly Shrinking or Extraordinarily Expanding. What was apparent 6 years ago is even more obvious now. Fair use is extraordinarily expanding.

Until recently, the courts held that generally it is not a fair use if you copy an entire work. From the point where copying an entire work generally defeats fair use, now copying the full contents of millions of works can qualify as fair use. So, why might this expansion spark concern? Fair use is an essential part of U.S. copyright law, but it isn't meant to be a carte blanche to make unlimited use of others' works, even for a socially beneficial cause. The rights of creators and the interests of users have to be balanced.

How did the law move so far so quickly? Well, the principal reason for this expansion has been the increasing significance of transformative use in evaluating fair use. This happened since the Supreme Court's decision in *Campbell* against Acuff-Rose. You may know that opinion; it had to do with a parody by 2 Live Crew of the song "Pretty Woman." Now, the Sixth Circuit had said 2 Live Crew did not make a fair use; it had relied on an earlier case which said that commercial use is presumptively unfair. The Sixth Circuit resolved factors one and four, which are often considered to be the most important, on the basis of this commercial use. Its decision wasn't atypical. A lot of courts had been doing that, depending on the commercial use and making commercial use virtually dispositive of fair use. In reversing, the Supreme Court said commercial uses can be fair, and that is one aspect of factor one. But, another important one is transformative use, and that is using a work in a way that adds something new, altering the other work with new expression, meaning, or message.

Like *Campbell* itself, earlier fair use cases involved productive uses. And they were premised on use of the work itself, for example to annotate, to analyze, to create a parody. But, post-*Campbell* cases began to interpret "transformative" in two significantly expansive ways.

First, to encompass not only changes to the substance of a work, but changes to how the work is used. They referred to this repurposing as "functional transformation." But, the second aspect, and more concerning, is that courts began to apply the transformative and functional transformation labels not only to new works that incorporate unaltered copies of earlier works, but also to new uses that exploit the prior work without creating a new work. So, transformative has been uprooted from its original context of new works to become applied to a much broader context of new purposes, enabling new business models rather than new works of authorship.

One troubling consequence is that if a court finds the defendant's use of an author's work is transformative, because it reaches new markets or a new audience, that finding can usurp the author's derivative work rights, particularly with respect to potential markets for the work. Because once a court has found that a transformative purpose exists with respect to a new use it tends, increasingly, to find that the new use exploits a transformative market that doesn't compete with the author's markets. Basically, authors' rights can hinge on a race to the market for new and sometimes unanticipated uses.

Now, over the years, fair use case law has sometimes strayed too far in one direction or the other. I mentioned earlier that courts had been using commercial use as, dispositive of factors one and four, because of the statement of Sony that commercial use is presumptively unfair. And, in *Campbell*, the court stepped in to try to restore that balance. But, now the pendulum has swung the other way. A finding that a use is transformative tends to sweep everything before it, reducing the statutory multifactor assessment to a single inquiry. It is important that the fair use pendulum once again be moved back toward the center.

Despite the concerns I just voiced, fair use remains a rule whose application is best made by judges, as the Congress recognized when it first put fair use into the statute, back in the 1976 Act. But, as we have seen, the pendulum can swing in both directions. There are times when a legislative intervention may be appropriate, when that application proves too rigid or too expansive.

I think the current judicial expansion of fair use may reflect concern to preserve the benefits of mass digitization, notwithstanding the tension between mass digitizing and the Copyright Act itself. I think, without altering the text of section 107, Congress might separately address the problems of mass digitization, which is skewing the law. If Congress turned its attention to those issues, it might relieve the pressure that risks turning the fair use doctrine into a free pass for new business models, and restore fair use to its most appropriate role of fostering new authorship.

Thank you.

[The prepared statement of Ms. Besek follows:]

Prepared Statement of June M. Besek, Executive Director, Kernochan Center for Law, Media and the Arts and Lecturer-in-Law, Columbia Law School

Thank you, Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, and members of the Committee. Good afternoon, ladies and gentlemen. My name is June Besek. I am the Executive Director of the Kernochan Center for Law, Media and

the Arts at Columbia Law School and a Lecturer-in-Law at Columbia, where I teach seminars on advanced copyright and legal issues concerning individual creators—authors, artists and performers. I have practiced in the field of copyright since 1985, roughly half of that time in private practice and the other half in academia.

I'm here today to discuss fair use, and to emphasize its rapid expansion.

THE IMPORTANCE OF FAIR USE

Fair use is an exception to the exclusive rights the Copyright Act vests in authors. It excuses exploitations of a work that would otherwise be infringing. Fair use is an essential part of U.S. copyright law. It promotes cultural exchange and the creation of new works by facilitating activities such as education and scholarship, news, criticism and parody. Fair use is a critical means by which the copyright law fosters creative expression.

The fair use doctrine is contained in section 107 of the Copyright Act:

> **Limitations on exclusive rights: Fair use**
>
> 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.

In broad brush, the fair use factors look to the purpose for which the copyrighted work was used; the type of work it is; how much was taken; and how the new use could affect the actual or potential market for the copyrighted work.

FAIR USE: EXTRAORDINARILY EXPANDING

In early 2008 Columbia Law School sponsored a day-long symposium titled *Fair Use: "Incredibly Shrinking" or Extraordinarily Expanding?* What was apparent six years ago is even more obvious now: Fair use is extraordinarily expanding.

Until recently, the courts held that "[t]hough not an absolute rule, 'generally, it may not constitute a fair use if the entire work is reproduced.'"[1] From the point where copying *an* entire work generally defeats fair use, now copying the full contents of *millions* of works can qualify as fair use, regardless of whether it's done for commercial or noncommercial purposes.[2]

If fair use provides the important benefits described earlier, why might this expansion spark concern? Fair use is not a carte blanche to make unlimited use of others' work, even for a socially beneficial cause. The rights of creators and the interests of users must be balanced. As the Supreme Court stated in *Harper & Row v. Nation Enterprises,* reversing the Second Circuit's holding that *Nation* magazine was protected by fair use when it used pre-publication excerpts of President Ford's memoirs without authorization:

> [C]opyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred

[1] Infinity Broadcasting Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998), quoting Nimmer on Copyright § 13.05[A][3] at 13–178 (1997).

[2] *See* Authors Guild, Inc. v. Hathitrust, 902 F.Supp. 2d 445, 457 (S.D.N.Y. 2012), *appeal pending* (2d Cir.); Author's Guild, Inc. v. Google, Inc., 2013 U.S. Dist. Lexis 162198, 2013 WL 6017130, *appeal pending* (2d Cir.).

> by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.[3]

The Court went on to warn that

> It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike. . . . [A]s one commentator has noted: "If every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading."[4]

THE RISE OF TRANSFORMATIVE USE

How did the law move so far so quickly? The principal reason for this expansion has been the increasing significance of "transformative use" in evaluating a fair use defense. The term "transformative use" is nowhere found in the fair use statute. It is not an entirely new concept, however: "productive use"—in the sense of producing new and independent creative works—has long been part of the fair use determination. In *Campbell v. Acuff-Rose,*[5] the Supreme Court embraced "transformative use" as a highly influential (though not determinative) factor in assessing fair use.

Campbell v. Acuff-Rose involved a parody by 2 Live Crew of Roy Orbison's song, "Pretty Woman." Campbell asserted a fair use defense. [6] The district court found in Campbell's favor, but the Sixth Circuit Court of Appeals reversed and held that fair use did not apply. Relying on the Supreme Court's statement in *Sony v. Universal City Studios* that "commercial use is presumptively an unfair exploitation" of the copyright owner's rights,[7] the Sixth Circuit resolved the first factor—the purpose and character of the use—in plaintiff's favor, because 2 Live Crew's parody was commercial. [8] On the fourth factor, often said to be the most important, the court stated that because 2 Live Crew's parody was entirely commercial, it "presume[d] that a likelihood of future harm to Acuff-Rose exists."[9] The Sixth Circuit's decision was typical of many post-*Sony* courts, which had made commercial use virtually dispositive of factors one and four. As a result, it had become very difficult to make a commercial fair use, so the Supreme Court intervened.

The Supreme Court reversed the Sixth Circuit's decision. It criticized the appellate court for letting the commercial nature of the use so heavily influence its fair use determination. The Court explained that commercial use is not dispositive of fair use, and commercial uses can be fair. But commerciality is only one aspect of factor one; whether a use is "transformative" is a very important consideration.[10] To determine whether a use is transformative, one looks at whether "the allegedly infringing work "merely supersede[s]" the original work "or instead add[s] something new, with a further purpose or a different character, altering the first with new expression, meaning or message."[11] As Judge Pierre Leval explained in an article on which *Campbell* relied, "[i]f . . . the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine tends to protect for the enrichment of society."[12]

The Supreme Court also emphasized that all four fair use factors must be analyzed independently—there are no shortcuts. Still, it observed that "the more transformative the *new work,* the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[13] As this quotation illus-

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[3] Harper & Row, Publrs. v. Nation Enters., 471 U.S.539, 545–46 (1985) (citation omitted).

[4] *Id.* at 555 (citation omitted).

[5] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

[6] Campbell was 2 Live Crew's lead vocalist and the first named defendant.

[7] Sony Corp. of America v Universal City Studios, 464 U.S. 417, 451 (1984).

[8] Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1436–37 (6th Cir. 1992) *rev'd,* 510 U.S. 569 (1994)
(*citing* Rogers v. Koons, 960 F.2d 301, 312 (2d Cir. 1992)).

[9] *Id.* at 1438–39.

[10] Transformative use is not essential to fair use; as the *Campbell* court observed, making complete copies, such as multiple copies for classroom use, can be fair use. 510 U.S. 569, 579 n. 11 and § 107.

[11] *Campbell,* 510 US at 579 (citing Leval, Towards a Fair Use Standard, 103 HARVARD L. REV. 1105, 1111 (1990)).

[12] Leval, *supra* note 11 at 1111.

[13] *Campbell,* 510 U.S. at 579 (emphasis supplied).

trates, it bears emphasis that the Supreme Court embraced the inquiry into "transformative use" in the context of a second author's creation of a "new work."

"FUNCTIONAL TRANSFORMATION" AND MAKING COMPLETE COPIES

Prior to *Campbell,* fair use cases involving transformative (or productive) use were premised on changes made to the subject work itself: annotating a work, analyzing or critiquing it, creating a parody, and so on. *Campbell* itself involved a parody of "Pretty Woman," achieved through changes to both lyrics and music. Moreover, even where a second author transforms the copied material, the amount of the copying remains an important consideration. In *Campbell,* the Supreme Court, although it stressed the "transformativeness" of the 2 Live Crew parody, ultimately remanded to the Sixth Circuit to determine whether the resulting work copied too much—that is, more than was needed to achieve its parodistic purpose.

As explained above, the Supreme Court defined transformative use as use of a copyrighted work for "a further purpose or different character, altering the first with new expression, meaning or message."[14] Post-*Campbell* cases began to interpret "transformative" in two significantly expansive ways. First, to encompass not only changes to the substance of a work, but also changes to how the work is used, referring to this repurposing in a new work as "functional transformation." Second, and more radically, courts began to apply the "transformative" and "functional transformation" labels not only to new works incorporating unaltered copies of preexisting works, but also to new uses that exploited the prior work without creating a new work. "Transformative" thus became uprooted from its original context of "new *works"* to become applied to a much broader context of "new *purposes."*

This expansive view of what it means to be transformative has opened the door to claims that making complete copies of multiple works, even for commercial purposes, and even without creating a new work, can be a fair use. This is a substantial departure from the long-prevailing view that copying an entire work is generally not a fair use.[15] It also implies an important constriction of the author's rights respecting "*potential* market[s]" for her work, because, once a court has found a "transformative purpose" to a new exploitation, it tends increasingly to find that the new use exploits a "transformative market" that does not compete with the author's markets. In other words, contrary both to statutory text and to the Supreme Court's cautious reminder in *Campbell,* a finding that a use is "transformative" now tends to sweep all before it, reducing the statutory multifactor assessment to a single inquiry.

How did we get here? For example, in *Bill Graham Archives v. Dorling Kindersley Ltd.,* the court found defendant's use of complete copies of Grateful Dead concert posters to be a fair use because the copies were used, in reduced size, as part of a historical timeline in a group biography of the Grateful Dead, rather than for their original purpose. The court stated that "[a] transformative use may be one that actually changes the original work. However, a transformative use can also be one that serves an entirely different purpose."[16] The Grateful Dead poster case, however, still concerned a new and independent work (indeed, of a kind that has traditionally come within the ambit of fair use): a biography.

The more radical shift came in *Perfect 10 v. Amazon.com.*[17] There, the Ninth Circuit Court of Appeals concluded that making complete copies of Perfect 10's copyrighted photos, and providing "thumbnail" reproductions to consumers in response to image search requests was a fair use. According to the court, "even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work."[18] The court viewed defendants' use as "highly transformative" because their search engine served an "indexing" purpose which improved access to information on the Internet, entirely different from the photo-

[14] *Id.*

[15] The Supreme Court's decision in *Sony v. Universal City Studios*—the "Betamax case"—was a notable exception. There the Court concluded that in-home copying of free broadcast programming for timeshifting purposes was a fair use, because it was noncommercial and merely allowed consumers to watch at a different time programs they were invited to view without charge. *Sony v. Universal City Studios,* 464 U.S. 417. *Sony* also dubbed any commercial use "presumptively unfair"—a position from which the Supreme Court later retreated.

[16] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006).

[17] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

[18] *Id.* at 1165 (citation omitted).

graphs' aesthetic purpose, and because of the considerable public benefit the search engine conferred.[19]

Two recent "functional transformation" cases involve mass digitization of books from research libraries. *Authors Guild v. Google*[20] was a challenge to the mass digitization project initiated by Google, which contracted with research libraries to digitize their entire collections of published books. Google would provide each library with a full text digital version of the books in their collection. It would also retain copies of the full text database to enable it to allow customers to search Google's database to identify books of interest. A user's search would not retrieve a full-text version of a book unless it were in the public domain, but it would provide "snippets" of books in response to search requests, and information as to how one might get access to particular books. Google also uses its full text database to improve its translation capabilities and enhance its search capabilities, from which it derives revenue. Unlike the libraries, who purchased the books, Google did not pay the authors or publishers for its creation of full-text permanent retention copies.

The Authors Guild and publishers filed suit for copyright infringement against Google. Some time after the suit commenced, the parties entered into a class action settlement agreement, which the court declined to approve. The publishers subsequently entered into a separate settlement agreement with Google and dropped out of the suit.

In November 2013, the district court entered judgment in favor of Google on its fair use defense. The court found Google's use was "highly transformative" because Google had converted the books' text into digital form and created a valuable word index. It had also transformed the text into data that enabled new forms of research, like data-mining. Google's profit motive was accorded little weight in the decision, especially in light of the important educational purposes served by its project. The court found that Google's activities had little likely effect on the authors' actual or potential markets for their works. The court did not consider the market impact that could ensue were other for-profit enterprises to follow Google's lead in mass digitizing library collections. The Authors Guild has appealed the case.

Authors Guild v. Hathitrust[21] was the second case addressing massive databases of digitized books. Hathitrust is a nonprofit entity housed at the University of Michigan. It manages a large shared digital repository of millions of books that were scanned for Hathitrust's constituent libraries as part of Google's Library project. The repository is used for searches by library patrons (those search results yield information but no excerpts of text), preservation, and to provide full text of books in the libraries to persons who are visually impaired. In a suit brought by the Authors Guild against Hathitrust, the court concluded that Hathitrust's use was a fair use. It considered the use transformative since Hathitrust and the libraries were using the works for a different purpose than the originals—providing a searchable index that enabled locating books, data mining, and providing access for the print-disabled. The court found factor two "not dispositive" and concluded that the amount copied was reasonable in relation to the transformative purpose. The court decided that there was likely to be little impact on the market for plaintiffs' works since the plaintiffs were unlikely to set up a licensing system for this type of use. An appeal to the Second Circuit is pending.

POTENTIAL CONSEQUENCES OF "FUNCTIONAL TRANSFORMATION"

The ascendency of transformative use, and in particular, "functional transformation," gives rise to concern that the fair use pendulum has now swung too far away from its roots and purpose, now enabling new business models rather than new works of authorship, and potentially placing the U.S. in violation of international restrictions on the scope of copyright exceptions and limitations. Lower courts applying "transformative use" analysis appear at times to be ignoring the Supreme Court's warning to consider the impact on copyrighted works were the challenged use to become widespread. Similarly, their analyses of "transformative mar-

[19] *Id.* at 1165–66. Some of the distinctions that courts use to support "functional transformation" are simply untenable. For example, in *American Inst. of Physics v. Schwegman Lundberg & Woessner, P.A.,* 2013 U.S. Dist. Lexis 124578 (D. Minn. July 30, 2013), the court found defendant law firm's internal use of scientific articles (reading them to determine whether they represent "prior art" required to be supplied to the USPTO with a patent application) was intrinsically different from the plaintiff's purpose in publishing them (informing interested readers about developments in various scientific disciplines). In both cases the articles were read for information about scientific developments; there is no transformative purpose here.

[20] Author's Guild, Inc. v. Google, Inc., 2013 U.S. Dist. Lexis 162198, 2013 WL 6017130, *appeal pending* (2d Cir.).

[21] Authors Guild, Inc. v. Hathitrust, 902 F.Supp. 2d 445, 457 (S.D.N.Y. 2012), *appeal pending* (2d Cir). *Hathitrust* was filed after *Authors Guild v. Google,* but it was decided first.

kets" that fall outside the author's exclusive rights risk inappropriately cabining the scope of the derivative works right. The sheer volume of the taking in some of these functional transformation cases has at times resulted in courts' failure to consider distinctions among subject works that should be analyzed, if not individually, then by categories of works with certain characteristics. A capacious concept of "transformative use" also seems to be swallowing up the more specific exceptions Congress has crafted for particular uses, overriding their limitations and thus disregarding the balance Congress set for those exceptions.

1. Some Courts Fail to Give Due Consideration to the Effect of Defendant's Use on the Copyright Owner's Potential Market.

Some courts are giving short shrift to two important considerations under factor four: First, the effect on the market if the use should become widespread, and second, the appropriate scope of authors' potential markets.

The analysis of factor four requires a court to consider

> not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the original.[22]

Similarly, the Court in *Sony* stated that a plaintiff must show that defendant's use is harmful or that "if it should become widespread, it would adversely affect the potential market for the copyrighted work." The Court explained in more detail:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of harm exists.[23]

Lower courts have in the past heeded this counsel. For example, in *A&M Records v. Napster,*[24] the Ninth Circuit found that Napster's activities in promoting and enabling consumers to engage in file-sharing of copyright-protected music CDs harmed the record companies' future markets. Although the record companies had not yet entered the market for digital downloads, they had "expended considerable funds and effort" to commence licensing digital downloads. The court found that the presence of unauthorized copies of plaintiffs' recordings on Napster's file-sharing network "necessarily harms" the record companies' potential market.[25]

In some of the more recent "transformative use" cases, however, the courts have taken an unduly narrow view of the "transformative" use's effect on potential markets. For example, in *Perfect 10,* the Ninth Circuit was unwilling to find market effect attributable to defendant's transformative use because Perfect 10 could not demonstrate *current* sales of thumbnails, even though Perfect 10 had just begun a program to offer thumbnail photos (specifically, cellphone downloads) in the market. In contrast to its decision six years earlier in *Napster,* the Ninth Circuit did not find plans to enter a market sufficient; it would recognize a market for thumbnails only if Perfect 10 could prove actual sales.

In *Authors Guild v. Google,* the court never considered the consequences "if the use should become widespread." Perhaps the court implicitly assumed that no one but a Google could (or might want to) create such a comprehensive and expensive database. But it could well be that smaller, more narrowly tailored databases (e.g., financial economics or travel guides) would be of value to specific entities or individuals for a variety of purposes). The cost of book-scanning is far less now than it was when Google began its digitization project, so the prospect of a "democratization" of mass digitization is hardly far-fetched, and may already be well in prospect. Or, another internet service provider may seek a database to enhance its searches and bring in more advertising revenue, just as Google has done. The court simply never addressed the possible adverse effects on plaintiffs of a multiplicity of such databases.

2. Confusion Between a Transformative Work and a Derivative Work.

Cases since *Campbell* have contributed to tension between the market for derivative works and exploitation of transformative works.

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[22] *Campbell,* 510 U.S. at 590 (quoting Nimmer on Copyright, § 13.05 [A][4], at 13–102.61).

[23] *Sony,* 464 U.S. 417, 451. The Supreme Court placed the burden of this showing on plaintiffs when the challenged use is noncommercial: since fair use is an affirmative defense, the burden respecting harm remains with defendants whose use is commercial.

[24] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[25] *Id.* at 1017.

Under the Copyright Act:

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".

A transformative work is one that adds "something new, with a different purpose or a different character, altering the first with new expression, meaning or message." [26]

This overlap in terms and concepts has led to confusion. When is a work "transformed" in such a way that it becomes a protectable (or infringing) derivative work? On the other hand, when is it transformed in such a way that the transformation significantly bolsters a fair use claim? This decision has important implications for authors' potential markets. If a court finds that defendants' use of an author's work is "transformative" because it reaches new markets or makes the work available to a new audience, that finding could risk usurping the author's derivative work rights. Ultimately, those rights could hinge on a "race to the market" for new and sometimes unanticipated uses. If the party allegedly making transformative use gets there first, that market may belong to him and be foreclosed to the author or copyright owner. Moreover, in some cases the copyright owner, who may have obligations to its licensors or others, may be unable to move as quickly as the putative "fair" user.

3. Fair Use is Swallowing Other Copyright Exceptions.

In some cases, expansive readings of fair use have virtually swallowed other exceptions to copyright. For example, the *Hathitrust* case's interpretation of fair use effectively reads section 108 (c) of the Copyright Act and portions of section 121 out of the statute.

Section 108(c) permits qualified libraries and archives under certain circumstances to make copies of published works in their collections. It provides:

> (c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if———
>
> (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and
>
> (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

The courts in both *Authors Guild v. Hathitrust* and *Authors Guild v. Google* apparently accepted that libraries are free to copy in digital form (or have copied for them) all published works in their collections, without qualification. The *Hathitrust* court finds no inconsistency between this comprehensive copying and section 108(c) quoted above, because section 108(f) provides that nothing in section 108 "in any way affects the right of fair use as provided by section 107. . . ." [27] But section 108(f) does not justify the court's conclusion. Under fundamental principles of statutory interpretation, statutes are to be interpreted in a manner that gives sense to the whole.[28] A statutory provision should not be interpreted in a manner that renders another provision superfluous or redundant.[29] Interpreting fair use to permit

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[26] *Campbell,* 510 U.S. at 579.

[27] § 108 (f)(4). The idea that fair use could make substantial portions of section 108 irrelevant was clearly not anticipated by Congress when the 1976 Act was passed. According to the House Report accompanying the 1976 Act, "[n]o provision of section 108 is intended to take away any rights existing under the fair use doctrine. To the contrary, section 108 authorizes certain photocopying practices which may not qualify as a fair use." H.R. Rep. No. 96–1476, 94th Cong. 2d sess. at 74 (1976).

[28] 2 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 46:5 (7th ed. 2013).

[29] Bilski v. Kappos, 130 Sup. Ct. 3218, 3228–29 (2010) (citation omitted); Kungys v. United States, 485 U.S. 759, 778 (1988).

a library to copy every published work in its collections leaves section 108(c) with no remaining significance.

Similarly, the *Hathitrust* rationale effectively swallows section 121 as well. That section provides an exception from copyright for the blind and visually impaired. Section 121(a) states:

> (a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

As it did in setting a balance in section 108, Congress carefully crafted section 121 to provide a balance between the interests of the visually impaired and those of authors. In *Hathitrust*, however, the court concluded that although defendants in its view "fit squarely within" section 121, they "may certainly rely on fair use . . . to justify copies made outside of these categories or in the event they are not authorized entities." [30]

The court's conclusion reads the essential conditions in section 121 out of the law.

4. Evaluating Fair Use "In Gross."

The sheer volume of works involved in the mass digitization cases has led courts to eschew the case-by-case fact-based analysis fair use has traditionally required. Of course it is not possible to evaluate each work individually in these cases. But even significant differences among subgroups of works seem irrelevant in these cases, e.g., fiction versus nonfiction? Works no longer available on the market versus those recently released? It's as though courts are according some kind of "volume discount" for fair use, where a massive taking justifies a lower level of scrutiny in a fair use determination. It becomes increasingly difficult to explain to authors and public alike a copyright regime that rigorously examines the extent of a single scholar's partial copying,[31] while essentially according a free pass to a for-profit enterprise's massive takings. It also risks putting the U.S. at odds with international norms.

5. Expansive Interpretations of "Transformative Use" Risk Putting the U.S. in Violation of its International Treaty Obligations.

The United States is a member of a number of international copyright treaties and agreements—e.g., TRIPs, the Berne Convention, and the WIPO Copyright Treaty—that require that member states' copyright exceptions (as applied to foreign works) meet the "Three Step Test." As set out in the TRIPS, that test provides:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.[32]

As the World Trade Organization's dispute resolution panel held in a case in which the U.S. was found to be in violation of this test,[33] under the first step, any limitations or exceptions must be clearly defined and limited in scope. "Normal exploitation" embraces all forms of exploitation that the author would normally seek to exploit now or in the future. In other words, an exception may not compromise a normal market for the work. The third and final step requires that authors be protected from unreasonable loss of income; in some cases a compulsory license or remuneration scheme is permissible if the author's rights are adequately protected.

An increasingly expansive fair use exception risks violating each of these three steps. Fair use is open-ended; its consistency with the first step depends on the scope of its application in particular cases. The broader the scope of the works affected, or the wider the uses the exception permits, the more likely that the exception will not be deemed limited to "certain special cases." By the same token, the breadth of the exception's application can affect types of exploitation that the author is now or likely will in the future be engaging in. Finally, fair use is an all-or-nothing proposition. If a use is "fair", authors receive no compensation for the use. The U.S. has no remuneration scheme in connection with fair use.

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[30] *Hathitrust,* 902 F. Supp. 2d at 465 (footnote omitted).

[31] *See, e.g.,* Craft v. Kobler, 667 F. Supp. 120 (S.D.N.Y. 1987) (Leval, J.) (holding that a biographer copied more than was needed for his critical examination of the letters of Igor Stravinsky).

[32] TRIPS, Annex 1C, art. 13.

[33] WT/DS160/R 15 June 2000 UNITED STATES—SECTION 110(5) OF THE US COPYRIGHT ACT Report of the Panel.

THE FAIR USE "PENDULUM"

Fair use doctrine is not static. Over the years fair use case law has sometimes strayed too far in one direction, favoring right holders, or in the other direction, favoring users. For example, after the *Sony* case, many lower courts interpreted the Supreme Court's statement that "'commercial use is presumptively an unfair exploitation' of the copyright owner's rights" to drive both the first and fourth fair use factors, making commercial fair use difficult to achieve. In *Campbell,* the court stepped in to restore the balance.

Now, the pendulum has swung the other way. Now it is "transformative use" that drives these two factors, which together are generally determinative of fair use. It is important that the fair use "pendulum" once again be moved back toward center.

A ROLE FOR CONGRESS?

Despite the concerns just voiced, fair use remains a rule whose application is best made by judges, as Congress recognized in codifying the doctrine in section 107.[34] As we have seen, the pendulum can swing in both directions. But if Congress had best continue to leave the general task of applying the section 107 factors to the courts, legislative intervention may be appropriate when that application proves too rigid or too expansive. Thus, after a series of decisions in which lower courts misapprehended the Supreme Court's interpretation of the second fair use factor as wholly insulating unpublished works from quotation, Congress added a final sentence to section 107 to emphasize that all the factors should be taken into account, and that the single feature of a work's publication status was not dispositive.[35]

Just as some judges overreacted to the Supreme Court's protection of the right of first publication by overly-constricting fair use, the current judicial expansion of fair use may reflect concern to preserve the benefits of mass digitization notwithstanding the tension between those activities and the Copyright Act's charge to secure the actual and potential markets for works of authorship. Without altering the text of section 107, Congress might separately address the problems of mass digitization, including whether authors should be compensated for publicly beneficial uses (compensation is not currently an option under section 107). Congress' attention to those issues might relieve the pressure that has risked turning the doctrine into a free pass for new business models, and thus restore fair use to its most appropriate role of fostering new authorship.

Thank you for this opportunity to provide comments to the Committee.

Mr. COBLE. I thank you, Ms. Besek.

Ms. Novik?

TESTIMONY OF NAOMI NOVIK, AUTHOR AND CO-FOUNDER, ORGANIZATION FOR TRANSFORMATIVE WORKS

Ms. NOVIK. I would like to thank the House Judiciary Committee for inviting me to testify about fair use and its role in promoting creativity.

I am not a lawyer, but as one of the creators and artists whose work is deeply affected by copyright law, I hope to explain how vital fair use is to preserving our freedom and enabling us to create new and more innovative work.

Today, I am the published author of 10 novels, including the New York Times bestselling "Temeraire" series, which has been optioned

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[34] *See, e.g.,* H.R. Rep. No. 96–1476 at 66: "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way."

[35] In *Harper & Row v. Nation Enters.,* the unpublished nature of the Ford memoirs was a key consideration in the Court's decision that the Nation had not a made a fair use. *Harper & Row,* 471 U.S. 539, 561–62. After that decision, the high level of protection accorded unpublished works by some courts seemed largely to foreclose making fair use of unpublished material, posing serious obstacles to historians, biographers and others. *E,g,* Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.), *cert. denied,* 484 U.S. 890 (1987). In 1992, Congress amended § 107 to provide that "[t]he 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."

for the movies by Peter Jackson, the director of "The Lord of the Rings." I have worked on professional computer games and graphic novels, and on both commercial and open-source software. And I would have done none of these things, if I hadn't started by writing fan fiction.

I found the online remix community, in 1994, when I was still in college. For the next decade, before I wrote one word of my first novel, I wrote fan fiction, built online computer games, wrote open-source archiving software, and created remix videos. I met hundreds of other artists creating their own work and found an enthusiastic audience who gave feedback and advice and help. We weren't trying to make money off our work. We were gathering around a campfire. We were singing, telling stories with our friends. The campfire was just a bigger campfire, thanks to the Internet, and instead of telling new stories about Robin Hood, we told new stories about Captain Picard, because that is who we saw on our television every week.

Fair use gave us the right to do that. And, I am not a lawyer, but I can tell you that for all of us, what we were doing felt absolutely "fair." We watched Star Trek every week, religiously. We bought the t-shirts and the videotapes and the spinoff books. And, when the DVDs came out, we bought those too. Of course we were going to have our own new ideas about the characters, about the universe, about what might happen. That is what we do. We are imaginative creatures. And of course we wanted to share our ideas with each other.

I learned to explore ideas in the remix community and to see where they led me. And, eventually, they led me to my own characters and my own universe. And now other artists—other remix artists are writing fan fiction for "Temeraire." And they make fan art. And sometimes they even send me a stuffed "Temeraire" to give to my 3-year-old daughter. And I hope that one day one of the fans writing "Temeraire" fan fiction will go on to write their own bestseller or make their own movie or game, perhaps with an idea sparked by something that I wrote.

We all build on the work and ideas of people who came before us. In fact, that is the only way to innovate. There isn't a hard line between remix work and work that stands on its own. Original work is at the end of a natural spectrum of transformation. And fair use protects the spectrum. It creates a space where artists can play with ideas and develop our skills, share our work within a community, and learn by doing.

Licensing is just not a realistic alternative. On the purely practical level the vast majority of remix artists doing noncommercial work simply don't have any of the resources to get a license, not money, not time, not access. I wrote my first fan fiction story as a sophomore in college, taking five courses, working a part-time job doing page layout for the campus weekly, and occasionally calling my parents. If I had had to pay someone and go through a complicated licensing process to get to the point of writing that story, I would never have done it and I might never have written my own novels in the end. Imagine if kids who watched the "Lone Ranger" and ran outside to make up a new adventure in the backyard had

to get a license before doing that. And today the Internet is increasingly becoming our shared backyard.

And speaking also as a copyright holder, licensing is not a practical option for most of us on the other side of the problem as well. Most artists are not large media conglomerates with substantial legal departments. I am delighted for other artists to make fair use of my work. But, I don't want the difficulty and the expense and the legal risk of having to give a license to every kid who might want to write a story where they become the captain of a dragon in the "Temeraire" universe.

More importantly, licensing still doesn't work, even if the practical considerations are removed, because licensing invariably stifles transformative work. I know authors who have written licensed tie-in novels. And they always face a long list of requirements. And, at the end of the book, they have to bring everything back to the beginning. The point of licensing, by the copyright holders, almost always is to avoid transformation because, by definition, a transformative work is one that doesn't match up to the copyright holder's vision.

I see I am running out of time, so I am going to skip a little bit ahead and ask Congress to make it easier for developing artists, like the one that I once was, who are often at a significant disadvantage currently to exercise their fair use rights. Most remix artists, especially ones just starting out, don't so much as know a lawyer. They don't have the resources to defend themselves against even the most frivolous lawsuit or an automated takedown.

Congress could give tremendous support to the incubator of remix art by making it less frightening to take the chance of creating. Artists creating transformative work should not be asked to pay more in damages than they have earned from their work, so long as they acted in good faith. Congress could also require platforms that create automated screening tools for copyrighted work, to provide a straightforward way for artists to identify their work as transformative and make the claim of fair use. And, Congress could add a specific exemption for noncommercial transformative work that would supplement fair use the same way that libraries and teachers have specific exemptions that provide a clear safe harbor.

In general, I strongly urge Congress to resist any suggestion of narrowing fair use, including by trying to replace it with licensing. Innovation starts with asking, "What if?" What if we could build a machine that could fly? What if you crossed a cellphone and a music player? Our country is a world leader in innovation precisely because here we ask the "what if" questions.

Thank you very much.

[The prepared statement of Ms. Novik follows:]

TESTIMONY OF NAOMI NOVIK
Before the Subcommittee on Courts, Iutellectual Property, and the Internet

I'd like to thank the House Judiciary Committee for inviting me to testify about fair use and its role in promoting creativity. I am not a lawyer, but as one of the creators and artists whose work is deeply affected by copyright law, I hope to explain how vital fair use is to preserving our freedom and enabling us to create new and more innovative work.

I urge Congress to not only preserve but strengthen fair use, to encourage still more innovation and creative work by more new artists. I would ask in particular that Congress consider improving protections for fair users, especially individual artists, who are threatened with lawsuits or DMCA takedowns.

I. Fair use is vital to developing artists and creative communities.

Today, I'm the author of ten novels including the *New York Times* bestselling *Temeraire* series, which has been optioned for the movies by Peter Jackson, the director of *The Lord of the Rings*. I've worked on professional computer games and graphic novels, and on both commercial and open-source software. I'm a founding member of the Organization of Transformative Works and served as its first President, and I'm one of the architects and programmers of the Archive of Our Own, home to nearly a million transformative works by individual writers and artists.

And I would have done none of these things if I hadn't begun by writing fanfiction.

In 1994, while I was still in college, I first came across the online remix community. Over the next decade, before I wrote one word of my first novel, I wrote fanfiction, built online computer games, wrote open-source archiving software, and created remix videos. I met hundreds of other artists creating their own work, and found an enthusiastic audience who gave feedback and advice and help.

I had no money for licenses or lawyers. Neither did my fellow artists. No one would have sold us one anyway. We weren't trying to make money off our work. We were gathering around a campfire to sing and tell stories with our friends. The campfire was just a bigger one, and instead of telling new stories about Robin Hood, we told new stories about Captain Picard, because that was who we saw on television every week.

Fair use gave us the right to do that. I'm not a lawyer. But I can tell you that for all of us, what we were doing felt like just that — *fair*. We watched Star Trek every week. We bought the t-shirts and the videotapes and the spin-off books, and when they started making DVDs, we bought those, too. Of course we were going to have our own new ideas about the characters, about the universe, about what might happen. Of course we wanted to share our ideas with each other.

When a previous generation watched The Lone Ranger on television and then ran outside to make up new adventures in their back yards, no corporations descended on them with cease-and-desist letters,

attempting to squash the storytelling impulse. Today the Internet is our shared back yard. It's where we make friends and meet to play with them, children and adults alike, and when we tell stories, that's where we tell them. It's how we share our enthusiasms and our opinions, our responses to the things that excite or disappoint or inspire us.

For many of us, it is more natural to write a story than a review. We didn't want simply to praise or complain about the original. We wanted to build upon it, the way that creators have always built upon the work of those before them.

Our work was transformative in every sense of the word. We weren't simply retelling the old stories — we were creating new stories, and ones that weren't being told. We transformed the original work, and we transformed ourselves by doing so. We learned to think of ourselves as writers, artists, programmers, as creators. We took our craft seriously and so did our audience, and that audience was invaluable.

In the remix community, I wasn't in a writers' workshop exchanging stories with five people, each of whom was more interested in their own writing than in mine, or in a creative writing class with one teacher with her own particular taste judging my work. Instead, I was sharing my work first with dozens and then with hundreds and then with thousands of readers, who told me what they liked, what made them laugh, what delighted them — and just as usefully, what annoyed them or even made them angry. They told me when I had the characters right or wrong, and when I'd done something that didn't make sense. They could tell me that, because we were all playing in the same sandbox.

And the more I learned from that feedback, the more confidence I developed, the more I built my skills and my craft, the further I was able to take my work, and in directions not constrained by existing genre divisions.

The *Temeraire* series is about dragons in the Napoleonic Wars. *Time* Magazine described it as "Jane Austen playing Dungeons & Dragons." People often ask me how on earth I got the idea. But it was natural for me, coming from the remix community. Remix art is rife with mashed-up wildly transformative ideas like this. Buffy the Vampire Slayer meets Edward the vampire from *Twilight*. (Spoiler: it doesn't go well for Edward.) The ultra-violent movie *300* becomes a music video about dance and movement. The Avengers are transformed into the baristas and customers of a coffee shop.

I learned to explore ideas in the remix community, and see where they led me. And eventually, they led me to an idea that could be commercially published, and from there to ten novels of my own with more than a million copies in print and translated into thirty languages. Now other artists write fanfiction for *Temeraire*, and make fan films, and sometimes they even send me a stuffed Temeraire dragon to give to my daughter.

And I hope one day one of the fans writing Temeraire fanfiction will go on to write their own bestseller, or make their own movie or game, perhaps with an idea sparked by something I wrote.

We all build on the work and ideas of people who came before us — in fact that's the only way to innovate. There isn't a hard line between remix work and work that stands on its own. They exist on a

continuum.

Vincent van Gogh deliberately copied Japanese woodcuts so that he could find his own style. Shakespeare borrowed heavily from earlier sources. No one could deny that he transformed them. But imagine if the laws of his time had barred him from doing so. We wouldn't have Hamlet, we wouldn't have King Lear, we wouldn't have Romeo and Juliet. And if Leonard Bernstein hadn't borrowed from Romeo and Juliet, we wouldn't have West Side Story. Now if we prevent the next generation from borrowing from West Side Story, we cap the flow of creativity, we dam the river of innovation.

Right now, my three year old daughter is obsessed with *The Wizard of Oz*. Her favorite game is re-enactment. On a daily basis, my husband and I are assigned to play the Scarecrow and the Tin Woodman, and we are led down the Yellow Brick Road to see the Wizard, and if we say our lines wrong, you can bet we are called on it.

She's already however begun to take the first steps towards transformative work. The other day she decided that really, she wants Aunt Em and Uncle Henry to come with her to Oz, too.

It's a step from there to writing a story where you get to go to Hogwarts and make friends with Harry Potter, and it's another step from there to writing a story about what the wizarding world looks like here in the United States, and then it's another step from there to writing a completely new story about your own kind of wizards.

Original work, work that stands alone, doesn't just pop up out of nowhere. It is at the end of a natural spectrum of transformation. Fair use protects this spectrum, this incubator if you will. It's a space where artists can play with ideas and develop our skills, and share our work within a community and learn. I cannot overstate the importance this space has been in the development of my own career, and that of many other professional writers and creators that I know.

This past summer I had the opportunity to speak to a group of older teenagers in an intensive summer creative writing program called Shared Worlds. These students form groups to create a detailed encyclopedic description of a fantasy world, researching economics, history, politics, physics, and religion in order to make the world a consistent one, and they then write stories in that shared universe. Some of these students are surely future authors and television writers and playwrights and scriptwriters.

When I asked how many of them had previously written fanfiction, three quarters of the room raised their hands.

And furthermore, this creative space is one where all citizens, not just those who want to be professional artists, have a right to participate, and where we as a citizen body broadly benefit from their participation. A student who takes a part in their high school play can enjoy and learn from that experience even if they are never going to be a professional actor. They will bring the performance skills and confidence they gain to public speaking in whatever career they eventually pursue. A person can pick up a guitar and sing in the park with their friends on the weekend without ever wanting to be a professional musician. They still benefit from the social connections they make and gain more ability to

appreciate music by others. And the person who writes fanfiction in the evenings will bring the writing and editing skills they gain to virtually any field they enter.

II. Licensing is not a replacement for fair use

When I read about the claims by large corporate copyright owners that licensing is always an option, I know that they don't understand how noncommercial remix art works.

Licensing is not a realistic option for most artists and communities who rely on fair use. On the purely practical level, the vast majority of remix artists doing noncommercial work simply don't have any of the resources to get a license — not money, not time, not access. I wrote my first fanfiction story as a sophomore in college, while taking five courses, working a part-time job, doing page layout for the campus weekly, and occasionally calling my parents. If I'd had to pay someone and go through some complicated licensing process to get to the point of writing that story, I would never have done it.

And speaking as a copyright holder, licensing is not a realistic option for most of us on the other side of the problem either. Most artists are not large media conglomerates with substantial legal departments. I personally am delighted for other artists to make fair use of my work, as they are entitled to do. But I very much don't want the difficulty and legal risk and expense involved in coming up with a license and issuing one to everyone who would like to write their own story about becoming a dragon captain in the *Temeraire* universe.

And more importantly, licensing still doesn't work even if the practical considerations are removed, because licensing invariably stifles transformative work.

I know several authors who have written licensed tie-in novels for various media properties. The list of requirements and restrictions they deal with is enormous. They aren't allowed to change anything significant about the universe, and by the end of the book, they must generally bring everything back to the beginning. Characters can't change in any substantial way.

In short, the entire point of licensed work is to *avoid* transformation. And that is the natural tendency for any copyright holder when considering whether or not to grant a license. If you look at the licenses that are supposedly models for the future--Amazon's Kindle Worlds and YouTube's Content ID--they always allow suppression of anything the owner doesn't like.

Almost by definition, a transformative work is one that doesn't match up to the copyright holder's vision. Chances are it won't neatly fit a brand or a marketing message, and in some cases may make the copyright holder actively uncomfortable.

In particular I recall the case of Margaret Mitchell's estate trying (and, thanks to fair use, ultimately failing) to stop publication of *The Wind Done Gone*, which retold the story of *Gone With The Wind* from the perspective of one of Scarlett O'Hara's slaves, and was meant to highlight the racist and sexist elements of that book. I've also seen many copyright holders have a similar knee-jerk reaction to fanfiction works that were even much less critical of the original work, or not intended as critical at all.

As someone who is passionate about my own characters, I can sympathize with the emotional reaction of an author who sees them being altered by a new artist's hands, or who takes a critical work to heart. But I also have an emotional reaction when someone posts a one-star review of my book and says mean things about my work. That doesn't mean I should have the right to silence my critics, or to prevent other storytellers from telling stories I wouldn't tell myself. The more transformative a work, the further from the original it has gone, the more valuable it is as an addition to our shared public conversation.

Separately, some large copyright holders have begun treating licensing like a technical problem that could be solved if only remix artists would just publish on their proprietary sites, or with specific platforms who negotiate a deal with them.

But this is like someone showing up at your campfire singalong and telling you that you have to come to their theater and perform for an audience that has paid them. Free speech isn't free if you can only utter it on someone else's terms or in someone else's forum.

Amazon's Kindle Worlds is a recent attempt to monetize fanfiction. But it is a heavily restricted walled garden, and nothing like the community that has nurtured me and other new creators. The design of Kindle Worlds keeps fanfiction writers from growing. It confines their work strictly to Amazon — an author is literally not allowed to take down their own story once they have posted it. It forces them to charge for their works, which makes it harder to get useful feedback. This restricts their ability to share their work with a wider audience, the kind of invaluable audience that helped nurture me and so many other remix artists.

And there is no incentive to innovate, to add new elements. For one thing, copyright holders can set any limits they want on content, just as with tie-in novels, and can reject works at any time, and any work that pushes the boundaries is likely to be discarded. *The Wind Done Gone* would surely have been rejected at once. And by the terms of Kindle Worlds, any new elements effectively become the property of the copyright holder. If a Kindle Worlds writer creates new characters, they aren't allowed to take those new characters and write their own stories about them. If they do write a story that stands on its own, by publishing it in Kindle Worlds they have lost the right to make it commercially publishable separately, and they have lost the derivative rights. Kindle Worlds authors are better off if they stay carefully within the boundaries of the copyright holder's expectations and don't explore their own ideas.

I don't object to the existence of Kindle Worlds as an option: if a copyright holder chooses to open their world on strict terms, and a fanfiction writer goes into it with their eyes open, and treats it as a reasonable way to make some spare cash by writing tie-in work, there's nothing wrong with that, any more than there is with a fanfiction writer taking a contract to write a tie-in novel. But this is not remotely a replacement for fair use.

III. Congress should facilitate the exercise of fair use

I would ask Congress to make it easier for developing artists, who are often at a significant disadvantage currently, to exercise their fair use right.

I have never received a cease-and-desist letter. But some of my fellow remix artists have, despite the fact that their work was completely noncommercial and highly transformative. It drove several of them completely out of the community and caused them to stop sharing their work, or it stopped them creating it at all.

Virtually every remix video artist I know (including myself) has had their videos taken down from multiple platforms by automated systems that look for even minute fragments of copyrighted work. In order to restore them, if that's even possible, they have had to file counter-complaints in the face of terrifying automated warnings telling them that they could be fined enormous amounts of money, and making them feel like criminals.

I have gone hunting for stories and art and videos that were so good they stuck in my mind even years later, only to find out that they had been yanked down and were effectively destroyed.

None of this was because the work wasn't fair use, but because most of us didn't so much as know a lawyer, and didn't have the resources to defend ourselves against even the most frivolous lawsuit. Facing a massive media conglomerate as an individual is an alarming prospect, and when you are creating noncommercial work, not just without a profit but often at your own expense, it's hard to accept that risk for yourself and your family. Even if you are confident that your use was fair, what if the court disagrees with you?

Congress could give tremendous support to the incubator of remix art by making it less terrifying to take the chance of creating. Artists creating transformative work should not be asked to pay more in damages than they have earned from their work, so long as they acted in good faith. Copyright holders, on the other hand, who deliberately try to stifle the exercise of fair use with lawsuits and automated takedowns should be subject to damages.

Congress could also require platforms that create automated screening tools for copyrighted work to provide a straightforward way for artists to identify their work as transformative and make a claim of fair use. And Congress could add a specific exemption for noncommercial remix that would supplement fair use, the same way that libraries and teachers have specific exemptions that provide a clear safe harbor.

And finally, I strongly urge Congress to resist any suggestion of narrowing fair use, including by trying to replace it with licensing. It is central to our country's creative and technology industries.

Innovation starts with asking *what if?* What if we could build a machine that would fly? What if we could record and project a moving image? What if you crossed a cellphone and a music player? What if you could search the entire Internet? Those are big ones, ones we all know, and our entire world has been shaped by the answers.

Our country is the world leader in innovation because here we ask those *what if* questions, and we are free to imagine what the answers look like. We're encouraged to look around us at the things that exist and imagine how we could make them better, how we could take them to the next level, how we could transform them.

That is the spirit behind fair use. Fair use invites us to tinker and transform, and it frees us to explore ideas and share them with one another. It gives new artists and creators more tools to play with early in their careers and facilitates the evolution of genres and new forms.

Any narrowing of fair use is inimical to this spirit.

Mr. COBLE. Thank you, Ms. Novik.

Ms. Besek, you are the only witness so far to beat the red light. [Laughter.]

Mr. COBLE. Now I am imposing pressure upon Mr. Lowery.

Mr. Lowery, you are recognized for 5 minutes. [Laughter.]

Mr. LOWERY. I may have a distinct advantage, Mr. Chairman, since I am used to expressing myself in less than 5 minutes.

Mr. COBLE. Well, we—as I said, we won't penalize you if you fail in that effort.

TESTIMONY OF DAVID LOWERY, SINGER/SONGWRITER AND LECTURER, TERRY COLLEGE OF BUSINESS, UNIVERSITY OF GEORGIA

Mr. LOWERY. Okay. Chairman Goodlatte, Chairman Coble, Ranking Member, and Members of the Subcommittee, my name is David Lowery, and I am a mathematician, writer, musician, producer, and entrepreneur based in Richmond, Virginia, and Athens, Georgia. I also teach Music Business Finance at the University of Georgia. Thank you for this opportunity to speak with you today about the scope of fair use.

The rise of the Internet corresponds with recent attention devoted to fair use as an excuse for trumping the rights of authors established both in the U.S. and other countries. This attention comes from technology companies, commentators, lobbyists, and some parts of the Academy.

I am not concerned with parody, commentary, criticism, documentary filmmakers, or research. These are legitimate fair use categories. I am concerned with the illegal copy that masquerades as fair use, but is really just a copy. This masquerade trivializes legitimate fair use categories and creates conflict where there need be none. These interpretations of fair use have become important to my daily life as a singer-songwriter. There are attempts by certain Web sites and commercial services to pass off, as fair use, versions of my work that are indistinguishable from my work. As I will demonstrate, these works compete directly with licensed instances of my work.

As a professional singer-songwriter, I believe that fair use doctrine, as intended by Congress, is working in the music business and music industry and should not be expanded. Sampling and remixing is one arena where there has been a push for expanded fair use. This defies logic, as there is no emergency. Hip-hop relies on samples of other artists' work. There exists robust market-based mechanisms for licensing these samples. And hip-hop has gone on to become the most popular form of music on the planet, without expanded fair use. "Don't fix it, if it ain't broke." I go into great detail in my written testimony.

Another arena is song lyrics. Some commentators have suggested that sites that reprint song lyrics with annotations or meanings may be covered by fair use. I have personally experienced the unauthorized use of my lyrics on one of the most famous lyric annotation sites called RapGenius. Exhibit one shows an example from this lyric annotation site. I research lyric sites as part of my academic work at the University of Georgia and produced the UGA "Top Fifty Undesirable Lyric Website List." After I published my

most recent update to the list, which placed RapGenius at number one, the editor in chief of RapGenius transcribed the lyrics of my song "Low" and began annotation of my lyrics. These annotations are invisible in the exhibit. They appear only as hyperlinks to popup windows. Now, note these links could refer to anything.

How is this use any different from the use of my lyrics on the non-annotated-and-licensed site? These are virtually identical. The RapGenius instance of my lyrics is nearly identical to this one. How is it fair use? It competes directly with the revenue I receive from this licensed site. Following this logic, I could reprint an entire book and occasionally provide a hyperlink to the definition of a word. Indeed, the owners of RapGenius seem to agree that their use is not fair use, as evidenced by their recently completed licensing deals with Sony, ATV Music, and Universal.

My final point, before thanking the Subcommittee for this opportunity to speak today, is: What is so hard about asking permission? As an artist, I only expect to be treated as I would treat other artists. I believe that permission or the legitimacy of consent and doing unto others are the very foundations of civilizations. The rights' holders have never been easier to look up. Millions of recordings can be identified with an iPhone application or looked up in a public database at no charge. It takes little effort.

In conclusion, I respectfully request that the Members of the Subcommittee review the practical history of the application of fair use defense to see that it is working as intended. I hope you will agree with me that no legislative expansion or governmental intervention is needed at this time.

Thank you very much.

[The prepared statement of Mr. Lowery follows:]

STATEMENT OF

DAVID LOWERY

Singer / Songwriter
Lecturer,
Terry College of Business
University of Georgia

BEFORE THE

COMMITTEE ON THE JUDICIARY

Subcommittee on Courts, Intellectual Property and the Internet

U.S. House of Representatives

The Scope of Fair Use

JANUARY 28, 2014

I. Introduction

Chairman Goodlatte, Chairman Coble, Ranking Member, and Members of the Subcommittee:

My name is David Lowery and I am a mathematician, writer, musician, producer and entrepreneur based in Richmond, VA and Athens, GA.

While studying mathematics at the University of California Santa Cruz in the early 1980's, I founded the ensemble *Camper Van Beethoven* and record label *Pitch-a-Tent Records.*[1] In 1991, I moved on to the ensemble *Cracker*. I have also produced a variety of albums for critically acclaimed and commercially successful artists, such as The Counting Crows and Sparklehorse. In 1993, I founded *Sound of Music Studios* with John Morand.[2] Since 2011, I am a Lecturer at the University of Georgia where I teach on the

[1] These two entities helped jump-start the Indie Rock movement.
[2] The studio has recorded over 500 albums for a wide range of artists from D'Angelo to Lamb of God. In 2005, *Sound of Music Studios* led to *Shockoe Noise LLC*, a company that focuses on custom music and music licensing for TV, film and commercials.

economics and finance of the music business at the University of Georgia.[3] With a few like-minded entrepreneurs, I helped establish The Athens Angel Investment Fund to provide early-stage capital to technology-based startups throughout the Southeast United States. Recently, I have been writing for *The Trichordist*, a blog that examines Artists' Rights in the digital age and seeks to respond to Silicon Valley's aggressive attacks on artists and other content creators.[4] Last May, I wrote *Getting Copyrights Right*, an op-ed for *Politico* concerning copyright reform.[5]

Thank you very much for the opportunity to speak with you today about the scope of fair use. In my different involvements in the music industry, the fair use doctrine plays a role in my life on a daily basis. As a professional singer songwriter, I believe the "fair use" doctrine is working as intended in the music industry. However, I do have concerns about pushes to expand its boundaries beyond its traditional scope, especially when that expansion undermines my and other creators' ability to make a living from our work.

II. The Expansion of Fair Use in the Music Industry

The push to expand fair use in the music industry manifests itself in two areas, unlicensed sampling and permissionless "remixing"; and, lyric annotations and "song meanings".

II.I. Unlicensed Sampling And Permissionless "Remixing"

There are legitimate and compelling "fair uses" of music and lyrics – snippets of lyrics or songs used in journalism, music criticisms and academic studies. Enabling the reasonable use of works when they do not compete with an author's market for these purposes serves the public interest. In contrast, this is not the case with sampling, remixing, mash-ups and lyric annotations for two reasons. First, these uses are operating successfully within existing licensing mechanisms. Second, creators are benefitting financially from these licenses and, therefore, creating more works. In this context,

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[3] In this capacity, I teach the courses Fundamental Concepts in the Music Business, and Promotions and Publicity Techniques. I have also worked to develop and expand the Music Business Certificate Program.

[4] Three of my pieces have gone massively viral, Letter to Emily White at NPR All Things Songs Considered, Meet the New Boss, Worse than the Old Boss?, and My Song Got Played On Pandora A Million Times And All I Got Was $16.89.

[5] This piece was entered into the Congressional Record by Rep. Mel Watt D-NC.

expanding fair use to encompass these uses would do a disservice to the public interest to the extent that doing so would subvert the goal of incentivising the creation and dissemination of works for society at large.

Traditionally, fair use has served as a limited exception to the property rights of creators when certain public interests conflict with those rights. When it comes to sampling and 'remixing', the argument "I don't want to ask permission of the artist nor do I want to pay for a license" is not a compelling reason to expand fair use. This "permissionless innovation" should be seen for what it truly is: not free expression but free riding. Expanding fair use to include these uses would allow some to freeload on the works of others.

Moreover, our current copyright system is not broken. Over the last thirty years, the Copyright Act has allowed robust market-based mechanisms and conventions to evolve and facilitate the licensing of samples and remixes. For instance, two of the most popular and commercially successful music genres in recent years, hip-hop and electronic dance music, rely greatly on sampling and remixing.[6] In both genres, seeking permission from and/or compensating sampled artists are—and have been—common practices.[7] These two thriving genres constitute a clear example that existing market dynamics enabled by our copyright laws are serving the public interest as intended.

As a recording studio owner for nearly 20 years, I have observed how creativity is served by current copyright laws first-hand. A hip-hop artist will build a track around a sample. Then, the artist will attempt to clear the sample. If successful, then the artist

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[6] *See* NIELSEN GROUP, U.S. MUSIC INDUSTRY YEAR-END REVIEW: 2013 10 (2013) *available at*
[6]http://www.nielsen.com/us/en/reports/2014/u-s-music-industry-year-end-review-2013.html (showing that rap and R&B music produced 26.2% of total album sales and 18.7% of total digital track sales in 2013 in the U.S.); *See* Zach O'Malley Greenburg, Ryan Mac, *The World's Ten Highest Paid DJs of 2013*, FORBES (Aug. 14, 2013), http://www.forbes.com/pictures/eeel45egemd/the-worlds-highest-paid-djs-6/
[6](showing that in 2013, the ten highest paid DJs earned between $46 million and $13 million each).
[7] Stephan Nikun, *Illegal Sampling Motivates Kevin Saunderson to Speak Out*, XLR8R (Feb. 21, 2011), http://www.xlr8r.com/news/2011/02/illegal-sampling-motivates-kevin (quoting Kevin Saunderson, a well-known creator of electronic dance music, explaining that common reliance on sampling and the clearing of samples in the genre); see also Thomas W. Joo, *Remix Without Romance*, 44 Connecticut Law Review 415 (2011).

proceeds. If the artist cannot arrive at a mutually beneficial arrangement with the rights holders, the artist *creates* a new "loop" that does the same job as the originally sought sample. This creation of new works to serve the public is what the Founding Fathers had in mind when they introduced the Copyright Clause into the Constitution. My experience illustrates that under existing legal and market conditions, even when sampling work legally is not possible, creativity still finds its way.

There are also several emerging-market and permission-based solutions that allow the public to create amateur and fan remixes while protecting the rights of other creators. YouTube and the National Music Publishers Association currently have a licensing agreement where users can upload videos and remixes incorporating music from a multitude of songwriters without seeking individual permissions. In this arrangement, songwriters and music publishers share the ad revenue that these videos generate. There are also small companies that allow fans to remix works from creators who submit their works in exchange for compensation.[8] The Principles for User Generated Content Services, developed through a multistakeholder cooperative process, provide guidelines for services that disseminate user-uploaded content to facilitate lawful uses and mitigate infringing uses. [9] This variety of alternatives and business models are further proof that the market is working and, therefore, there is no need for legislative intervention.

II.II. Unlicensed Song Meanings and Lyrics Annotations

Some commentators have suggested that sites engaged in the wholesale reproduction of song lyrics along with "annotations" or "song meanings" are covered by the "fair use" doctrine.[10] Although I am fully supportive of these services, their providers are not free from their obligation of compensating creators and rights holders. The ability to add value to someone else's property has never excused the appropriation of that property.

Personally, I have experienced both the authorized and unauthorized use of my lyrics. As part of my official research duties in the Music Business Program at the

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[8] *See e.g.* Indiloop - Remix Online, http://www.indiloop.com.
[9] See http://www.ugcprinciples.com.
[10] Timothy Geigner, *When Is A Lyric Site More Than A Lyric Site?*, TECHDIRT (Nov. 12, 2013, 2:34 PM),
[10]http://www.techdirt.com/articles/20131112/04223125204/when-is-lyric-site-more-than-lyric-site.shtml

University of Georgia, I began studying and cataloguing many of the "lesser known" kinds of copyright infringing websites this past summer. It may seem surprising in the digital age to be talking about song lyrics, but anecdotal evidence suggests that lyric websites generate large amounts of web traffic and significant revenues—in fact, unlike sound recordings business, lyrics may be *more* valuable in the Internet era. Indeed, the vast majority of lyric websites appear to have well-established advertising-based monetization schemes, with accounts with major online advertising exchanges featuring advertising from major brands.

In October 2013, I published a list of *Fifty Undesirable Lyric Websites* through the University of Georgia.[11] The list shows the most popular commercial lyric websites that do not appear to be licensed. Soon after, a self-described "editor in chief" of RapGenius.com, one of the most famous lyrics annotation sites and number one on my undesirable list, copied, posted and began annotating the lyrics of my song "Low".[12] These same lyrics were also posted on the licensed site Letssingit.com.[13] Although the services are virtually identical, I only received revenue from Letssingit.com for every page view. In this instance, RapGenius' "permissionless" copying of my lyrics directly competed with the fully licensed site and interfered with my revenue.

RapGenius ended up doing the right thing, entering into license agreements with Sony/ATV and other music publishers.[14] A number of other websites on the list did the same.[15] In fact, licensing of music lyrics has never been easier through clearinghouse licensing authorities such as LyricFind[16] and MusixMatch.[17] These services enable the

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[11] David Lowery, Undesirable Lyric WebsiteList (2013); *available at* [11]http://media.terry.uga.edu/socrates/publications/2013/10/UGA_Music_Business_Undesirable_Lyric_Website_List_Oct_22nd_2013.pdf.

[12] *See* Exhibit 1 (please note the annotations are invisible as they appear only as hyperlinks to pop up windows).

[13] *See* Exhibit 2.

[14] Alex Pham, *Rap Genius, Universal Music Publishing Group Strike Licensing Deal*, Billboard (Jan. 22, 2014), available at http://www.billboard.com/biz/articles/news/digital-and-mobile/5877856/rap-genius-universal-music-publishing-group-strike.

[15] See "Early results and evolution of the UGA Undesirable Lyric Website Study to include advertisers," UGA Undesirable Lyric Website Project, at http://ugalyricwebsitelist.org/2014/01/01/early-results-and-evolution-of-the-uga-undesirable-lyric-website-study-to-include-advertisers/.

[16] http://www.lyricfind.com/about-lyricfind/

offering of commercial lyric sites to consumers in a way that serves the lyric site operators' interests in turning revenue, the consumer's interest in having accurate information about lyrics, and that fairly compensates the artist.

III. Asking permission is easy

In recent years, there has been an unfortunate push to cast aspersions on the concept of permission or control. The notion that individual creators' rights are some pesky obstacle standing in the way of a wonderland of creativity has gained momentum in certain sectors. In countering these ideas, our current copyright laws protect creators based on the notion that permission, or consent, is the foundation of civilization. In addition, rights holders have never been easier to find. [18] I wholeheartedly believe that in this context where the law and technology make it easy for authors to authorize the use of their work, there is no compelling reason to change the fair use doctrine as it currently exists.

Advocates for further expansion of fair use often appeal to the *noncommercial* nature of many remixes and lyrics annotations sites as a reason to place these activities under the fair use umbrella. This argument fails to consider that *commercial* intermediaries distribute these works and profit from their widespread dissemination.[19]

IV. Conclusion

In conclusion, I humbly ask that the Members of the Subcommittee look at the history of fair use and its traditional purpose to see that it is working as intended and to see that no legislative intervention is needed at this time.

Thank you very much.

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[17] http://musixmatch.com/; *see* Jennifer Hicks, Turning Lyrics into a Business: musiXMatch's Next Generation Lyrics API, Forbes (Jun. 30, 2011, 5:35 PM) http://www.forbes.com/sites/jenniferhicks/2011/06/30/turning-lyrics-into-a-business-musixmatchs-next-generation-lyrics-api/2/ (citing CEO Massimo Cicciola's statement "The secret to our success is in licensing data. It's all about data today, which is probably one of the most overlooked aspects of the music industry. MusiXMatch's Lyrics API delivers exactly what music site owners need to meet the demands of users and content rights holders.")

[18] ASCAP, BMI, Sesac, HFA, and SoundExchange, to name a few, provide databases of ownership information for songs. In addition, any song can be readily identified with an iPhone app like Shazam (http://www.shazam.com/music/web/about.html)

[19] *See e.g.* ORGANIZATION FOR TRANSFORMATIVE WORKS, COMMENTS IN RESPONSE TO DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 62 (2013).

Mr. COBLE. Thank you, Mr. Lowery. And you prevailed over the red light.

Mr. LOWERY. Barely. [Laughter.]

Mr. COBLE. Mr. Wimmer?

TESTIMONY OF KURT WIMMER, GENERAL COUNSEL, NEWSPAPER ASSOCIATION OF AMERICA

Mr. WIMMER. Chairman Coble, Members of the Subcommittee, thank you for having me here today.

The professional reporting that newspapers publish starts important conversations in the communities that we serve. We recognize that this conversation often continues online, both on platforms that our industry owns and on those owned by others. Because our content is a central part of these conversations, the scope of fair use is an important issue for the news industry.

The newspaper industry spends about $5 billion a year gathering and producing news and information. We are also investing heavily in new online and mobile platforms to deliver content to readers. As a result of these efforts, newspapers have a larger audience than ever before. Newspaper circulation revenue grew 5 percent in 2012 and digital-only circulation revenue grew by 275 percent. Nearly 65 percent of all U.S. adults read newspaper content in a typical week or access newspaper content on a mobile device in a typical month. The digital future, then, is bright. But there is much ground to make-up because of the unprecedented disruption caused by the digital transition. For every $15 in print advertising revenue lost, newspapers have gained only $1 in digital advertising revenue.

Competition for viewers in the digital world is fierce. And our publishers increasingly find themselves competing not only against companies that create original content, but also with companies that build businesses on the backs of the very news content that our members produce. Newspaper content makes up 66 percent of the content on news aggregation platforms such as Google News. Newspaper content also makes up more than half of the content on many popular digital platforms. These uses can result in some limited traffic to newspaper sites, but most don't result in meaningful revenue. The platforms using our content, however, certainly benefit by using news content to build and monetize readership on their sites without paying a dime for the use of that content.

Some of the uses of newspaper content certainly qualify as fair use, while others clearly do not. But this is an issue that we think can be remedied by the courts rather than Congress. We believe the current state of the Copyright Act, including the formulation of fair use, strikes the right balance and should not be changed. The fair use doctrine has been developed over decades as a common law concept allowing courts to respond to changes in technology. This case-by-case analysis allows courts to balance the competing individual interests at hand, and to capture both those needs and the welfare of society as a whole.

A recent example of a court deftly applying this fair use doctrine is the Southern District of New York's decision in *Associated Press v. Meltwater*. Meltwater is a for-profit reporting service that scraped AP articles and delivered verbatim excerpts of them to its

paying subscribers. The court properly found that Meltwater's customers viewed the service as a substitute for reading the original articles, judging by the minuscule click-through rates. The court held that Meltwater's republication of segments of news articles without additional commentary or insight was not transformative and not a fair use. Targeted enforcement actions focusing on commercial ventures that simply take and resell our content may continue to be necessary.

Of course, not all fair use decisions are decided correctly. In particular, some courts' recent willingness to give undue weight to the concept of transformative use is troubling. This undue weight and the surprising types of rather pedestrian uses that have been found to be transformative risks allowing that element to subsume the other equally important factors. We hope and expect that this imbalance in applying the fair use factors will be corrected over time.

Another reason that the Copyright Act need not be changed is because licensing arrangements are becoming more realistic in many industries, including ours. We believe that many participants in our ecosystem, particularly innovative startup ventures and social media platforms, would really prefer to deploy solutions that rely on licensed content rather than to rely on questionable business models, such as scraping and violation of copyright and terms of use. Licensing news content allows that content to be distributed on new platforms, but helps to support the cost of high quality original journalism.

In all, our goal in the digital world remains consistent with our longstanding mission: We seek to inform audiences as broadly as possible about the communities in which they live. In the digital environment, we will seek the appropriate balance of enforcement, licensing, cross-industry partnerships, and deploying our own new platforms to achieve this goal. And continued reliance on steadfast areas of law, such as fair use, will be essential as we continue to move forward.

Thank you for the opportunity to testify. And I look forward to your questions.

[The prepared statement of Mr. Wimmer follows:]

The Scope of Fair Use

Testimony of the Newspaper Association of America

House of Representatives
Committee on the Judiciary
Subcommittee on Courts, IP
and the Internet
January 28, 2014

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Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
United States House of Representatives
113th Congress, 2nd Session

The Register's Call for Updates to U.S. Copyright Law: The Scope of Fair Use

Testimony of Kurt Wimmer
General Counsel, Newspaper Association of America

January 28, 2014

Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, and members of the Subcommittee, good afternoon and thank you for the opportunity to appear before you to discuss the scope of "fair use" under the Copyright Act. My name is Kurt Wimmer. I am privileged to serve as general counsel of the Newspaper Association of America, which represents the publishers of more than 2,000 newspapers in the United States and Canada, and I have practiced law in the technology and media industries for more than 25 years.

The news publishing industry recognizes that the professional reporting and writing that newspapers publish start important conversations in the communities we serve, and that this conversation often continues online —both on our digital platforms and those owned by others. Because newspaper content serves as a central catalyst for these crucial digital conversations, the "fair use" defense, which draws a distinction between infringing and non-infringing uses of copyrighted material, is a critically important issue for the news industry in the digital age.

As I will describe in this testimony, the newspaper industry believes that the current formulation of fair use in the Copyright Act need not and should not be changed by Congress as part of any effort to update the Act. Court decisions interpreting fair use have not always been perfect, but overall we have faith that the long arc of the common law will, over time, result in workable fair use decisions for all members of the digital ecosystem and for the public we serve.

I.
The Crucial Role of Newspapers in the Digital Ecosystem

As primary sources of credible information and forums for debate, newspapers are essential components of a well-informed citizenry and a free and democratic society. Newspapers have undertaken tremendous efforts to uphold these values in the digital age. The newspaper industry continues to spend upwards of $5 billion a year to inform citizens about everything from the high-profile investigative reports that win Pulitzer Prizes to the day-to-day information that brings communities together.

In doing so, newspapers have become innovators and drivers of new business models and sources of digital revenue. As a result of these innovative efforts to publish online, on mobile platforms, and in print, newspapers have a larger audience than ever. Newspaper circulation revenue grew 5 percent in 2012. Digital-only circulation grew by 275 percent in the same year. The vast majority of United States adults, nearly 65 percent, read newspaper content in a typical week or access newspaper content on a mobile device in a typical month. In addition, consumers clearly are embracing digital subscriptions in support of the high-quality content they receive from local newspapers. Some 500 newspapers —35 percent of all daily newspapers —have successfully implemented digital subscription models, which provide a valuable source of revenue to support journalism going forward.

The digital future, then, is bright. But there is much ground to make up because of the unprecedented disruption caused by the digital transition. Newspaper advertising revenue, which of course supports our newsgathering efforts, was $49 billion in 2006 and dropped by more than half, to $22 billion, in 2012, the most recent year for which figures are available. Digital ad revenue is growing but is not yet close to making up the difference in lost print advertising. Even now, print produces far more revenue for newspapers than digital. In 2012, print advertising revenue for the industry was $19 billion, and digital advertising

revenue was $3 billion. In other words, for every $15 in print advertising dollars lost, newspapers have gained only $1 in digital advertising revenue.

As newspaper publishers reinvent their platforms for the digital future, they find themselves competing not only with companies that create original content, but also with companies that build businesses on the backs of the very news content that our members produce. Newspaper content makes up 66 percent of the content on news aggregation platforms such as Google News. Newspaper content also makes up more than half of the content on many popular digital platforms. Although these re-uses of newspaper content do result in some limited traffic to newspaper sites, most do not produce marketable click-throughs resulting in impressions that would generate meaningful revenue.[1] The platforms using our content, however, certainly benefit by using news content to build and monetize readership on their sites without paying a dime for the significant costs our industry bears to produce that content.

II.
The Importance of Copyright Protection In Supporting Essential Journalism

Effective copyright protection is essential to funding the professional newsgathering and reporting that permits the newspaper industry to continue to serve the American public. When other digital players build their platforms and generate significant profits using newspaper content that they do not pay to produce or support, it undermines the ability of journalists to undertake high-quality reporting and contribute to a well-informed citizenry.

[1] Social media uses of news content, particularly in partnership with news sites, can provide an interesting contrast to other digital uses that appropriate and monetize news content without consent. News appears to drive about 30 percent of the content on Twitter, for example, but this type of use appears to be generating useful traffic to news sites. News publishers continue to innovate on these platforms, which hold promise for the future.

These other players in the digital ecosystem, such as news aggregators, search engines, and advertising networks, impact newspaper revenues by diminishing the number of users that visit the online and mobile newspaper platforms that actually pay to produce the content at issue and by siphoning off the advertising revenue that content creators might otherwise gain from serving those audiences. Some of the uses of newspaper content certainly qualify as "fair use" under the Copyright Act, while others quite clearly do not. And NAA's members also benefit from both strong copyright protection and the "fair use" defense. Many online platforms, including those operated by newspaper companies, curate the content of others, which, if done with respect for the rights of copyright owners and in compliance with fair use, can be a benefit to readers.

III.
The Careful Balancing of Factors in the Copyright Act's "Fair Use" Defense Should Not Be Altered.

The NAA believes that the current state of the Copyright Act, including the current formulation of fair use, strikes the right balance and should not be changed despite the unquestionably significant technological advances since passage of the 1976 Act. The careful balance embodied in the statute's current fair use factors should be maintained. In particular, any weakening of copyright protection or broadening of fair use would be unacceptable and would undermine the Constitution's encouragement of compensation to creators to generate creativity and productivity.

Significant content industry practices and understandings have built up over decades of experience around the concept of fair use in the Copyright Act. Indeed, the general concept of fair use far predates the Act itself. The judicially created concept of fair use dates back to 1741, when the English Chancery Court decision *Gyles v. Wilcox* created the "Fairness Abridgement" doctrine—a rule allowing abridgements displaying significant labor, originality, and judgment to be found non-infringing. The notion that some uses of an otherwise protected work may be non-infringing was carried to America by the founders and became part of early

American law. And, over time, the fairness abridgment doctrine evolved through United States common law into what we know today as the fair use doctrine.

The modern formulation of fair use and its four-factor test has a long and established history in American society in its own right, tracing back to Justice Story's articulation of the four fair use factors in 1841. Over the following 135 years, the doctrine was clarified and sculpted prior to its codification in Section 107 of the Copyright Act of 1976. The codification respected the common law nature of the doctrine in providing little to no guidance on the factors themselves, appropriately allowing courts to continue to rely on common law sources in this particularly delicate realm of copyright law.

This common law approach to development of the doctrine has been entirely appropriate and should continue. The case-by-case analysis unique to this method of adjudication allows courts to balance the competing individual interests at hand and to capture both the needs and welfare of society as a whole. What has resulted over time is a careful calibration of fair use, designed to maximize social welfare by providing incentives for the creation of original works, but tempering such rights when the exercise would interfere with the rights of others or otherwise burden important social goals such as education and the dissemination of certain factual information. Crucially, this case-by-case adjudication has permitted the courts to take into account a myriad of technological developments in communications and media in assessing fair use. Given the rate of technological change in the digital marketplace, the fundamental wisdom of a common-law fair use doctrine that can adapt to these changes has never been more apparent.

The common law approach also ensures fair use's continued viability as a safety valve to relieve the tensions inherent in both protecting the copyrights of some and the First Amendment rights of others. Absent fair use, there exists a potential conflict between copyrights—which grant to authors an exclusive right to the reproduction, distribution, public performance, public display, and preparation of derivative works of their creations—and First Amendment rights—which grant

to each individual a right to expression free from government interference. The judicial system is the appropriate forum for resolving, developing and balancing these important principles, particularly given the continuously increasing and novel means for expression. In conducting a case-by-case analysis, courts can appropriately consider all relevant interests, changing norms, and other relevant factors when setting the limits of fair use.

IV.

Although Judicial Fair Use Decisions Are Far from Perfect, Congress Should Permit the Common Law to Evolve.

All bodies of common law decisions contain uneven results. Even though NAA does not agree with all fair use decisions and the weight given to specific factors by individual courts, we believe that the courts, rather than Congress, should continue to be the appropriate forum for resolving issues surrounding fair use.

A recent example of a court deftly analyzing and applying the fair use doctrine in novel settings is the Southern District of New York's decision in *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537 (S.D.N.Y. Mar. 21, 2013). *Meltwater* involved a for-profit subscription news reporting service, which used automated computer algorithms to scrape Associated Press articles from online news sources. Meltwater indexed the articles and then delivered verbatim excerpts of the articles to its customers in response to pre-established parameters. The click-through rate—that is, the number of users who would click on a link associated with the snippet provided by Meltwater—was miniscule, indicating that Meltwater's customers viewed its service as a substitute for reading the Associated Press story (and viewing associated advertising that funded that story) on an AP member's website. In conducting its fair use analysis, the court properly determined that Meltwater acted as a substitute news service. Therefore, the court held that Meltwater's automatic capture and republication of segments of news articles, without additional commentary or insight, was not transformative in purpose nor use and did not constitute a fair use. *Id.* at 552. Importantly, the court

also found that AP members did not grant an "implied license" for content to be scraped, copied and reused indiscriminately by merely publishing content on a free website without the use of blocking technology, an essential finding to support content creation of all kinds in the digital ecosystem.

It is not the NAA's position that judicial fair use analysis is always as correct as the result in *Meltwater*, of course. In particular, some courts' recent willingness to give undue weight to the concept of "transformative use" in connection with the first fair-use factor risks eroding fundamental copyright protections.[2] Courts' rapid expansion of and overreliance on the transformative use factor has resulted in its becoming the touchstone of recent fair use cases involving digital technology. The relative weight some courts have been giving to "transformative use," and the surprising types of rather pedestrian uses that have been found to be "transformative," risks allowing that element to subsume the other, equally important, factors, particularly the essential fourth factor requiring an analysis of the second use on the market for the primary use. We hope and expect that this imbalance in applying the fair use factors will be corrected over time.

Although reaching the appropriate fair use balance through common law adjudication takes time, at the end of the day, the NAA believes that the courts will reach the right conclusion and should remain the appropriate forum for developing the fair use doctrine. Fair use involves the balancing of a multitude of considerations recognized as relevant over time in order to best ensure society's progress of the useful arts. Because of the many factors at play and the industry investments and expectations that have built up around them, altering the fair use

[2] *See, e.g., Sofa Entm't, Inc. v. Dodger Prods.*, 709 F.3d 1273 (9th Cir. 2013) (holding that the display, during a live musical, of a seven-second clip from the Ed Sullivan Show was transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (concluding that the republication of Grateful Dead concert posters in a coffee table book was transformative merely because the publisher placed them in chronological order); *Warren Publ'g Co. v. Spurlock*, 645 F. Supp. 2d 402 (E.D. Pa. 2009) (concluding that a book's republication of twenty-four pieces of artwork from magazine covers was transformative).

formulation, or removing control of the doctrine from the judicial sphere, undoubtedly would have unintended consequences that are not readily apparent. The complexity and sensitivity involved in balancing the fundamental interests and rights at issue in fair use copyright determinations counsels in favor of retaining the factors as they are currently codified, and in favor of maintaining reliance on the wisdom and experience of common law interpretations of those factors.

V.
The Way Forward

News publishers recognize that the digital ecosystem contains a wide array of participants. Legal solutions, such as copyright infringement actions, may be required in certain cases where companies are appropriating and monetizing copyrighted or otherwise proprietary content, thus free-riding on newspapers' journalistic efforts without supporting those efforts with appropriate funding. But enforcement is only one part of the long-term future for digital news distribution.

We believe that many participants in the ecosystem—particularly innovative mobile apps and start-up ventures in Silicon Valley and elsewhere—often would prefer to deploy solutions that rely on licensed content rather than rely on questionable business models, scraping in violation of terms of use, or other business behaviors that are neither appropriate nor scalable. Some market leaders, such as Yahoo!, now are building news solutions that rely primarily on licensing models that pay for content and support its continued creation. This focus on properly licensed content provides many benefits for the public, as well as for companies that license content. Licensing news content permits the funding of high-quality original journalism and content production, which is in the long-term interests of all members of the digital marketplace and society at large.

Moreover, the value added by partnerships with news organizations is significant. Licensees and their audiences can be assured that they are obtaining original content, that it has not been modified by some anonymous and unreliable scraper, and that all updates in a fast-breaking area can be delivered to the licensee

and its customers in real time. News publishers are working diligently to make content broadly available for licensing to digital platforms so that these platforms can obtain these benefits for their audiences, and take the responsible step of supporting the journalistic and informational content they distribute. Licensing content supports the continued high-quality local, national and global journalism and professional content on which our democracy depends.

So even if enforcement actions, particularly against companies that appropriate broad swaths of news content to resell it for profit, will be an essential part of correcting marketplace imbalances and inequities, the news industry sees a bright path forward through its own digital platforms, through industry and cross-industry partnerships, and through licensing to other innovative digital platforms.

In all, our mission in the digital world remains consistent with our longstanding mission to audiences around the world. We seek to inform audiences as broadly as possible about the communities in which they live, their nation, and the world. In the digital environment, we will seek the appropriate balance of enforcement, licensing, and deploying our own new platforms to achieve this goal. And continued reliance on steadfast areas of law, such as fair use, will be essential as we continue to move forward into new digital challenges. As the digital sands continue to shift, the content industries need the assurance that legal protections and principles underlying their production of content will be steady and dependable rather than mercurial and unreliable, and that these principles will develop on an organic and rational basis. We urge that the careful balance embodied in copyright law, and in particular, fair use, be maintained.

* * *

We look forward to working with this Subcommittee and the full Judiciary Committee as you move forward with your review of the Copyright Act.

Thank you for the opportunity to testify. I look forward to your questions.

Mr. COBLE. And you also prevailed, Mr. Wimmer. Thank you.

Mr. WIMMER. Well, Mr. Lowery had raised the bar.

Mr. COBLE. And I am not penalizing you, Mr. Jaszi, by association.

Because we try to apply the 5-minute rule to ourselves, so if you could be terse in your response, we would be appreciative. I will start.

Let me start with you, Mr. Wimmer and Mr. Lowery. What—with the focus of transformative uses, what, in your minds, are transformative works for the purpose of fair use and what is not?

Mr. WIMMER. Well, it is a good question and it is one that is very fact based. You know, the transformative works that I have not been—that I really haven't been pleased with are the ones that have sort of allowed secondary uses to simply take copyright owners' work, use it in a very straightforward matter, and claim it is transformative.

The case that really does stick in my craw is the Grateful Dead case in which a publisher was making a coffee-table book about the Grateful Dead, which seems to be sort of a contradiction in terms, and took Grateful Dead posters over the years and put them in chronological order. The court then found that simply putting those posters in chronological order transformed them into something else, which I really do not agree with. The Bloomberg case, however, I think is an interesting—which the professor talked about, is an interesting transformative use case that I do think makes a lot of sense for the reasons that the court announced just yesterday.

Mr. COBLE. Mr. Lowery, do you want to add to that?

Mr. LOWERY. Well, yes. I mean, my example that I showed before is an example which is—some commentators argue is a transformative case, as you can see the reprinting of my lyrics on a site, which has yet to license these lyrics.

And this site, which I am sorry about the lady on there, but every ad I hit had something like this. I don't know if it is because I was at the airport or what. [Laughter.]

Mr. COBLE. No apology necessary.

Mr. LOWERY. Yeah. [Laughter.]

But this is the same instance of my lyrics here. But some commentators have claimed that this is transformative because you can click on these hyperlinks and they might go to another window or a popup or something like that that has maybe an explanation of a word or says, "Oh, he is referencing Baudelaire, right here." Which, by the way, is a perfect example of fair use. I subtly reference Baudelaire here. Well, actually, I mean, that doesn't even involve fair use, because I believe that is in the public domain. So this, to me, is a case of something that is not transformative that people argue is transformative. And so, it competes directly with this, for which I make, well, micro-pennies for each page view. But it is a market; it has been established. There are market-based mechanisms. There are, you know, agencies that license these. There is a free market in the reprinting of song lyrics.

Mr. COBLE. Thank you, Mr. Lowery.

Mr. LOWERY. Thank you.

Mr. COBLE. Professor Jaszi, should a definition of transformative be codified?

Mr. JASZI. I think that——

Mr. COBLE. Mike, please.

Mr. JASZI [continuing]. The—that it is—it would be a great mistake, at this time, to attempt to arrest this judicial development or this process of judicial development that is well underway. We have resisted, over time, codifying in detail other aspects of the fair use doctrine. The results have been enormously productive, in terms of social, cultural, and technological innovation. For the same reason, I think, the reduction to a narrow description of transformativeness would be a great error at this time.

Mr. COBLE. Thank you, sir.

Professor Besek and Ms. Novik, are there recent fair use decisions with which you disagree? And, why?

Ms. BESEK. Well, there a number of recent decisions which I disagree with, but one comes to mind immediately. It was a case that dealt with whether use within a law firm of certain scientific articles was fair use or not. The argument for functional transformation was that the law firm was trying to decide if it needed to submit the articles to the PTO as evidence of prior art. The argument was that, "Well, these articles are published so that people can understand new scientific developments, and the law firm is only using them to see if they are prior art." But they are both reading them. They are both reading them to see what substance is contained in the article and what it says about scientific development. So, I don't think that that is a transformative use. It may be excused on other grounds, but it is not transformative.

Mr. COBLE. And you want to add to that Ms. Novik?

Ms. NOVIK. I am not a lawyer, so of course I am not as familiar with various cases that are coming out. But, I will say that I think transformative is one of those things where you kind of know it when you see it.

And to actually speak to the case that Mr. Wimmer mentioned of the Grateful Dead posters, I actually happened to see an example of this. The coffee-table book presented the posters in thumbnail form and in chronological order in a way that, at least for me as a simple reader, I actually found did add information and did not replace the original. You know, if you want a big poster of the Grateful Dead on the wall, it is not the same thing as looking at a page in a coffee-table book that has seven or eight posters showing you the evolution of the style of the Grateful Dead. So, I actually felt that that was a reasonable judgment.

And, so far at least, I feel that the court has been making—the courts have generally been making interpretations of transformative that, at least for myself as a creator, have made a certain sense.

Mr. COBLE. I thank you for that.

And I plead guilty, I failed to prevail with the red light.

Ms. Chu is recognized for 5 minutes.

Ms. CHU. Thank you, Mr. Chair.

As cochair of the Creative Rights Caucus I am so glad to see that we have individual creators here on today's hearing. And, in particular, I want to welcome back David Lowery to Capitol Hill. He

is an outspoken singer-songwriter who is not afraid to speak his mind on key copyright issues, for the purpose of advocating for creative rights. So, thank you, Mr. Lowery, for speaking out for individual creators who simply want to preserve their right to make a living from their works, but often face many unique challenges.

And, in fact, let me start with a question for you, which is on remixes and illegal lyric Web sites. In your testimony, you seem to indicate that there is a right way to sample music and that a permission-based solution is possible. You offer hip-hop and electronic dance as examples of music that rely on sampling and remixing. So, why is it that some choose not to do it the right way, when our current copyright system has allowed, as you say, "market-based mechanisms and conventions to evolve and facilitate the licensing of sample and remixes?"

And then, let me also ask about lyric Web sites, as a lesser-known kind of copyright infringement. And, you conducted a study to figure out how rampant this type of online infringement is and have even experienced that with your own lyrics. Can you tell us how serious and prevalent of a problem illegal lyric Web sites are?

Mr. LOWERY. Well, I will start with your second question. The lyrics were kind of a—they are an interesting case for the digital age, because really for a lot of artists there was no market for their lyrics because the fixed cost to print a book was too high. So, this is actually a success story for the Internet and music. One of the few ones. It is that there actually is a market for relatively obscure artists to market their, you know, essentially get some small amount of revenue from their lyrics. So—and, generally, the lyric Web sites have generally been licensed. Not all of them, but, looking at the traffic, about half of them or a slight majority of the traffic to these Web sites has been licensed. But, what started to, you know, peak my interests is that there seemed to be backsliding and a push for fair use, based around sort of annotations or meanings of the songs. And these are directly competitive with the, like I said, directly competitive with the market that already exists which has sort of established a market price, has established uses and all of that.

Speaking to EDM and hip-hop, I often hear that there has been some sort of argument that hip-hop is not as innovative as it once was. Because of various rulings and stuff like that, people don't sample quite as much as they did before and stuff like that. All I can say is, I just like to point out that the market, basically, disagrees with that because hip-hop is now more popular than it ever was. So those rulings that may have sort of restricted some uses actually didn't affect the popularity of hip-hop.

And finally, generally, having owned a studio for 20 years, I see that people tend to do what copyright intended when they are not able to obtain a license for a song that they sample. They tend to do what was intended in copyright, they create a new loop, we call them loops, to take the place of the sample. That is, they create a new work, which is something that I believe the founding fathers intended in the copyright clause.

Ms. CHU. Okay. Thank you for that.

Professor Besek, you expressed concerns with how there is the use of fair use in trade promotion authority. And, I understand

that the courts don't always get it right, especially as digital technology continues to facilitate the reproduction and distribution of content in ways not contemplated by Congress. But some people are pushing for required exporting of our common law of fair use. What are the potential consequences of this, if—to the U.S. standards of fair use?

Ms. BESEK. I think the idea of exporting fair use is a really interesting one, although I don't think this is the time to do it. And that is because we have enough uncertainty here in our fair use doctrine that we should not be sending it to other countries. But, the part that I think is especially interesting is we are—I think some people are assuming that fair use, when exported, would be the same. But we have had so many different cases in the United States where the fair use has switched from the district court to the Appellate Court to the Supreme Court. And in another country it could have gone the other way. So, I don't think we can assume that fair use, applied in another country, would look like it does here.

And the other point is that other countries have very different copyright laws, in the sense that they don't have a blanket exception, they have very specific exceptions. And for us to be imposing our fair use exception on them wouldn't sit very well, when they, in fact, cover a lot of the same uses that we do, but just in a different way.

Ms. CHU. Thank you.

I yield back.

Mr. COBLE. The gentlelady's time is expired.

We have time for one more round of questions before we go vote.

The gentleman from Pennsylvania is recognized for 5 minutes.

Mr. MARINO. Thank you, Chairman.

Professor Jaszi, I would like to begin with you, sir. Where do you draw the line on the fair use? Where do you draw the line on copyright using, particularly, lyrics for music or poetry?

Mr. JASZI. I think that line is properly drawn, although it is not easily drawn, between those uses which are genuine value-added uses which do infuse commentary, critique, and other added value into the material used——

Mr. MARINO. So, you——

Mr. JASZI [continuing]. And those——

Mr. MARINO [continuing]. You don't support the fair use, then? You just think that everything is game? Everything is—it can be used by anyone out there?

Mr. JASZI. I don't think that that was my answer.

Mr. MARINO. Okay.

Mr. JASZI. But I was about to say that, by contrast, there may be situations, and perhaps some of the sites to which Mr. Lowery refers are such situations, in which the added value or repurposing is protectoral rather than real.

Mr. MARINO. Okay, now——

Mr. JASZI. It is my——

Mr. MARINO.—I am at limited time here, sir. So, I would love to discuss this all day long with you because you seem—you are certainly aware of it. But I have to move on in my line of questioning.

I hear constantly from musicians, artists, individuals who supply the lyrics, supply the music, who are waiting on tables in restaurants and they see their music, their lyrics on the Internet. They receive nothing for that. Do you have any problem with that, whatsoever?

Mr. JASZI. I don't believe that the kinds of complaints about the use of music in public places, for example to which you refer, are even arguably covered by fair use. There may be enforcement issues concerning how well the music industry does, in fact, impose on restaurants which are subject to——

Mr. MARINO. No, no. You misinterpreted. I am sorry, maybe I wasn't clear enough. I don't mean using the material, playing it. I mean that these artists, these writers who write the lyrics then this music goes—makes a lot of money and then pirates on the line, on the Internet are using this music and selling it——

Mr. JASZI. Again, I don't believe that anyone, certainly not myself, would defend Internet piracy as a form of fair use. It lacks all of the characteristics of transformative use, repurposing and addition of value, which the courts have identified, over the last 20 years, as the earmarks of fair use.

Mr. MARINO. Okay. So, you don't have a problem with the courts then interpreting, as Attorney Wimmer—Wimmer, sorry, stated, that let us let the courts—it is common law, let us let them make that determination?

Mr. JASZI. I am sorry, the——

Mr. MARINO. Do you have any problem with the courts then making that determination on the four points that they usually use to determine whether there is transformation or not?

Mr. JASZI. Oh, I think that is exactly the way we should proceed.

Mr. MARINO. Okay. Let me pose this scenario, and please don't take it personally. You are a lecturer. And what would your position be that, concerning the—wherever you lecture, your employer pays you for that lecturing. So they video your lectures and then next year they say, "We don't need you anymore. We are just going to run your videos and not pay you for them." What is your position on that?

Mr. JASZI. Well, they do that already. And—— [Laughter.]

Mr. JASZI [continuing]. So far I have survived. It is essentially a contractual thing.

Mr. MARINO. But, sir, there is the key. Therein lies the phrase, "You have survived." Many, many of the people in the entertainment industry and the writers, they are not surviving. Fortunately for you, like myself, we have an income that we can live on. But individuals with the talents that I don't have are out there making—writing books and beautiful music, but yet are getting maybe, maybe a few cents, if at all. So you—would you—I would have to think that, based on what you said, you agree with me that they must be compensated.

Mr. JASZI. Oh, I absolutely agree. But the problem here is not a problem with copyright. Just as I am defended in my workplace by my contract, so the essential problem relating to the return from the markets to creative people is a problem of contract rather than copyright.

Mr. MARINO. So, why limit it then, with your position, why limit to copyright? Why not trademark? Why not patents?

Mr. JASZI. Well, we do have a very vital doctrine of fair use in trademark law. And the patent law, although it is different in its nature, far shorter in duration, is also subject to a number of public interest exceptions. So there is——

Mr. MARINO. But it is far more——

Mr. JASZI [continuing]. Nothing unique here.

Mr. MARINO [continuing]. It is—they are far more stringent than we are in the copyright areas.

Mr. JASZI. Well again, I would make a distinction, I think I would probably differ slightly, with respect to trademark. I think trademark law actually is as porous or more porous than copyright law. But as to——

Mr. MARINO. I see my time——

Mr. JASZI [continuing]. Patent, there is a significant——

Mr. MARINO.—I see my time has elapsed and we have to go vote. But, thank you so much, I appreciate the exchange.

Mr. COBLE. I thank the gentleman.

The gentlelady from California asked to be recognized.

Ms. LOFGREN. Thank you, Mr. Chairman.

I would like you to ask unanimous consent to put into the record some fair use principles for user generated video content, submitted by a variety of advocacy groups.

Mr. COBLE. Without objection.

[The information referred to follows:]

Fair Use Principles

for User Generated Video Content

Online video hosting services like YouTube are ushering in a new era of free expression online. By providing a home for "user-generated content" (UGC) on the Internet, these services enable creators to reach a global audience without having to depend on traditional intermediaries like television networks and movie studios. The result has been an explosion of creativity by ordinary people, who have enthusiastically embraced the opportunities created by these new technologies to express themselves in a remarkable variety of ways.

The life blood of much of this new creativity is fair use, the copyright doctrine that permits unauthorized uses of copyrighted material for transformative purposes. Creators naturally quote from and build upon the media that makes up our culture, yielding new works that comment on, parody, satirize, criticize, and pay tribute to the expressive works that have come before. These forms of free expression are among those protected by the fair use doctrine.

New video hosting services can also be abused, however. Copyright owners are legitimately concerned that a substantial number works posted to some UGC video sites are simply unauthorized, verbatim copies of their works. Some of these rightsholders have sued service providers, and many utilize the "notice-and-takedown" provisions of the Digital Millennium Copyright Act (DMCA) to remove videos that they believe are infringing. At the same time, a broad consensus has emerged among major copyright owners that fair use must be accommodated even as steps are taken to address copyright infringement.[1]

Content owners and service providers have indicated their mutual intention to protect and preserve fair use in the UGC context, even as they move forward with efforts to address copyright concerns. The following principles are meant to provide concrete steps that they can and should take to minimize the unnecessary, collateral damage to fair use as they move forward with those efforts.

1. **A Wide Berth for Transformative, Creative Uses**: Copyright owners are within their rights to pursue nontransformative verbatim copying of their copyrighted materials online. However, where copyrighted materials are employed for purposes of comment, criticism, reporting, parody, satire, or scholarship, or as the raw material for other kinds of creative and transformative works, the resulting work will likely fall within the bounds of fair use.

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[1] *See* User Generated Content Principles, Principle #6, <http://ugcprinciples.com>.

But a commitment to accommodating "fair use" alone is not enough. Because the precise contours of the fair use doctrine can be difficult for non-lawyers to discern, creators, service providers, and copyright owners alike will benefit from a more easily understood and objectively ascertainable standard.

Accordingly, content owners should, as a general matter, avoid issuing DMCA or other informal takedown notices for uses of their content that constitute fair uses *or* that are noncommercial, creative, and transformative in nature.[2]

2. **Filters Must Incorporate Protections for Fair Use**. Many service providers are experimenting with automated content identification technologies ("filters") to monitor their systems for potential copyright infringements. If a service provider chooses to implement such filters, the following precautions should be taken to ensure that fair uses are not mistakenly caught in them:

    a. **Three Strikes Before Blocking**: The use of "filtering" technology should not be used to automatically remove, prevent the uploading of, or block access to content unless the filtering mechanism is able to verify that the content has previously been removed pursuant to an undisputed DMCA takedown notice or that there are "three strikes" against it:

    (1) the video track matches the video track of a copyrighted work submitted by a content owner;

    (2) the audio track matches the audio track of that *same* copyrighted work; and

    (3) nearly the entirety (e.g, 90% or more) of the challenged content is comprised of a single copyrighted work (i.e., a "ratio test").

    If filtering technologies are not reliably able to establish these "three strikes," further human review by the content owner should be required before content is taken down or blocked.

    b. **Humans Trump Machines**: Human creators should be afforded the opportunity to dispute the conclusions of automated filters. If a user's video is "matched" by an automatic filter, the user should be promptly notified by the service provider of the consequences of the "match" and given the opportunity to dispute the conclusions of the filtering process. Notice should be provided to the user whether or not the "match" results in the blocking of content (e.g., a parodist may not want the target of the parody receiving a share of revenues generated by it).

    If the user disputes a "match" pursuant to the above dispute mechanism provided by the service provider, the provider should promptly notify the relevant content owner. The service provider may choose to impose a brief "quarantine" period on the content (no more than three business days), in order to afford content owner an opportunity to issue a DMCA takedown notice after human review of the disputed content.

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[2] Viacom's website, for example, states that "regardless of the law of fair use, we have not generally challenged users of Viacom copyrighted material where the use or copy is occasional and is a creative, newsworthy or transformative use of a limited excerpt for noncommercial purposes." <http://www.viacom.com/NEWS/YouTube Litigation/About Fair Use>

c. **Minimization**: In applying automated filtering procedures, service providers should take steps to minimize the impact on other expressive activities related to the blocked content. For example, automated blocks should not result in the removal of other videos posted by the same user (e.g., as a result of account cancellation) or the removal of user comments posted about the video.

3. **DMCA Notices Required for Removals**: The DMCA's "notice-and-takedown" procedures provide two important protections for creators whose noninfringing materials are improperly targeted for removal: (1) the right to sue where the removal is the result of a knowing material misrepresentation[3] and (2) a "counternotice-and-putback" procedure that overrides a takedown notice unless a content owner is willing to file an infringement action in court.[4]

   In order to preserve these protections, service providers should require compliant DMCA takedown notices from content owners before removing content in any manner that does not afford users the ability to contest and override the removal (such as the dispute and notice procedure described in Principle #2b above).

4. **Notice to Users upon DMCA Takedown**: Upon issuance of any DMCA takedown notice by a content owner, the service provider should provide prompt notice to the user who posted the allegedly infringing material. Such notices should include (1) an entire copy of the takedown notice, (2) information concerning the user's right to issue a DMCA counter-notice and the provider's procedures for receiving such notices, and (3) information about how to contact the content owner directly in order to request a reconsideration of the takedown notice (see Principle #5 below).

   Where feasible, this information should be made available to the posting user on the page where the content formerly appeared, as well as in private communications (such as email).

5. **Informal "Dolphin Hotline"**: Every system makes mistakes, and when fair use "dolphins" are caught in a net intended for infringing "tuna," an escape mechanism must be available to them. Accordingly, content owners should create a mechanism by which the user who posted the allegedly infringing content can easily and informally request reconsideration of the content owner's decision to issue a DMCA takedown notice and explain why the user believes the takedown was improper.

   This "dolphin hotline" should include a website that provides information about how to request reconsideration, and a dedicated email address to which requests for reconsideration can be sent.[5] Service providers should ensure that users are informed of these mechanisms for reconsideration, both on the site where the removed material previously appeared, as well as in the notice described in Principle #4 above.

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[3] 17 U.S.C. § 512(f).
[4] 17 U.S.C. § 512(g).
[5] Viacom, for example, has established a dedicated email address for this purpose: counternotices@viacom.com.

Upon receiving an informal request for reconsideration of a particular takedown notice, the content owner should evaluate the request promptly, generally within three (3) business days, and retract the notice where it was issued in error.

6. **Mandatory Reinstatement upon Counter-notice or Retraction**: Service providers should establish and follow the formal "counternotice-and-putback" process contemplated by the DMCA. Service providers also should provide users with a streamlined mechanism to reinstate content in cases when a takedown notice has been retracted by the content owner.

These Principles endorsed by:

Electronic Frontier Foundation

Center for Social Media, School of Communications, American University

Program on Information Justice and Intellectual Property, Washington College of Law, American University

Public Knowledge

Berkman Center for Internet and Society at Harvard Law School

ACLU of Northern California

Mr. COBLE. Ladies and gentlemen, the Committee will stand in recess for this series of votes. But Members should be advised that we will resume the hearing immediately after the votes. We will continue until it is time for Judiciary to manage its portion of H.R. 7, on the House floor.

So, we will stand in recess until we come back.

[Recess.]

Mr. COBLE. And now we will continue to hear from the gentleman from Pennsylvania until we wait for the others to show up.

Mister—the gentleman from Pennsylvania?

Mr. MARINO. An innocuous question for the lawyers and we can start with Mr. Wimmer. If you have followed the cases that have come down through the Federal courts, following the law, the common law that has been established, and I am going to ask the others to respond to it too, were you able to see that there is a relative consistency in the courts' opinions?

Mr. WIMMER. You know, it is an interesting question. I think there was a substantial amount of consistency until about the late 90's, when the transformative use concept really started to ascend. And now, when you look at cases, like the *Kelly v. Arriba Soft Case*, and Perfect 10, and even through Google Books, it almost seems as though the transformative use piece has really unsettled the marketplace. But in terms of the rest of the factors, it has been pretty consistent, I think.

Mr. MARINO. Professor Besek and then Professor Jaszi?

Ms. BESEK. I think that where you start finding inconsistencies is when there is a genuinely new use. So, for example, you see courts really split on issues. And it is hard to predict whether a new use will be fair or not. I mentioned earlier that, in some of these cases like Sony, the district court goes one way, the Appellate Court goes another way, the Supreme Court goes another way. And then, sometimes, the decision that is originally written, turns out to be the dissent. So that's where, I think, the principal areas of difference between the circuits and the courts generally come up.

Mr. MARINO. Professor?

Mr. JASZI. I actually, I think, have a somewhat different take on this. I think that there is a lot more consistency in the current pattern of decisions, what I referred to in my remarks as, "the emerging unified field theory of transformative fair use," then I would actually have expected for an approach to legal analysis that really is only 20 years old. And, in particular, now we are seeing a convergence of the approaches of the two circuits that have done the most decision-making in this area, that is the Second and the Ninth, which for a while we believed might be on different tracks. But, which the last couple of significant opinions suggest are probably not. Now, one can agree or disagree with that emerging unified field theory. But, I think it is remarkably consistent, even though, as Professor Besek states, sometimes it isn't clear how it applies to the whatever the new thing is.

Mr. MARINO. As a prosecutor, I am used to the criminal statutes and it is fairly consistent. It is—I have done some civil work in the banking industry, and I see how it does vary from, you know, codified legislative law, whether it is at the State or at the Federal level.

So, I yield back. Thank you.

Mr. COBLE. I thank the gentleman.

And, while we are waiting, I recognize the distinguished gentleman from Virginia, the Chairman of the full Committee.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Ms. Novik, and I direct this to Mr. Lowery too on this issue of remixing. I, you know, I see that a lot. I see it is very popular with people. And I understand it and I certainly understand the attraction of taking somebody's work and altering it and doing new things that can be very creative. But, is there a way to—you know, it troubles me that if they take that, remix it and are able to exploit it and offer it and actually copyright their new work themselves, that the original artist, whose work has been altered, doesn't benefit from that. I wonder if you have any thoughts on that. And whether, if the standard is that you are allowed to do this, if you have to get a license if you are deriving a certain amount of commercial benefit from it, as opposed to just doing it for fun and to share with your friends, kind of thing.

Ms. NOVIK. Well, obviously I have spoken a great deal about noncommercial transformative work, where, you know, it is really—I mean, I talk to a lot of 16-year-old kids who are writing their own Harry Potter story, for instance, where they get to go to Hogwarts. And that is not hugely transformative. They frequently participate in all the same events of the book. But, at the same time, it is noncommercial. And so, I think the four points of fair use balance each other out.

When it comes to commercial use, again, I feel that, you know, there are cases like——

Mr. GOODLATTE. You do agree that, if they did that and they hit on something really cool, that they would have to get a license from J.K. Rowling to do that?

Ms. NOVIK. I mean, I think that, you know, I think that obviously, depending on what they were doing, a court would have to look at it. I am sure if it were not and decide whether it were fair use. And part of the decision would be, how transformative it was. And, I think that most of us, most remix artists appreciate that and understand that and don't actually want to exploit work commercially when—and I am speaking as a remix artist, somebody who is really trying to create new forums.

Mr. GOODLATTE. Sure. Let me ask Mr. Lowery what he thinks about my question about whether, if you cross a certain threshold in terms of commercial gain, that the rules should be different.

Mr. LOWERY. Often, I find that, although these are noncommercial works by those who remix it, they are distributed on commercial platforms. Like, for instance, I went to, I think it is fanfiction.com, to look at that for a minute. And, right away, there is advertising on that site. The problem is not with so much with, you know, those who create the remixes. It is that, the problem is that then there are these large intermediaries who then disseminate this work, who do make a profit. And they often encourage their users to make these remixes. Which may be fair use or may not be fair use, but they may be fair use when they are noncommercial. But, they become commercial, they become vacuumed

up, you know, sort of into the commercial world and then monetized.

I have some examples on my laptop I can send to your office, if you like.

Mr. GOODLATTE. Thank you.

Mr. LOWERY. Thanks for the question though.

Mr. GOODLATTE. I am going to——

Ms. NOVIK. I would say——

Mr. GOODLATTE. I am going to——

Ms. NOVIK [continuing]. If I just may add to that though, that that doesn't actually change what the artist is doing. And the——

Mr. LOWERY. But they can still do it. It is just they don't put it onto that Web site. They could still do that. It doesn't infringe any rights of the remixer to continue to make that work. It is just——

Ms. NOVIK. It is true——

Mr. GOODLATTE. It is a good point for additional thought. But, I need to ask another question before my time runs out.

So, I am going to ask all of you, so you are going to get another shot at answering a question of mine, anyway. Professor Jaszi states that fair use is working. So I am going to ask the rest of you if you believe that fair use is working for everyone or only for specific groups of users. And then we will give you the last opportunity to rebut what your fellow panelists have to say. And we will start with Professor Besek.

Ms. BESEK. I think that fair use is working for some users, but it is not working for all users, and it is certainly not working for all right holders. One of the problems is these recent cases that deal with one party exploiting lots and lots of works at the same time are distorting fair use. The end that they want to serve, for example in the indexing of books or whatever, is truly a good one. I mean, you see these cases and you think, "What a great public benefit." But, the question is how you get there, what is the appropriate means to that end. And I think by trying to shoehorn it into fair use, we are doing a disservice to the Copyright Act. And it would be better if we could find another way to do that.

Mr. GOODLATTE. All right. Let me jump ahead to Mr. Wimmer, since I haven't asked him anything yet.

Mr. WIMMER. Thank you. I think it is generally working. You know, we look at fair use both from the offensive side and the defensive side. Newspapers and other news organizations have to employ fair use, in terms of reporting on other people's work and curating other people's content. At the same time, we try to not have fair use become an impediment when we have commercial appropriation of mass amounts of our content. So, our view is that it is generally working. This trend toward transformative use is concerning, but it has really been a fairly short-term trend in the overall path of the common law. So, we think the courts will eventually get it right.

Mr. GOODLATTE. Ms. Novik?

Ms. NOVIK. I do believe that fair use is generally working. I do, obviously, think that sometimes individual artists, especially those working on noncommercial works, are at a substantial disadvantage when they are faced with a large media conglomerate or auto-

mated systems that essentially prevent them from exercising their fair use rights.

Mr. GOODLATTE. Mr. Lowery?

Mr. LOWERY. I generally believe for music it is working. I don't want to get too deep into it, but I think it is the photographers who have probably been abused because you see plenty of—I mean, they are just—their business model has been really kind of wrecked by what I don't think was the intent of fair use. But, I am not an expert on that. So——

Mr. GOODLATTE. Well, on that point, if I might, Mr. Chairman, do you think that Congress should set distinctions based on the technology area between music, photography, books?

Mr. LOWERY. The fair use does manifest itself in different ways. I can't really say that—I feel like a little out of my league on that legally what they should—I would be glad to think about that and give you a more coherent answer.

Mr. GOODLATTE. Yeah. We would welcome anything you want——

Mr. LOWERY. Yes.

Mr. GOODLATTE [continuing]. Any of you, want to submit——

Mr. LOWERY. Okay.

Mr. GOODLATTE [continuing]. Any of these questions——

Mr. LOWERY. Thank you.

Mr. GOODLATTE [continuing]. In writing. And, Professor Jaszi, I promised you, you would get a final word on your inflammatory statement.

Mr. COBLE. And, Professor, if you could accelerate it because we are on a red, red light here. [Laughter.]

Mr. JASZI. I certainly agree that there are some groups of creators who are struggling in the current marketplace. But, I don't think that that struggle is really attributable to fair use, as it is instead to other conditions.

I actually want to disagree, mildly, with Professor Besek about her example of a situation in which fair use isn't working. Because I believe, in fact, that the recent mass digitization cases Author's Guild against HathiTrust and Author Guild against Google, in the Southern District of New York, are really excellent examples of the doctrine fulfilling its function. In those cases, material is being dramatically repurposed for non-superseding uses. The public interest, as the judges in both cases have acknowledged, in those uses going forward, is enormous. No existing licensing structures are available to enable those uses. So far from thinking about mass digitization and all the benefits that it has brought to various communities, including the print disabled for whom it has been my privilege to work on these issues, I must say that I would count that as a story of success rather than a story of failure.

Mr. GOODLATTE. Thank you.

Mr. Chairman, I apologize for the extra time, but I thank you for it.

Mr. COBLE. You are indeed welcome.

The gentleman from Florida, Mr. Deutch?

Mr. DEUTCH. Thank you very much, Mr. Chairman.

I would like to thank the witnesses for coming and for being so indulgent to our schedule. Thanks for the testimony. I enjoyed

reading it. I am sorry that I haven't been able to be here for all of your presentations.

I already—I appreciate the ability to hear the lively and ongoing debate about what constitutes fair use. I was able to hear some of that. And I understood that it was a frequently litigated area of copyright law. But it has been especially interesting for me to hear the witnesses and in reading their testimony just a very small sampling of the ongoing issues of the development of the law in this field.

And what hearing all of this has reminded me is how critical the entire previous body of law is to our current understanding of fair use. It is easy to forget that, by themselves, the words "fair use," in this context, really have no meaning. Instead, fair use is defined only by the hundred-plus years of precedent in the United States. And, as someone who has followed the ongoing negotiations for trade deals with interest and with some concern, I am troubled at the suggestions that we just simply insert the words "fair use" into our IP section.

Now, I support continuing to not only allow, but encourage a country to develop fair-use-style exceptions, as our previous trade deals have. But, what I don't fully understand is what the words "fair use" would mean, when taken away from the precedents that define them. And, because you can't build that precedent into a trade agreement or export it, it makes it exceedingly difficult to understand how this would work. And, while our trade agreements allow flexibility for any countries that so desires to adopt fair-use-style exceptions, mandating it would just provide a loophole incapable of definition through its countries who, frankly, often care little about IP, can excuse the lack of protection for authors. Fair use has no definition at all, in the context of a trade agreement.

So, in doing just a bit of research for the hearing, I acquired some background materials of fair use precedent. What I got was a multivolume set of books. [Laughter.]

This being just one. And I have only read a few chapters of this one, to be perfectly honest with you. This is the first volume. It is a 700-page, condensed—— [Laughter.]

Mr. DEUTCH [continuing]. It is a 700-page, condensed version of our fair use law. Now, clearly, we are not seriously considering including a 700-page footnote in our trade agreements. Obviously, that doesn't work. Or, in the reverse, we are not going to blindly assume that putting the words "fair use" or the four statutory factors into a trade agreement would result in the inclusion of the decades of precedent represented by the piles of books that are now sitting on my desk.

Mr. Besek—I am sorry, Professor Besek, you discuss cases in which our interpretations of fair use can threaten to move the U.S. out of compliance with our international treaty obligations. So, even in the U.S. fair use law, which is quite actually fluid and vague on its own, if you erase all the precedent behind fair use and started completely from scratch in this country, would you see the fair use defined by future courts in the same way that it is now?

[No response.]

Mr. DEUTCH. Well, let me just go on. So, going further though, if you inserted section 107 into another country's legal system,

without including any of our defining precedent, what is the likelihood that you would come up with remotely similar meanings as other governments try to flush out what this means?

Ms. BESEK. It is certainly possible that there would be some aspects of it that would be similar. But, they have such different cultural and other factors, I don't think there is any reason to think that it would track our fair use law. For one thing, one of the aspects of fair use is that it attempts to accommodate First Amendment concerns and those same concerns don't necessarily apply in other countries. But, they have just come from a different tradition, where they have had more explicit, separate exceptions which—and not this general kind of catch-all exception. And so, I don't know that they would necessarily treat it the same way we did.

Mr. DEUTCH. And safe to say their explicit exceptions may fill volumes of their own, in those countries.

Ms. BESEK. Probably, that is true. I mean, they tend to have more exceptions and more very specific exceptions. But often they track the kinds of things that fair use would embrace.

Mr. DEUTCH. But it wouldn't mean, in another country, it wouldn't mean the same thing. It could easily—the concern, obviously, is that it then becomes a loophole to completely overturn what is a really sensitive balance that we have in this country, based on volumes and volumes of precedent. There is an important balance to be struck in our trade deals. And the words "fair use" themselves, I think, don't bring us anything.

Mr. Wimmer, I wonder if you would agree with that.

Mr. WIMMER. I do agree with it. I am not a trade expert, so I might be getting a little bit out of my depth here. But I have done legal work in about 20 different countries. And there are common law legal systems and there are civil law legal systems. We have a common law legal system, and that is the way fair use has grown up here. That is true for England, true for Canada, true for Australia. You go to all of the civil law legal systems, where judges don't have the same tradition of working to create precedent and expand precedent over time, and they really can't cope in the same way with these types of common law doctrines in a civil law society as we can. It is hard for me to see it working, truthfully.

Mr. DEUTCH. Thanks, Mr. Wimmer, you may not be a trade expert, but your insight, I think, is right on point and was helpful.

And I appreciate the Chairman. And I yield back.

Mr. COBLE. I thank the gentleman.

I am told the gentleman from Missouri has no questions.

I want to thank all the witnesses and those in audience, because your presence here indicates more than a casual passing interest in this very important issue.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

The hearing is adjourned.

[Whereupon, at 3:34 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Public Knowledge

Published on *Public Knowledge* (http://www.publicknowledge.org)

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Copyright Week Day 5: Fair Use, An Area of Copyright Law That Has Actually Kept Up with the Times

Copyright Week Day 5: Fair Use, An Area of Copyright Law That Has Actually Kept Up with the Times [1]

By John Bergmayer [2] | January 17, 2014

Follow @bergmayer [3]

It's Copyright Week! From today through Saturday, a number of groups around the Web will be exchanging ideas, information, and actions about how to fix copyright law for the better. Each day will be devoted to a different aspect of copyright law. For more on Copyright Week, see here [4].

Today's focus is on how copyright law balances the rights of someone who wrote a copyrighted work and someone who bought a copy of it. This post looks at how fair use, while it can be messy, ends up protecting uses that can be hard to predict.

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[5]

Fair use is many things. Some people think of it as an escape valve--a means for protected uses of copyrighted works that are important for free speech and critical discourse. But that metaphor can minimize its importance, because fair uses of copyright content are not rare, exceptional cases. They happen all the time. When writers quote each other, they depend on fair use. When video clips get shown on newscasts around the world, that's fair use. It would harm free speech and the ability to engage with the culture around us if every snippet of a copyrighted work (which includes every video that

someone records and every word that someone writes) had to be licensed and paid for.

But even recognizing the prevalence of this kind of fair use does not show how important it is. The modern digital economy could not function without fair use. Computers are copying machines--any time you move data over a network, you create a new copy. While many of these copies are covered by limitations to copyright besides fair use, without fair use as a backstop, there could be arguments about whether simply operating modern computing technology opens you up to charges of copyright infringement.

Fair use shows off both the good sides and the bad sides of the "common law" approach. In the US, and many other countries with historical ties to Great Britain, law tends to develop on a case by case basis. Of course, we have legislatures that pass statutes, but in common law countries, courts are more likely to apply broad principles to cases before them, or interpret statutes in particular ways, and then follow the same reasoning in the future. That's why the statute that defines fair use doesn't actually specify what uses are fair. Instead, it simply tells judges to weigh various factors:

> (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.

This is rather vague, by itself, but over time a body of case law has developed that offers a lot more guidance, as judges look at the particular facts before them.

By contrast, in "civil law" countries, there's a greater chance that a legislature has written a more detailed statute that tries to cover more situations, and has even offered guidance to a judge on how to interpret a statute. In addition, in civil law countries, courts aren't bound to follow precedent--judges are supposed to just look at the statutes. If the law is clear enough, the reasoning is, different judges will always interpret it the same way, anyway.

The common law system can be more flexible and nuanced than legal systems that do not operate under principles of case-by-case adjudication and precedent. It is easier for a court to come to a just result given the case before it than for a legislature to try to write detailed rules in advance that cover every conceivable situation. The system can also be more predictable--if a particular dispute lines up with precedent, you can more easily determine how a court will rule. But when a case does not line up with a precedent, and absent the more detailed statutes you tend to find in civil law countries, it can be difficult to know whether a given action is lawful or not. This is where we are with fair use. There have been enough fair use decisions that some things are clear. But new technology is developing at a breakneck speed and new uses don't always exactly match older uses in every detail.

Because the way people use copyrighted works has been changing, lawyers can argue and re-argue about whether things like home recording are still fair when done with new technology. [5] That's why astute observers like Lawrence Lessig have said [6] that "fair use in America simply means the right to hire a lawyer." It is true that litigation takes a long time and is very expensive, which means that guidance from precedent is not always forthcoming. Many cases settle before going to trial, as settlements can be faster and cheaper for both parties involved. (Of course, this is true of a number of areas of the law.)

But I think that's a bit pessimistic [7]. While some people wish that fair use was more civil law-like--with detailed lists of what uses, and what percentages of a work are allowed--there are always going to be situations that don't quite match up with any list of safe harbors. Another downside to this approach is that if you define a "safe harbor" of allowed uses some could argue the *only* allowed uses are those in the same harbor. Fair use, by contrast, is flexible enough to accomodate unforeseen circumstances. (As I've argued elsewhere [8], fair use is not the only doctrine that allows for non-infringing uses of copyrighted works, and it would be good if lawyers and judges gave more weight to these other doctrines, such as "de minimis" copying.) "Safe harbor" approaches need to be approached with the understanding that they describe a minimum amount of conduct that is lawful, with the ability to fall back to a more general test like fair use for cases that fall outside the safe harbors.

The Google Books decision [9] is a good illustration of how fair use works. That decision held that it's legal for Google to make internal copies of books for its book search engine (just as it makes copies of websites for its web search engine). However, because book scanning on this scale is so new, there was not much precedent to guide the court. The judge had to rely on analogical reasoning, his good sense, and the fundamental purpose of copyright law when weighing the fair use factors. The downside to this is that the case took years to come to a decision (and it could still be overturned on appeal, however unlikely that may be). Legal reforms that sped up this process would be welcome. But the positives outweigh this. Because the Google Books case will serve as a precedent, other book-scanning projects can follow it. Further, it's unlikely that some kind of "safe harbor" system would have foreseen the usefulness of a large-scale book search engine.

In the end, the case-by-case approach works, in practice, as a set of safe harbors that can help the users of copyrighted works stay within the law. Fair use is perfectly suited to this common law approach, as it's a flexible doctrine that can grow to accommodate new technologies and new kinds of uses. While fair use can seem uncertain at times, it's a process that does create certainty. In addition to the Google Books decision, 2013 brought a number of fair use victories, [10] each of which serves as precedent for the future, providing more certainly, and continuing the development of the doctrine of fair use. Fair use may be messy and confusing, but it works.

- g+1
- Tweet 0 [11]
- submit
- Share / Email [12]

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[11] http://twitter.com/share?
[12] http://www.addtoany.com/share_save

Copyright Week: Fair Use Is Not An 'Exception' But The Rule

Update: *This post was modified to better explain the role of the three-steps test in both Berne and the TPP.*

Today is day five of Copyright Week, where the focus is on fair use. Earlier today we already had Michael Petricone's excellent post about the innovations and consumer benefits unleashed by the Betamax ruling, which hinged on the concept of fair use. Over at Wired, Automattic's (the makers of WordPress) general counsel, Paul Sieminski, also has a great post talking about how much innovation is enabled by fair use and why companies should be fighting more to support their users' fair use rights. Meanwhile, over at Public Knowledge, there's a good discussion of how the flexibility of fair use is important in enabling it to respond to new innovations. These are all great ways of looking at the issue.

I wanted to focus on a different aspect of fair use, however, and that's the unfortunate fact that it is often described (especially in official political discussions) as an "exception or limitation" to copyright. That implies, incorrectly, that copyright is "the normal state" and that fair use is something that can only be used in "exceptional" cases, where a political body has decided to carve out some small breathing space. But that's wrong. Fair use is about the rights of the public to speak, to make use of content, to comment, to criticize and to express themselves.

These are fundamental rights of the public -- not "exceptions or limitations."

It is, instead, copyright that has always been an "exception and limitation" on the rights to free expression. We can (and should) discuss and debate the proper levels of copyright and its limitations on expression. But to frame things as if fair use is a minor "exception" is a subtle but dangerous twist of language that copyright maximalists have been employing for far too long.

And it's a public right that is **under threat**. While negotiators were (after decades of negotiating) able to work out a WIPO Treaty for the Blind last year, copyright maximalists fought hard against it, because they were convinced that any attempt to expand what they called "limitations and exceptions" would set a dangerous precedent. And, if you look at things like the Trans Pacific Partnership (TPP agreement), the USTR tried to take credit for it being the first time that it was willing to include "limitations and exceptions" in a trade agreement. That, on its face, is true (and it's better than previous agreements, like ACTA, which ignored fair use and the public's rights entirely), but the wording does not in fact establish any limitations or exceptions: it sets out parameters that curb what limitations and exceptions countries are allowed to offer. The wording is based on a three-factor standard that is actually *more restrictive* than current fair use laws in the US. The standard is clearly modelled after the Berne convention, to which the US is already a signatory despite several differences, such as fair use, between US copyright law and that treaty's requirements. The TPP's "exceptions" would only serve to solidify these inflexible fair use requirements that the US currently, mercifully, defies.

Pay close attention to this issue as we go through the copyright reform process. Fair use isn't just some limitation or exception. It's not just – as some have said – a "valve" on copyright restricting speech. It is, instead, core to the very concept of free speech. It is the public's rights. Don't let the language twisters try to frame the debate as one about "limitations and exceptions" because if that's the debate, we've already lost. Fair use doesn't just enable all kinds of important innovations – including much of the internet you use and love today. It represents a fundamental right of you to express yourself, and that right must not be taken away.

CENTER FOR DEMOCRACY & TECHNOLOGY

Published on Center for Democracy & Technology (https://www.cdt.org)

Copyright Week: Fair Use and Innovation

by Andrew McDiarmid [1]
January 17, 2014

In the week leading up to Saturday's anniversary of the SOPA blackout [2], EFF is leading "Copyright Week." [3] Every day this week, participating organizations will be highlighting a different principle to guide the development of balanced, innovation- and free expression–friendly copyright policy.

Today is all about fair use. Given its role in remix, mashups, parody, and lots of what's funny on the Internet, fair use is always a favorite topic. It's also famously hard to pin down, so it makes for some of the most interesting debates on copyright. But beyond its role in allowing space for free expression, criticism, and the creation of new works that build on others, fair use plays a critical role in driving technological innovation.

Examples aren't hard to come by. Thirty years ago this week, it was fair use that kept VCRs on the market [4]. Near the turn of the century, it played a role in a court's assessment [5] of early mp3 players. Fair use has allowed search engines [6] to work without having to license each and every image they index, and most recently, Google Books was found to be protected by fair use [7].

These cases highlight just how important fair use is to technological innovation. (You can find more cases in the Computer & Communications Industry Association's report, "Fair Use in the U.S. Economy." [8]) Without the doctrine's flexible approach that allows for totally unexpected uses of copyrighted works, many of these products might never have gotten off the ground.

Understanding this flexibility and working to see that it is maintained will be essential as copyright reform discussions get underway. In addition to the process underway in the US Congress (see CDT's testimony [9] from last November) and the upcoming multistakeholder meetings at the US Department of Commerce (see our comments [10]), the European Union is currently conducting a public consultation on copyright. The questionnaire [11] focuses in large part on the role of "limitations & exceptions" to copyright, of which fair use is a prime example. The importance of flexible exceptions like fair use to technological innovation will be a central theme in the comments we plan to submit.

Email

fair use copyright week

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[11] http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

3D Printers Will Soon Change The World, If It's Not Strangled In A Lawyered Up World

By Gary Shapiro

One product which will soon change the world is 3D printing. These devices let consumers print three-dimensional objects at home, from phone cases, jewelry, ceramics and home décor to board game pieces, tools, and even food. The 2014 International CES® was the first ever to host a 3D printing TechZone, and it had to be expanded three times to accommodate all the new companies in the market. As 3D printers evolve with new inputs, features and lower prices, they'll change the consumer landscape much like MP3 players transformed the music industry at the turn of this century.

Yet along with this innovation, 3D printing is facing legal challenges. Established players in manufacturing are going after user-generated 3D file sharing sites, arguing that their intellectual property is ripped off by home printers. But in many cases, home 3D printer aficionados are building out and improving upon original designs. Our copyright laws are unclear about the degree to which 3D designs and software are protectable, and what constitutes infringement. Looking ahead, it is important for the courts and the Congress to allow in-home manufacturing to blossom and make its full potential contribution to our economy. Imagine a world where most products are made locally, and aspiring jewelers, cooks, inventors and designers can create, experiment and create new markets with a simple investment from their home.

The U.S. Constitution states that our patent and copyright law should "promote the Progress of Science and useful Arts." Two centuries later, the debate about what to promote and what to protect through copyright law continues. Recently, the House Judiciary Committee began an overdue examination into whether the copyright laws need updating as it considered the legality of uploading copyrighted files to peer-to-peer networks. But politicians are overrun by armies of lobbyists and their PACs, all trying to strengthen rather than loosen the copyright monopoly Congress bestows. Thankfully, technology moves quicker than Congress and such innovations as the VCR and personal video recorder survived misguided legislative murder attempts.

Our challenge now is to make sure the 3D printing ecosystem does not die death from a thousand cuts.

Thingiverse, a website that allows people to post and share designs for 3D printers, has been fielding Digital Millennium Copyright Act takedown notices since at least 2011. Last year, the company that owns the rights to the *Tintin* comics issued a takedown notice to Thingiverse over a toy design uploaded by one of the site's users. The original design – for a simple model based on a rocket from the comic – was removed, but another popped up in its place.

The *Tintin* rocket is a great, small-scale example of the potential for collaboration and innovation in 3D printing. Though the original design was removed from Thingiverse, another user posted a similar design for a Christmas tree ornament based on the rocket. And someone else modified the

idea so it could be illuminated, and then redesigned it again so other users could personalize the ornament with their names or other text. Out of just one idea, at least three new products were created, each improving on the last and providing a product that wouldn't have otherwise been available. Innovation in 3D printing isn't just about replicating things. It's about taking an idea and modifying it to make something even better.

The same example illustrates just how inadequate our copyright system can be at protecting intellectual property, while fostering an environment that allows innovation to thrive in the wake of new technologies. Rights holders need to move away from suing or threatening to sue every potential copyright violator, and embrace a system that makes it easy and affordable for at-home 3D printers to access legal and licensed designs. iTunes' licensing model is a good example. Just as the recording industry has adapted to digital music downloads and found revenue in other areas like touring and merchandise, the creative content and manufacturing industries will have to adapt to 3D printing. And we'll all be better off for it, with more access to unique, innovative products and services.

It took more than 20 years from the Copyright Act of 1976 to the establishment of "safe harbors" with the passage of the Digital Millennium Copyright Act (DMCA) of 1998. Yet the Internet now puts the world within our reach in ways no one imagined 40 years ago, that were just glimmers of possibility at the turn of this century when DMCA was passed. We can't let another 20 years go by before we enact appropriate policies that work in today's constantly changing Internet era.

Gary Shapiro is president and CEO of the Consumer Electronics Association (CEA)®, the U.S. trade association representing more than 2,000 consumer electronics companies, and author of the New York Times *best-selling books,* Ninja Innovation: The Ten Killer Strategies of the World's Most Successful Businesses and The Comeback: How Innovation Will Restore the American Dream. *His views are his own. Connect with him on Twitter: @GaryShapiro.*

Copyright Week: The Globalization of Fair Use

Posted by Sean Flynn on January 16, 2014

Much of what we hear about the globalization of copyright law around the world does not favor users. The dominant trend of lengthening terms, increasing criminalization and "deterrent" penalties and expanding third party liability has the intent and effect of privatizing more and more of the public domain. But one trend moves in the opposite the direction – the recent shift toward a global expansion of fair use.

The term "fair use" is often used to refer the specific limitation and exception to copyright contained in the US Copyright Act, 17 U.S.C. § 107. But it has also come to have a broader meaning – as any flexible limitation and exception that turns on a number of balancing factors surrounding the fairness of a particular unauthorized use of copyrighted content rather than compliance with a closed list of specific authorized uses contained in a statute. Such flexible user right clauses have distinct advantages in a rapidly changing society – they allow implementing authorities and judges to find particular unauthorized uses to be lawful even if they were not contemplated and specifically listed at the time one's copyright law was enacted.

Despite the strong policy reasons for enacting flexible fair use clauses in all copyright laws, many laws do not have such clauses. One of the main objections has been a belief that fair use clauses are not well adapted to civil law legal systems.

The Global Network on Copyright Users' Rights was formed to generate policy options and expert guidance on the protection of users' rights through flexible limitations and exceptions. This objective was outlined in the Washington Declaration on Intellectual Property and the Public Interest, drafted at the inaugural Global Congress on Intellectual Property and the Public Interest at American University Washington College of Law in August 2011. The Washington Declaration called for "discussion of employing 'open-ended' limitations in national copyright legislation, in addition to specific exceptions." The Users' Rights Network was created to answer that call.

The Network has published a set of documents drafted through a year-long consultative process with a broad group of copyright scholars and experts from across the spectrum of legal systems. Most importantly, the network crafted a Model Flexible Copyright Exception designed to be adaptable in general form to most copyright laws – including those in common and civil law systems.

The model has two main parts. The core of the proposal is a general balancing test that could be added as a general clause to any existing list of limitations and exceptions. That provision states:

In addition to uses specifically authorized by law, any use that promotes general economic, social and cultural objectives is not infringing if its character and extent is appropriate to its purposes and does not unduly prejudice the legitimate interests of the copyright owner, taking account of the legitimate interests of creators, users, third parties and the public.

The second part of the model provides a more specific set of balancing factors that could be adopted in addition to the general clause to give additional guidance in its interpretation and implementation.

The Network also created a number of explanatory and reference materials. Appendix I identifies a long list of Presumptively Lawful Uses created through a survey of limitations and exceptions included in many copyright laws around the world. It is noteworthy that no copyright law with a closed list of limitations and exceptions that we have reviewed include protection for every one of the purposes listed – an argument in itself for including a flexible exception in every copyright law. This list could be used to guide the interpretation of the general clause — indicating to users as well as courts and enforcement officials the kinds of uses that should be considered presumptively lawful under the general clause.

Appendix II provides examples of *flexible* exceptions from existing copyright laws or proposals from around the world. These examples of general clauses that provide flexibility in limitations and exceptions influenced the Network in its work. The examples may give policy-makers another starting point for considering the crafting of their own flexible exception clause.

Appendix III provides some short responses to frequently asked questions about flexible copyright exceptions.

The network has also engaged in subsequent research, analysis and technical assistance — some of the products of which are posted in the Additional Resources section below the Primary Documents.

The resources from the Global Expert Network can be found at http://infojustice.org/flexible-use

How the Google Books (Fair Use) Case Helped Me Find My Passion

Posted on January 17, 2014 by Carrie Russell — No Comments ↓

To celebrate Copyright Week, the American Library Association will join a number of organizations to exchange ideas, information and actions about copyright reform. From Monday, January 13th until Saturday, January 18th, copyright experts will explore different aspects of copyright law on the District Dispatch.

Guest blogger: Gretchen McCord

I am a copyright and privacy law attorney. I used to be a librarian. While working at a Big Law Firm, I was elected President of the Texas Library Association. For my theme, I chose: *Libraries: Igniting the Passion.* I was enjoying my legal practice, but libraries remained my passion, I told everyone. I'm not sure anyone ever asked me why. The choir doesn't often question the preacher. Nor did I.

After too many years, I finally left the firm and established my own practice. I now practice the type of law that I want to practice, for the clients I want to serve, and, generally speaking, under the conditions of my choosing. And yet, still I said, "I love my practice, but it is not my passion."

Then the biggest copyright fair use decision in two decades came down, and I was forced to ask myself new questions, and I found my passion for copyright.

Law is bargaining

We often talk about law in terms of "bargains" – each party gives a little so that each can gain something it wants more. One person's right to engage in any activity, by definition, limits the rights of others. Consider the current scandal over the National Security Agency's "spying" on American citizens. We all want to be safe from terrorists, but we also want a right to privacy and freedom of speech. We want the government to protect us, but we do not want to it to become Big Brother.

Copyright law, also, is a bargain. It grants to an author (or more accurately, a copyright owner, who often is not the author) the ability to control the use of his works, but only to a limited extent. In exchange, he must give up some degree of control so that others, and thus society, may benefit from those works.

The purpose of copyright law, per the Constitution, is to promote the production of new works, to encourage creativity, to promote the growth of the body of human knowledge. The way we achieve this goal is by maintaining a balance between, on one hand, granting creators the right to control use of their works, for the purpose of incentivizing them; and, on the other hand, placing limits on those rights so that others can build upon the works.

The Copyright Act specifies limitations that are few and limited in scope. For the vast majority of uses in which we engage without permission, we – anyone, and especially librarians and educators– rely on the doctrine of fair use. The law provides four factors that must be considered in determining whether a use may constitute a "fair use." However, the final decision must be made in the context of the overall situation, with the ultimate question being whether allowing the use would do more to promote the purpose of copyright law than would disallowing the use.

The *Google Books* decision and librarians' reactions

On November 14, 2013, an eight-year battle between Google and The Author's Guild ended (though the war continues) when a judge resoundingly held Google's digitization and use of twenty million books in its Google Books project to constitute fair use. The library community, among others, rejoiced.

The court emphasized that Google's uses were fair because the Google Books program "advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders."

I was thrilled with the decision and immediately sent an announcement to the Texas Library Association membership. Librarians. Those who, probably more than anybody else, value fair use and the need for well-crafted decisions providing guidance on fair use.

And I received comments from individuals who questioned whether this was a good decision, who feared that Google's uses, and the court's decision, would ultimately harm copyright owners.

I thought about how to address these completely unexpected responses. I talked about the need to maintain balance in order to meet the goal of copyright law. I quoted the court's finding that Google Books actually benefits copyright owners by pointing users to places where the books could be bought. "I'm still concerned about the potential harm to copyright owners," they said.

I find my passion

How else could I explain? I had explained the ***decision*** as best I could. I felt responsible for explaining the ***reason*** for The Copyright Bargain, beyond encouraging the promotion of Science and the Useful Arts. Why did the founders of this consider intellectual property protection so important as to include it in our very Constitution? What was the underlying value that was so vital to them to make it worthy enough to address in this most important document?

Then it hit me: ***Fair use allows us to be American.*** Fair use is one of several principles of law that enact fundamental American values, right up there with the Bill of Rights. (As a matter of fact, fair use cases sometimes invoke the First Amendment.)

We as a society place tremendous value on every individual in our society having an opportunity not only to obtain an education, whether formal or informal, but to have ***access to knowledge***. To be able to read a newspaper, to buy books or borrow them from libraries, to watch television and movies, to listen to music, to view masterpieces of the fine arts without having to travel to a far-away museum. We greatly value our ability to ***share our own knowledge***. To discuss a news item, to write about a political issue, to teach others, to share our religious views.

A strong doctrine of fair use is an absolute necessity to absolutely protecting and enacting these values.

If we were to allow copyright owners complete, or even near-complete, control over uses of their works, the result would be a society in which those who could afford to pay for education – and even access to the written word, the fine arts, music, software, the Internet – would have it, and others would not. We would become the ultimate society of haves and have-nots.

This I am passionate about.

Yes, a copyright owner ***may*** lose money when others legally use its works without paying, but what it gains is being part of a society in which access to knowledge is considered a defining, core, base value of society. What it gains is contributing to a society that values education, individual participation in government, and free speech. Without a healthy doctrine of fair use, we risk losing those rights.

This I am passionate about.

benetech: a nonprofit that develops and uses technology to create positive social change

Benetech's Blog

The Case for Copyright Exceptions and Fair Use

By Jim Fruchterman, CEO posted in Benetech on January 17, 2014 at 9:40am
Comments (0) Share:

The next time you set your digital device of choice to record your favorite show so you can watch it whenever you want, take a moment to be thankful that you're protected from lawsuits from the entertainment industry. For on January 17, 1984, the Supreme Court of the United States ruled that consumers could tape their favorite TV shows and watch them later without the copyright holder's consent. Such action, the Court decided, didn't constitute copyright infringement because it was fair use, that is, a limitation and exception to the exclusive rights granted by copyright law to the author of a creative work.

This ruling by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), also known as the "Betamax case", is a landmark copyright precedent that has had enormous implications for the media economy. It affected every step of the evolution of digital media—from the VCR to the digital video recorder to YouTube. It also underscored just how critical a balanced copyright law is for technology innovation.

Why do we at Benetech care about this so much? It's because our mission depends on a balanced intellectual property system that encourages innovation. As a different kind of Silicon Valley tech company—a nonprofit with a pure focus on social good—our goal is to see that the best of technology gets applied to social needs left unaddressed by for-profit businesses. The tools we develop for that purpose span a range of fields—from human rights, to global literacy, to the environment—but no matter what area we work in, we depend on an IP system that's friendly to technological advances and to positive social impact.

After all, our IP system was set up precisely to balance the interests of society with those of creators. We are especially concerned that the IP system ensures that it's both easy to serve disadvantaged communities and to innovate. For this IP system to work for all, it's critical that copyright exceptions such as fair use be defended as a policy for creativity.

ng January 17, the 30th anniversary of the Betamax decision, we're proud to mark Benetech's participation in Copyright Week—a week of action that aims to ge communities in the ongoing conversation about changes to copyright law and celebrate six principles for a balanced copyright system. We're joining the Electronic Frontier Foundation, which is leading this effort, and other participating organizations, including the American Library Association, Center for Democracy & Technology, Creative Commons, Knowledge Ecology International, Public Knowledge, Scholarly Publishing and Academic Resources Coalition, and the Wikimedia Foundation. We're pleased to contribute to today's theme, celebrating the fifth of the six principles: Fair Use Rights. And, Benetech is committed as an organization to all of these six principles.

To better understand why promoting "breathing space" for creativity is crucial for copyright to achieve its purpose of encouraging innovation, consider some examples from Benetech's work that demonstrate how copyright exceptions can create a framework for innovation in action.

Bookshare: Solving the "Accessible Book Famine"

Twelve years ago, we had an idea for reversing the traditional library for people with print disabilities—such as those who are blind, cannot physically turn the pages of a book, or have learning disabilities, like dyslexia—using the then-emerging technologies of digital books and crowdsourcing. We called this idea Bookshare, which is now Benetech's largest Global Literacy initiative. Bookshare is made legally possible by two copyright exceptions: Section 121 and Section 107 (fair use) of the U.S. copyright law. Let me first explain what Section 121, also known as the Chafee Amendment, has meant for Bookshare and the people we serve.

The Chafee Amendment allows authorized nonprofit entities like Benetech to create accessible versions of copyrighted books without the need to request permission from publishers (or pay a royalty) and then to distribute these versions exclusively to people with qualifying disabilities. We're committed to upholding the social bargain implicit in the Chafee Amendment—namely, help people with bona fide disabilities, but have minimal impact on the normal commercial process of selling books. And this copyright exception, in turn, has enabled us to create a completely new approach to providing people with disabilities access to the books they need for education, employment and participation in society.

Bookshare has reinvented the accessibility field and today serves over 250,000 members (the majority of whom are U.S. students) with a collection of 220,000+ (and counting) accessible books—the world's largest library of its kind. In the U.S., we've gone from addressing a sliver of the "accessible book famine" to solving most of it, and we now deliver an accessible book to a student for less than one-fifteenth of the cost of traditional approaches. Imagine the benefit to society when we go from solving less than five percent of a social problem to most of it, while using less money!

The Chafee Amendment has been crucial for this accomplishment. First, it was written broadly enough to encourage bold ideas that challenged the status quo in the accessibility field. It's also at the core of our ecosystem of socially responsible publishers who voluntarily provide us high-quality digital versions of their books—a major driver behind our rapidly growing collection. Publishers provide more than 80% of the thousands of books added each month to the virtual bookshelves of our online Bookshare library, under voluntary permission agreements modeled after the Chafee Amendment.

However, Bookshare continues to rely on the Chafee Amendment to regularly scan thousands of books each year without publisher authorization—and to incorporate similarly scanned books provided by college and university partners—in response to ongoing requests from users with disabilities. Without the rights the Chafee

Accordance grants to Bookshare and our volunteers and partners, our work would be substantially curtailed and the materials made accessible to people with print disabilities would be significantly restricted. The Section 121 exception is a major and indispensable safety net for accessibility. But, it's not the only one.

Accessibility

However useful the Section 121 exception has been for Bookshare, it is very narrowly drawn to cover nonprofit organizations and government agencies with a primary purpose to serve people with disabilities. In reality, the entire field of accessibility hinges on a robust fair use exception, Section 107. Making content accessible for the blind has been a traditional example of fair use. Individuals, schools and for-profit companies are often relied upon to make their materials accessible, and fair use creates a framework that makes much of that work legally possible.

Even Bookshare, with its position as an entity that can use the Section 121 exception, benefits greatly from fair use. This copyright exception allowed for the creation of the scanned copies that were originally used to create Bookshare. For instance, a Bookshare member who is blind contributed to the initial Bookshare collection 3,000 books he and his family had scanned on their own. It wasn't legal for him to distribute those books to other people who are blind, but it was for Bookshare to do so using Section 121.

In addition, Section 121 is quite short and doesn't explicitly discuss some important accessibility issues, such as making the content of pictures, math equations and diagrams available in alternate forms, like textual descriptions or tactile graphics (see the next section on that). The fair use principle established in Section 107 provides legal backup, another basis for protection for our staff and volunteers. It has been critical for Bookshare's foundational principle of "scan once, share with many."

DIAGRAM: Making Images Accessible

Fair use also has continued relevance to our social mission as we look to the future of our work within our Global Literacy programs. You see, our world is no longer dominated exclusively by the printed word, but also by images and video—and we believe it's a world everyone should be part of.

While many of the challenges of making text accessible have been addressed by the move to digital book publishing and by solutions like Bookshare, people with print disabilities are often still locked out from accessing information related to images—a problem that's becoming increasingly pressing as digital content is quickly shifting to include richer, more visual components, and is especially critical for STEM (science, technology, engineering, and math) books.

DIAGRAM Center
A BENETECH GLOBAL LITERACY INITIATIVE

Across this need, we've been operating the DIAGRAM Center, a research and development lab working to set standards, generate best practices, and design tools to ensure that images found in digital content are accessible to everyone. One of our goals is to lower the cost of making an image accessible by at least a factor of ten. To this end, we need to turn inaccessible images, such as equations in a digital math book, into machine-readable information. And again, many of the people and organizations helping realize this vision of accessibility aren't covered by the more restrictive Section 121. We're in the midst of these efforts to make image accessibility significantly less costly, but it's almost certain that the legal framework for such efforts will be based on the provisions of fair use.

Challenges and Opportunities

I am highly optimistic about the opportunity to solve the accessibility problem through innovative applications of technology. However, I don't want to underwrite the challenges we face.

For a start, more than a decade into the digital book era, technological protection measures (TPMs)—that is, tools designed to restrict the use or access to a work—still prevent people who are blind from using ebooks they purchase. Isn't it ironic that the people who most need access to digital books have been so discriminated against in utilizing them?

Furthermore, the legality of digital fair use continues to be challenged. In September 2011, the Authors Guild sued the HathiTrust digital library—a partnership of academic and research institutions that had created with Google a collection of millions of titles digitized from libraries around the world—alleging massive copyright violations. A federal court ruled against the Authors Guild in October 2012, finding that HathiTrust's use of books scanned by Google was fair use under U.S. law. One of the key justifications that the court used was the value of the scanned books to the blind, who could benefit so much more from a digital version of a library book than a physical copy sitting in a dusty stack.

The Authors Guild appealed the ruling and the parties are waiting for the decision from the appeals court. As a leading provider of accessible books to people with print disabilities in the U.S., we at Benetech are concerned that the Guild's arguments in their appeal regarding the definition of "specialized formats" would nullify Section 121 and remove the legal authorization for the important services that we provide, relegating people with disabilities to second-class status. Full disclosure: I was an expert witness in the district court case, and filed an amicus brief in the appeal supporting the decision of the district court. You can read more about our position in the Amicus Brief we filed jointly with our peer organization, Learning Ally, in the HathiTrust appeals case.

On the other, much brighter side, this is definitely a critical and hopeful time where technology and massive industry shifts make it possible to realize our shared dream of equal access to information for all people with print disabilities. The U.S. often leads the way towards that better tomorrow. One great example is the recently adopted "Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled"—an international copyright treaty that would make a copyright exception for people with disabilities a global norm and allow organizations like ours to share accessible books across national borders.

As someone who helped crease the original draft of what became the Treaty, it was a momentous event for me personally to see the great model we've used in the U.S.

spread globally, as I described in a post on the significance of this landmark treaty.

Conclusion

At their best, IP laws encourage technological advances, reward creativity, and benefit society. Practical and creative innovators need space to operate and ensure those benefits reach the people who desperately need new solutions but are often least able to afford them. To make this possible, we must ensure balance in copyright laws and defend fair use as a laboratory for creativity. With the leverage of technology and the foundation provided by well thought out IP laws, we can inspire both economic growth and social good.

LEAVE A COMMENT

"Value Flexibility: We prioritize flexibility for—and from—our team members, and in our work." - BENETECH TRUTH #6

January 15, 2014, 11:00 am

Betamax case still being argued

By Sherwin Siy

Thirty years ago this week, the Supreme Court said that it was legal for people to make home recordings of TV shows. That decision, *Sony v. Universal* (and often called "the Betamax case"), said that home taping was a fair use, and not copyright infringement. It is rightfully praised as showing that individuals using new technologies to make personal copies weren't pirates; that fair use wasn't just for teachers, media critics, or journalists. Ordinary consumers had the protections of fair use, too, when making use of a new technology to consume the media they liked and had a right to (since they paid for it or it was given to them).

But occasionally, *Sony* seems to be a less-than-complete victory. And a large part of that is because it's based on fair use. Fair use is a fundamental part of our copyright laws, intended to make sure that they don't end up hampering free speech, personal rights, or other constitutional principles. But knowing what uses are fair isn't an exact science. Fair use was designed to be flexible, so that it could be applied to lots of new, unanticipated situations. But that means that the law provides general guidelines that make clear cases easy, but that leave a lot of gray areas in the middle. This leads to a couple of troubling consequences.

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For one thing, some of the most direct descendants of the Betamax machine keep getting challenged in court by the same people who thought home taping would kill the television. Companies like Cablevision and Dish were sued when they came out with new types of digital video recorders—machines that do basically the same things as the thirty-year-old Betamax and its magnetic tapes. It would have been nice if, once and for all, we accepted that yes, home taping is perfectly fine.

The bigger problem, though, is that today's consumer makes dozens (or hundreds) more copies in the course of her day than the average American of 1984. Any time you use a computer, you're making copies, whether you want to or not. It's not just that your laptop has the *ability* to make copies; it's that it *needs* to make copies in order to work. If you're reading this on a computer screen, you've made a copy of it. Listening to an mp3 makes copies of portions of it as you listen. The buffering you computer is doing as it loads a streaming video? Copying. Copying is more pervasive and more essential than it ever was.

Thirty years ago, if you weren't a print shop or a large media company, you would only be making copies if you used a specialized machine designed for copying—audiocassettes for music, videotapes for TV and movies, a photocopier or mimeograph for text. Computer programs were less mainstream, and the home computers that ran them certainly didn't have the power or storage capacity to deal with most media.

So finding individual fair uses makes sense for specific categories, and it can pave the way for entire industries, sure. But can we expect to go to court every time someone comes up with a new way people can make personal, non-commercial uses of media they've already paid for?

But fair use isn't the only way we can balance copyright laws. Copyright law has other limitations and exceptions built in to it—doctrines that apply across the board, regardless of the specific technology at work. For instance, while you can't exhibit a movie publicly without permission, you can watch it at home to your heart's content. Or if you're the legal owner of a lawfully made copy of a work, you're allowed to sell or distribute it any way you want.

It's time that copyright law recognized that copying, by itself, doesn't hurt copyright owners. Certainly, you want to prevent piracy, but the number of pirated copies made each day is completely dwarfed by the number of legitimate copies made through simple computer use. Our making of those copies is so automatic and so necessary that we don't even think to count them—until someone decides to use them as leverage in a lawsuit.

So why not ease some of the burden placed on fair use by creating a clearly defined right for people to make personal, non-commercial copies and adaptations? So long as those uses don't affect the author's market for the copyrighted work, they should be found to be legal—and without having to even consider the various other factors that can complicate fair use arguments. This wouldn't just keep computer and electronics companies out of trouble, it also would remove a sword that hangs over the heads of consumers as they go about their daily digital lives.

It's a step that might have seemed a leap in 1984, just after *Sony* was decided—a case about a particular kind of machine being used for a particular purpose. But thirty years of experience and progress has shown us that the driving force behind the *Sony* decision's continued relevance isn't just the legal doctrine of fair use, but the simpler idea that we should be able to make of personal uses of the media we love. And that's an idea that, regardless of the cases in the courts right now, is more relevant than ever.

Sly is vice president of Legal Affairs at Public Knowledge.

The End of Ownership: Why You Need to Fight America's Copyright Laws

By Kyle Wiens, 01.17.14, 9:30 AM

Just the other day, I got a card in the mail for my 30th birthday. When I opened it up, the card started singing "Happy Birthday." And that little thing — pealing out at the top of its automated lungs — made me laugh. What a strange thing to computerize.

But it suddenly occurred to me that this silly card was the perfect example of what I call The Law of Electronic Eventuality: If something *can* have a computer in it, eventually it *will* have a computer in it. Our physical objects aren't just physical anymore. Code runs unseen through phones, watches, smoke alarms, birthday cards, and more like connective tissue. As with muscle, it's that connective tissue that makes a thing work.

Without code, without software, our Things become inert. Dead.

While this ushers in a whole new world of possibilities, it's also redefining ownership. Because when you purchase a physical object, you don't actually buy the software in it — that code belongs to someone else. If you do something the manufacturer doesn't like — repair it, hack it, unlock it — you could lose the right to use "their" software in "your" thing. And as these lines between physical and digital blur, it pits copyright and physical ownership rights against each other.

Welcome to the brave new world of copyright. If you want to truly own what you buy, you'll have to fight for those rights — because they are disappearing.

Copyright: Outdated, Outmoded, Outgunned

While technology continues to leap forward every day, copyright laws have yet to catch up.

The first copyright laws, born in the early days of the printing press, were a tool to incentivize intellectual property creation. But in those days the lines were clear: a book buyer could scribble in the margins, sell it, even light the book on fire. An individual copy of a book was not limited by copyright.

The last big Copyright Act was passed in 1976, back when Steve Jobs had just left his job at Atari and a single floppy disk cost $390. When the Digital Millenium Copyright Act — which governs how copyright applies to digital work — was passed in 1998, few people imagined that we might soon want to hack into our phones or thermostats. At that time, copyright stakeholders, including the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA), were so afraid of digital piracy that they built all sorts of overreaching protections into the law. Unfortunately, those mechanisms — such as the infamous Section 1201, which makes it illegal to bypass locks on hardware you own — are having far-reaching and unintended side effects.

The world has changed so much since 1998, but copyright hasn't. Even before the current Congress started considering copyright reform, corporate trolls were working to prevent it. The recently leaked Trans-Pacific Partnership treaty reveals how eager they have been to codify current U.S. copyright law into international treaties, where even Congress would have difficulty repealing them. (By the way, if the U.S. position in that treaty prevails, citizens in a dozen countries could have their ability to unlock their phones taken away.)

Hardware: The Final Frontier

Designing software into physical objects changes the rules of ownership — and right now it's not in our favor. Programming and code are copyrighted. You are not an owner; you are a licensee.

It sounds like some sort of Orwellian dream, but that reality is much closer than one might think. Just last year, carmaker Renault integrated DRM into a car battery — giving Renault the ability to shut down your car if you violate their contract. A few years ago, Texas Instruments threatened a hobbyist with legal action when he reverse-engineered his calculator, figured out how to install a different operating system, and shared his findings on the internet. (TI demanded he remove his blog post.) And there are many more examples among the thousand tiny cuts inflicted in the name of copyright: keeping diagnostic codes from neighborhood car mechanics; preventing developers from modifying digital media for the disabled; and stopping consumers from unlocking cell phones for use on different carriers.

While there have been positive steps in the right direction for the last one, they still don't go far enough: Developers who release unlocking software still face $500,000 in fines and up to five years in jail.

* * *

Copyright is like the many-headed, hostile-when-provoked hydra. And just like a hydra, chopping off one head — solving one issue — won't work. Congress could legalize unlocking phones on Monday, tablets on Tuesday, cars on Wednesday, and a different gizmo every day from now until the end of week let alone year. It won't matter. The day after that, there will be yet another new computerized product, a new thing with code for its connective tissue. As long as "The Law of Electronic Eventuality" marches on, and as long as companies can make money by keeping users out of their own stuff, they will … and so copyright law will never catch up.

Our current copyright laws clearly don't account for the role technology plays in our lives. But I was born a tinkerer, so I believe that with enough energy, ingenuity, and passion, anything can be fixed — and I mean that both metaphorically and literally (with our right to repair). If we want to preserve consumer rights against copyright power grabs, we'll have to aim at the heart of the hydra. We can't afford to wait another 40 years for Congress make a new copyright law. It has to happen now; here's how.

It's Copyright Week (leading up to the two-year anniversary of the SOPA blackout protests), where the EFF and others are discussing the key principles that should guide copyright policy.

Corporations Abusing Copyright Laws Are Ruining the Web for Everyone

By Paul Sieminski, 01.17.14, 9:35 AM

Picture this somewhat typical scenario: Before breakfast, you use WordPress to write your morning blog post, which includes a screen shot of a movie you saw last night, along with your thoughts about the film. During your workday, a colleague shows you a viral YouTube parody of a popular music video (found via a Google search). On your lunch break, you shop for a new book on Amazon, which you buy after reading a few reader reviews that include short quotations from the book. After work, you take pictures of your Brooklyn loft replete with Obey art posters and post them to Airbnb, hoping to rent it out for the week you're visiting family. At night, you catch up on an episode of *Downton Abbey* that you recorded to your DVR earlier in the week.

Whether you know it or not, each one of these activities is made possible by the legal term "fair use." It's an indispensable part of our lives, enabling many of the websites and services we use daily or depend on for our livelihoods. Fair use also happens to be an exception to content owner's rights under copyright law.

By allowing limited use of copyrighted material for things like criticism, review, commentary, parody, or just personal non-commercial use, fair use has a widespread and often invisible impact on today's social internet. Yet its very ubiquity means it's often taken for granted by individuals — and the internet companies who benefit from it.

This is worrying because fair use is under threat, and one of the culprits is the DMCA takedown notice that provides copyright owners an easy tool to remove content they claim to be unlawfully posted. Copyright owners send these notices to web companies who host content; the companies must then remove the content or risk legal liability themselves. Meant to promote the quick removal of impermissible copyright infringement, the DMCA system works well in many cases.

Unfortunately, an increasing number of copyright holders misuse this system to target even lawful fair use of their work. And the current DMCA system enables these aggressive copyright owners by providing virtually no penalties for failing to consider common exceptions to infringement — like fair use.

Many times per week, WordPress.com receives such DMCA takedown notices that target what we can plainly see is fair use. An all too common example is a notice directed at a blogger who is criticizing a company or its products, and therefore using screenshots of the company's website or a photo of the company's wares in their post. This isn't just an outlier case; given our unique vantage point, we see an alarming number of businesses attempt to use the DMCA takedown process to wipe criticism of their company off the internet.

What can someone on the receiving end of a fair use takedown do? One option is to challenge the removal of content by filing a "counter notice" with the internet company that removed the posting. Making this filing is a fairly easy thing to do, but few users actually go through with it.

In fact, Twitter reported in its most recent transparency report that it saw a 76% year-over-year increase in DMCA takedown demands: over 5,500 takedown notices were received over a six month period. But in that same time, Twitter received only six counter-notices challenging removal of content. One reason this number may be so low is that, in the process of submitting a counter notice, users are required to reveal their personal identity and agree to be sued in federal court.

The risk of being liable for large statutory damages (even if the infringement is minor) clearly daunts and sidelines an average individual user. The unfortunate result of this takedown notice power differential, however, is that a massive amount of content is being permanently removed from the internet. Even though much of it is lawfully and fairly used.

This is where internet companies have an opportunity to step in and do more to help, instead of just blindly honoring takedown notices. One obvious solution is education — not just for users but for DMCA complaint submitters too — about when fair use applies in the context of their sites.

Another issue is that it's easy on many websites to submit a DCMA takedown notice, but not as easy to submit a DMCA counter notice for improperly targeted content. Addressing this disparity is another easy step companies can take since many users don't understand how to navigate the process and certainly don't want to (or can't) spend money hiring a lawyer to help. On WordPress.com, where I work, we created a simple counter-notice form that's both easy to find and complete. We also make an effort to carefully review inbound DMCA notices, and push back on the ones that clearly target fair use, so lawful content is not taken down in the first place.

Many internet companies enjoy the legal protections of the DMCA and the convenience of letting users be responsible for what they post. But this puts much of the burden of defending lawfully posted content on individual users. Users who post content to a company's services are a constituency whose expression deserves to be protected. Until copyright laws change to provide some meaningful penalties for targeting fair use, internet companies need to be more active on copyright issues, serving as the first line of defense in protecting the fair uses of content that have helped to make their platforms so popular. Not to mention profitable, as fair use of content drives consumer demand for online information and services.

Fair use has also transformed the internet from a passive information library to an active, participatory, sharing web. People interact with information more meaningfully and passionately when they can transform it, review it, mash it up, and add their own individual perspectives to it — leading to a better internet for everyone (including copyright holders!). So let's do what we can to make sure the fair-use doctrine that created this living and breathing entity is protected.

It's Copyright Week (leading up to the two-year anniversary of the SOPA blackout protests), where the EFF and others are discussing the key principles that should guide copyright policy.

ARL Policy Notes

Power to the People: Five Reasons Fair Use Best Practices Are Changing the World

by guest bloggers Patricia Aufderheide, University Professor, American University School of Communication; Brandon Butler, Practitioner-in-Residence at the Glushko Samuelson IP Clinic, American University Washington College of Law; and Peter Jaszi, Professor of Law and Faculty Director of the Glushko-Samuelson Intellectual Property Clinic, American University Washington College of Law

Copyright Week is the perfect occasion to celebrate fair use, certainly the most dynamic and arguably the most important doctrine in copyright law. The last 15 or 20 years have seen a remarkable series of developments that make fair use, now more than ever, the most vital protection of the public interest in the Copyright Act. For Copyright Week, we wanted to highlight a part of the fair use landscape that, perhaps more than any other, puts fair use in the hands of practitioners who need it most: the Fair Use Best Practices movement.

With a little help from a team of researchers at American University, an ever-growing cadre of communities has identified where their work necessarily encounters copyright and the kinds of fair uses that are essential to the communities' continued flourishing and success. Each code (read them all here) contains a short but powerful description of fair use's broad history and meaning, followed by a set of principles that describe situations where fair use may apply accompanied by limitations that describe the outer bounds of community consensus. The effects of these documents can be dramatic. Documentary filmmakers came first, and had great success, but they've been joined by educators, scholars, poets, online video makers, journalists, and (most importantly for this blog) librarians. As more and more people need fair use to continue getting things done, best practices are an idea whose time has come.

So, without further ado, we give you **five reasons fair use best practices are changing the world**:

1. *They're based on solid legal footing.* Specifically, path-breaking research by copyright scholar Michael Madison. Madison surveyed over a century of fair use decision making and found that, over and over again, courts determining whether a use was fair inquired into the mission and values of the communities standing before them to vindicate their fair use rights. Uses firmly grounded in the socially beneficial mission of a practice community were much more likely to be blessed as fair.

   Each code starts from that insight, together with the dominant paradigm of "transformative use" that informs court decisions in fair use. The community norms developed on this foundation are then further shored up by a legal review by five independent experts from diverse backgrounds who certify that the Code represents a reasonable application of fair use law to the practice area. Practices consistent with the Documentary Filmmakers Code have been blessed by federal courts, as have practices identified as fair in the #Librarianscode. Indeed, between Georgia State and HathiTrust, the practices described in four of the eight principles in the #librarianscode have been blessed by federal courts.

2. *They clear away the crud.* Anyone who engages with copyrighted material for more than a few minutes will encounter a dizzying array of so-called 'guidelines,' rules of thumb, 'negotiated' agreements, and urban myths and legends that proliferate around copyright. The goal of best practices is to identify the best approaches to recurring fair use scenarios, rather than to measure the lowest common denominator of the status quo and freeze it in amber forever. Therefore, developing best practices is an opportunity for communities to step back and question current practice in light of the latest developments in fair use law and the broadest, deepest understanding of the mission of the community. Librarians, for example, categorically rejected the arbitrary numerical limits in the 1976 Classroom Photocopying Guidelines. On reflection, they were simply impossible to justify in light of the actual needs of librarians and the contours of modern fair use law.
3. *They make the law less alien, and rights less scary.* By grounding fair use choices in practices and norms that are native to a community, best practices change attitudes toward fair use. People with a Code go from a kind of grudging, fearful "compliance" with an alien copyright law imposed from above to a unified exercise of core First Amendment rights that emerges from their own values. Teachers, librarians, filmmakers, and poets who used to feel like they were acting alone in the face of an intimidating body of law come to understand that they are actually engaged collectively in legitimate, lawful acts that are normal, indeed essential, for their profession.
4. *They help you get things done.* The bottom line for any group with a shared mission and goals is whether they are able to advance mission and achieve goals. Where myth, misinformation, fear, uncertainty, and doubt dominate, any number of important projects and practices can be suppressed, driven underground, or stymied altogether. Films don't get made, or they don't get distribution; poems aren't written or published; works languish in archives inaccessible to remote or print-disabled researchers. Best practices are relentlessly pragmatic and mission-centered; through them, practitioners articulate fair use solutions to real, live problems. When the community takes best practices seriously, real work gets done—work that might otherwise have been inconceivable.
5. *They help you get management on board.* Almost everyone has a supervisor, counselor, or other gatekeeper who decides what projects they can pursue, whether their work will see the light of day, and so on. Whether it's a Dean, a TV producer, or a publishing agent, sooner or later you've got to convince someone else that what you're doing is legit. Understandably, gatekeepers are often expected (forced, even) to play the role of "copyright cop," saying "no" to any project that looks like it might raise an eyebrow.

   Before best practices, each practitioner would face these folks alone, often as non-lawyers, and try to convince them to take a risk based on, well, who knows what. But with best practices in hand, practitioners can go to their Deans, their publishers, their producers, whomever, and say, "What I'm doing is normal. It's grounded in the values of my community. And it's in line with a document that's been vetted by experts and endorsed by leading organizations in my field." That's powerful stuff! No wonder the Documentary Filmmakers code has been so transformative, as has the #Librarianscode, and many many others.

So, there you have it. As Copyright Week winds down and we contemplate the copyright system we have, and the opportunities for change and improvement, we submit that fair use best

practices are, by far and away, the most accessible, effective, and powerful tool in the hands of the public.

For more information, check out the full roster of best practices at the Center for Media and Social Impact and check out Pat and Peter's book, *Reclaiming Fair Use*.

Copyright Week: Fair Use

Submitted by Claudia Rebaza on 17 January 2014 - 5:18pm

The week of January 13-18 is being used by a number of legal advocacy organizations in the United States as a week of action to speak out about potential changes to copyright law. The dates were chosen so that the week's conclusion on Saturday the 18th coincides with the anniversary of the SOPA/PIPA blackout in which many organizations and companies, large and small, worked together to protest this misguided legislative proposal.

On each day this week, organizations will focus on a different aspect of copyright. Today we are focusing on Fair Use. The OTW was founded on the idea that fanworks are creative and transformative, and therefore are protected by Fair Use under US law. For that reason our Legal Advocacy project has been proactive in protecting and defending fanworks from commercial exploitation and legal challenge.

In the United States, Fair Use is a part of the Copyright Act, which lists four factors the courts can look to in determining whether a work is Fair Use; they include (1) the purpose and character of the use (commercial nature, educational purposes, etc.); (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. Courts have addressed these issues many times over the years, and many recent cases involving Fair Use have expanded the types of works that can take advantage of Fair Use protections. Only last year, the Southern District of New York found that Google Books' database of complete scans of fiction and nonfiction books was a transformative work, and Fair Use, because it "advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders."

This holding is in line with the OTW's longstanding view of transformative works and Fair Use, as our reading of U.S. law is that fan fiction and often other types of fanworks advance the progress of the arts (and sometimes sciences too), while respecting the rightsholders' ownership and ability to make commercial use of their intellectual property. Fair Use principles permit fans to create a wide range of transformative works without first seeking permission from rightsholders--including fanfic, fanart, vids, games, cosplay, fan films, ballets and stage plays. Noncommercial transformative works are generally permitted by Fair Use, but a lot of works within the Fair Use sphere are not also defined as transformative works.

The OTW's various projects all feature the amazing works that can be created and shared under the umbrella of Fair Use, whether remembered in Fanlore, preserved by Open Doors, archived on the AO3, explored in Transformative Works and Cultures, or featured in our Test Suite of Fair Use Vids.

Copyright Week is an important event for discussing how these laws and regulations impact citizens, but it's also an important opportunity for **you to make your voice heard**. You can help by:

1) Visiting the Copyright Week site and signing on to endorse the principles being expressed by the OTW and other organizations.

2) On that page you will find links to posts made by other groups that support a larger public domain, broader fair use, and open access. You can support the OTW or other groups working on your behalf.

3) Retweeting, reblogging, or linking to posts about the issues being discussed during Copyright Week.

January 17, 2014 | By Parker Higgins

Celebrating Fair Use for Copyright Week

In the week leading up the two-year anniversary of the SOPA blackout protests, EFF and others are talking about key principles that should guide copyright policy. Every day, we'll take on a different piece, exploring what's at stake and and what we need to do to make sure the law promotes creativity and innovation. We've put together a page where you can read and endorse the principles yourself. Let's send a message to DC, Hollywood, Silicon Valley, Brussels, and wherever else folks are making new copyright rules: We're from the Internet, and we're here to help.

Here's what makes a new product or service exciting: it enables you to do something you hadn't even thought possible. But with products that build on or incorporate digital technologies and the Internet—both of which dramatically lower the cost of making copies—some of those exciting surprises inevitably rile up people who control copyrights. If the law were to reflect only the interests of those existing rightsholders, they'd have a veto right on all sorts of new technologies.

Instead, we've got a concept called "fair use" that provides innovators and artists with the breathing space use copyrighted works in a variety of ways, without getting permission. It's a versatile doctrine, one we depend on every time we do research using the Google Books database or the Internet Archive, post a screenshot from a favorite video to Tumblr, share news and information on our favorite forums, or watch a TV show recorded to a DVR. Without fair use, some of our favorite technologies simply wouldn't exist.

How do we know? Because for at least a century, these technologies have been threatened and attacked by large rightsholders. Every time, fair use stands in their way, and essential shield for innovation and the public interest. It's the key to having an innovation culture, as opposed to a permissions culture.

A Supreme Victory

The fair use doctrine is deeply rooted in US law, but one of its watershed moments for innovation occurred thirty years ago today, in the case of *Sony v. Universal* (or more commonly, the Betamax case). Hollywood was doing its level best to sue the videocassette recorder out of existence, but the Supreme Court rejected the movie industry's arguments that consumers recording movies and TV shows at home were engaging in massive copyright infringement. Such personal use as time-shifting (recording a show to watch it later, something we take for granted now) were obvious fair uses, said the court, and providing technology to make it happen was not illegal.

Despite all the heavy-handed doom-and-gloom rhetoric from the movie industry—then-MPAA-head Jack Valenti famously claimed to Congress that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone"—the home video market that the case opened up turned out to be good for everybody, quickly providing a major portion of the studios' revenues.

All This Cool Stuff

The VCR is just one notable entry in a long line of great developments that rely on fair use. Take, for example:

- **iPods and other portable music players** When the first mp3 players came out, they came with an incredible value: unlike upgrading to tapes or CDs, you wouldn't have to re-buy all your music. Instead, you could make fair use copies of already purchased music, and fill it up that way. Dedicated music players aren't so common any more, but their popularity paved the way for the smartphones that so many people carry now.
- **Search engines** Any company that's building a search engine has to first make an index—basically a copy of all the material users are going to search. When it comes to the Web, it seems obvious that search companies don't need to ask permission to add a site to the index. But rightholders have repeatedly challenged these databases. For example, a company called Perfect 10 insisted that Google Images violated its copyrights by indecxing images on "unauthorized" websites, and the Authors' Guild challenged Google Book Search service for digitizing and indexing printed books. In both instances, court have recognized that these uses were fair uses, in large part because of the tremendous public benefit their provide.
- **DVRs, Aereo, and ad-skippers** You'd think that after the experience with the VCR, studios might stop throwing substantial time and resources into fighting technologies that allow users to watch video content in whatever time and place they choose. You'd be wrong. Like clockwork, whenever somebody introduces such a product to the market, big content owners up to file lawsuits. For example, broadcasters are currently doing their best to shut down Dish Networks' Hopper service, which allows viewers to record shows and then skip the commercials when they play them back. After the appeals court rejected that theory, they've turned to another; we expect they'll see the same result.

Danger Ahead

You might notice that many of these products followed a common story. First, there's a a great new technology that takes advantage of non-infringing copying in an exciting way. Then rightsholders try to challenge that copying, saying that it is in fact infringing. Then the courts explain that the technology isn't infringing after all.

The danger we face now is that, more and more, the established industries are finding ways to keep that story from ever playing out. Fair use is a powerful and versatile doctrine, but it relies on human judgment. So when we let algorithmic copyright cops like YouTube's Content ID block material because it detects a copy, that preempts the possibility of arguing fair use.

Similarly, when media or devices are wrapped in digital rights management software designed to restrict copying, the law says that circumventing that software is illegal even if the reason you're circumventing it is otherwise lawful. That in turn can short-circuit fair use and lead to chilling effects on products that require reverse engineering.

It's not all bad news, though. For one thing, courts continue to recognize the value and importance of fair use, and Congress plans to discuss it in an upcoming hearing. We'll continue to push for a strong and robust fair use doctrine. Join us by endorsing the Copyright Week principles today.

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Association of American Publishers[1]
Statement Submitted for the Hearing Record
House Judiciary Committee
Subcommittee on Courts, Intellectual Property, aud the Internet
Feb. 6, 2014

Hearing on "The Scope of Fair Use"
Jan. 28, 2014

Introduction

Publishers strongly identify with and are sensitive to the "fair use" concerns of users of copyrighted works because they are themselves users of copyrighted works and beneficiaries of the fair use doctrine. They embrace fair use to deliver high quality content that incorporates art, photographs, literature and other third-party creative works into their published works. In fact, the only amendment to Section 107 since its enactment was chiefly advocated by the publishing industry and helped to clarify that no type of copyrighted work (in this instance, unpublished works) is *per se* outside the scope of the equitable fair use defense as codified by Congress.[2]

The Association of American Publishers (AAP) submits this post-hearing statement to support Professor June Besek's testimony submitted for the hearing of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet ("IP Subcommittee") on "The Scope of Fair Use;" to note our position that there is no present need for Congress to amend Section 107; and to address a few issues that were raised at the hearing and one that was not, but should be addressed in the future.

[1] The Association of American Publishers (AAP) represents over 470 publishers, ranging from major commercial book and journal publishers to small non-profit, university, and scholarly presses.
[2] *See* Public Law 102-492 (1992).

Although AAP believes there is no present need to amend the statutory text of Section 107, AAP still appreciates the interest of Chairman Goodlatte and the IP Subcommittee in finding other ways to clarify the *application* of fair use in the digital age. Below AAP discusses four areas where Congress can help ensure that fair use remains an equitable remedy that balances the interests of copyright owners and users by providing courts with a means to "avoid rigid application of the copyright statute when, *on occasion,* it would stifle the very creativity which that law is designed to foster."[3]

The Role for Congress

Relationship Between Specific Limitations & Exceptions and Fair Use

Professor Besek's testimony explained that, although "fundamental principles of statutory interpretation" hold that "a statutory provision should not be interpreted in a manner that renders another provision superfluous or redundant,"[4] some recent judicial opinions have decided cases based upon "expansive readings of fair use [which] have virtually swallowed other exceptions to copyright." AAP agrees that the recent *HathiTrust* decision has effectively rendered the specific exceptions in Sections 108(c) and 121 superfluous, instead of treating these exceptions as a clear indication of the balance Congress intended to strike between the interests of copyright owners and users in defining these exceptions in detail.

To be clear, publishers fully support continued application of the fair use defense on a situational basis to permit certain otherwise infringing uses, including, but not limited to, circumstances in which permission from the copyright owner to use the work is unlikely to be obtained due to the nature of the intended use (*i.e.*, criticism, comment, news reporting, parody) and where the qualifying use (e.g. "scholarship" or "research")[5] is itself subject to nuanced interpretation in its application. However, Congress has already demonstrated that there are many circumstances in which specific limitations and exceptions defined directly in relation to particular types of works, uses or users are feasible and can offer more clarity and predictability than can be obtained through resort to a claim of fair use. Such limitations and exceptions, when carefully crafted, can acknowledge and facilitate certain legitimate public and private interests in engaging in particular uses of copyrighted works without authorization from rights holders while

[3] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (*emphasis added*).
[4] *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Professor June Besek at 11) (citing *Bilski v. Kappos*, 130 Sup. Ct. 3218, 3228-29 (2010)); *Kungys v. United States*, 485 U.S. 759, 778 (1988)).
[5] 17 U.S.C. §107 (noting the need to undertake the four-factor fair use analysis to determine if any particular instance of "scholarship" or "research" is actually a fair use).

ensuring that the legitimate rights of the copyright owner are not unreasonably prejudiced. Thus, AAP makes two suggestions:

1. Clarify the Relationship Between Specific Limitations & Exceptions and Fair Use.

Congress should promote clarification of the relationship between fair use and existing specific statutory limitations and exceptions by urging the U.S. Copyright Office to gather public comments, coordinate stakeholder roundtables, and issue an educational circular or fact sheet addressing this issue in order to provide guidance to users and rights holders. In addition, Congress should ensure that the relationship between fair use and any *new* specific statutory limitations or exceptions is made clear through the statutory language of such provisions and their legislative history.

Rights holders, users and courts will benefit from being able to assess the legality of any particular use with greater certainty by reference to the specific limitation or exception that addresses such use, while also having a clear understanding of what additional scope, if any, Congress may have left for a fair use claim to address uses that are implicated by such a limitation or exception but fall outside of its specific terms.

2. Recognize the Practical Utility of Specific Limitations & Exceptions.

As Chairman Goodlatte noted at the hearing, the flexibility of fair use is crucial for creating parodies, new works, and new technological innovations, but "certainty" is just as beneficial in many contexts for both copyright owners and users. Professor Peter Jaszi's testimony seems to imply that large commercial users and well-funded user communities (e.g., Google and the HathiTrust Digital Library Partnership) are happy to continue to slog through years of costly, *piecemeal* litigation to expand the scope of fair use where they want to routinely engage in unauthorized and infringing uses which they claim are generally in the public interest and justifiable impingements on the interests of rights holders. However, relying upon litigation to establish new copyright exceptions places the day-to-day burden of the uncertainty of fair use on individual users and publicly-supported entities that lack the necessary resources to engage in costly litigation. These groups would be served more efficiently and effectively by Congressional accommodation of such uses through the enactment of appropriately calibrated statutory limitations or exceptions that specifically address the specific works, uses and users at issue.

Congress has constitutional authority over the creation and operation of a *national* copyright scheme, which includes defining appropriate limitations and exceptions to exclusive rights. To the extent that proponents of expanded applications of "fair use" are in fact seeking to achieve legitimate, socially beneficial ends *and* Congress finds particular uses of certain works

by users to be appropriate subjects for limitations or exceptions to exclusive rights, such goals are more effectively, clearly, and appropriately accomplished through the codification of specific, tailored and balanced copyright exceptions instead of a patchwork of judicial decisions.[6] Congress is also in the best position to ensure that any new exceptions or limitations are consistent with the requirements of the "three-step test"[7] which, as incorporated in the Berne Convention, the TRIPS Agreement, and several WIPO copyright treaties, provides an international standard for evaluating the propriety of such specific limitations or exceptions in national copyright laws.

Best Practices

AAP appreciates Rep. Conyers' suggestion for content owners, tech companies, and user groups to work together to develop best practices for fair use. Recently, a number of groups have developed "Codes of Best Practices in Fair Use" which attempt to establish quasi-bright-line rules to mitigate uncertainty and facilitate the application of fair use in connection with particular activities. When those "Codes of Best Practices" are the product of collaboration among the various stakeholders (for example, the "Documentary Filmmaker's Statement of Best Practices in Fair Use," http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use), they may have some clarifying value even if they cannot (and do not purport to) eliminate the inherent uncertainty of many fair use determinations.

However, when "Best Practices" are prepared without input from copyright owners and are instead defined exclusively by a user community to legitimize the community's own practices, as was the case for example with the Association of Research Libraries "Code of Best Practices in Fair Use" (http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices), they become one-sided statements of that particular community's "wish list" that are misleading and potentially dangerous to those who would rely upon them. They can perpetuate unreasonably broad assertions of fair use which, when challenged in court, may have an untoward influence on the outcome of litigation. Instead of clarifying appropriate fair use

[6] For example, AAP has consistently worked with Congress, the Copyright Office and relevant stakeholders to craft a statutory copyright limitation to resolve issues presented by "orphan works." The books at issue in the *Google* and *HathiTrust* cases included many orphan works and, under the authority of a single judicial opinion in each case, such works lost meaningful copyright protection against unauthorized reproduction. These decisions purported to resolve the thorny issue of orphan works without the benefit of the years of public comments, stakeholder roundtables and policy analyses conducted by the Copyright Office to develop a balanced national solution to this issue.

[7] The "three–step–test" as articulated in art. 13 of the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS") states that limitations or exceptions to exclusive rights must be confined "to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

scenarios, such "wish lists" produce guidance that fails to achieve an appropriate balance between the legitimate interests of copyright owners and users.

To the extent that Congress believes that best practices would provide appropriate guidance to users, copyright owners, and courts, AAP suggests that Congress direct the Copyright Office to gather public comments, coordinate stakeholder roundtables, and issue a report with potential best practices for fair use, which should also include guidance on transformative use.[8] Such best practices would no doubt be more robust, transparent, and balanced than some of the existing Codes of Best Practices, which have for example, completely eliminated any consideration of market harm to rights holders from their suggested fair use analyses.[9] Among other things, publishers would like such best practices to confirm that: (1) fair use need not always be transformative; (2) a transformative use will not always be a fair use; (3) innovation is not always transformative; (4) a new audience is not the same as a new purpose and does not by itself make a use transformative; and (5) "transformative" in the context of fair use is distinct from creating a "derivative work" by transforming an existing one.

Distinguishing Between Derivative Works and Transformative Fair Use

AAP also agrees with Professor Besek's perception that recent cases have caused "confusion between a transformative work and a derivative work."[10] Much of the current confusion stems from the fact that some courts and one-sided Codes of Best Practices are giving too much weight to the importance of the first fair use factor (*i.e.* by emphasizing non-profit purposes and utilizing overbroad definitions of "transformative use"), and giving too little weight

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[8] *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Statement of Rep. Conyers noting that transformative use also needs clarification as it has become "all-things-to-all-people."). Indeed, the extant caselaw reflects different approaches taken and conflicting results reached by the courts in applying the transformative use doctrine. This judicial confusion continues to complicate what conflicting appellate court decisions (including some within the same circuit) have already made "a highly contentious topic" and a "splintered" area of law. *See, e.g., Seltzer v. Green Day, Inc.*, Nos. 11-56563 and 11-57160 (9th Cir. Aug. 7, 2013) (citing the dissents from numerous appellate decisions and attempting to clarify the distinction between transformative and non-transformative use by noting that the typical 'non-transformative' case… is one which makes no alteration to the *expressive content or message* of the original work…[whereas an] allegedly infringing work is typically viewed as transformative as long as new expressive content or message is apparent." Despite this attempt at clarity, the court blurs its own distinction by citing two cases where the original work was not changed as an example of transformative use (*Arriba Soft*) in one instance and classic non-transformative use (*Monge*) in the other.) (*emphasis in the original*).

[9] *See* Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries*, 8 (Jan. 2012) http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf (condensing the fair use analysis down to two questions: (1) *Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original? (2) Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?).*

[10] *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Professor June Besek at 9-10).

to the fourth fair use factor (effect of the use on the potential market or value of the copyrighted work). This confusion raises a concern that, as "transformativeness" is increasingly asserted as a dispositive determination in fair use analyses, the fact that derivative works, by definition, may be considered "transformed" could lead courts and others to view the creation of derivative works as inherently fair use rather than ordinarily within the copyright owner's exclusive right to make or authorize.[11] Market harm — including that which is based on the cumulative, *i.e.*, widespread, effect of alleged fair uses — is a critical portion of every fair use analysis, and should not be accorded any less weight by courts than determining whether a challenged use is "transformative." To minimize uncertainty, avoid inconsistent outcomes, and maintain the integrity of the "derivative work" right, Congress should direct the Copyright Office to survey the current caselaw, consult with stakeholders, and issue a circular which explains the distinction between "transforming" a work as an act of fair use and "transforming" a work in the creation of a "derivative work" that requires permission from the copyright owner of the work that is transformed.

Use of Third-Party Copyrighted Works for Non-Profit Educational Purposes

While Professors Jaszi and Besek highlighted serious concerns about "transformative use" which have led to a surge of inappropriately expansive applications of the "fair use" doctrine, publishers are also seeing core educational markets for their copyrighted materials undermined by expansive fair use claims justifying "*non-transformative*" "mirror-image" copying by non-profit educational institutions.[12]

At a time when tuition increases and the imposition of all kinds of "service fees" at institutions of higher education across this country annually raise new affordability hurdles for matriculating students,[13] many colleges and universities are aggressively empowering their

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[11] *See, e.g., Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F.Supp. 2d 1236 (D.Colo. 2006) ("Non-transformative nature" of commercial film edits made for family viewing suitability purposes held to weigh against fair use defense, but also to rebut "derivative work" claim); *see also Patrick Cariou v. Richard Prince, et al.*, 714 F.3d 694 (2d Cir. 2013) (No. 13-261) *cert. denied* 571 U.S. __ (2013) (Court's "talismanic evocation" of the "transformative" character of secondary work/use "effectively obliterates" the derivative works right). *Compare, e.g.*, R. Anthony Reese, *Transformativeness and The Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008) *with* Ashton Kimbrough, *Transformative Use v. Market Impact: Why the Fourth Fair Use Factor Should Not Be Supplanted By Transformative Use as the Most Important Element in a Fair Use Analysis*, 63 ALA. L. REV. 625 (2012).

[12] *See Cambridge University Press et al. v. Becker et al.*, 863 F. Supp. 2d 1190, 1232 (N.D.Ga. 2012), *appeal pending* (11th Cir.).

[13] PRESS RELEASE, *Fact Sheet on the President's Plan to Make College More Affordable: A Better Bargain for the Middle Class*, WHITE HOUSE (Aug. 22, 2013) http://www.whitehouse.gov/the-press-office/2013/08/22/fact-sheet-president-s-plan-make-college-more-affordable-better-bargain- (stating that "a higher education… has never been more expensive… [D]espite [Administration] measures, college tuition keeps rising. The average tuition at a public four-year college has increased by more than 250 percent over the past three decades, while incomes for typical families grew by only 16 percent, according to College Board and Census data."); *Trends in College Pricing 2013*,

faculty and libraries to use digital copying and posting to offer their cost-aggrieved students the comparative luxury of free curriculum materials in all of their courses. Those materials, typically although not exclusively copyrighted works produced by authors and publishers for whom these campuses are collectively their core market, are made freely available online to enrolled students for downloading in the form of digital "coursepacks" of unlicensed reading materials.

Despite settled law establishing that it is *not* fair use to copy and distribute for free to entire classes of students what amounts to custom anthologies of copyrighted reading materials, in multiple courses, semester after semester,[14] academic institutions are increasingly asserting – now with the misguided support of a single federal judge – that their "non-profit" tax status and "educational purpose" are dispositive factors that effectively truncate the required fair use analysis. Specifically, the "amount and substantiality of the portion used" and "effect of the use upon the potential market for or value of the copyrighted work" factors were given short shrift in *Cambridge University Press v. Becker* ("GSU"), where the judge concluded that fair use supports this unlicensed "custom anthologizing" activity at the individual class or professor-level as well as the University's overall systematic, institution-wide, market-supplanting program of such unfair takings.[15] This decision incorrectly ignored the copyright principle of "media neutrality"[16] claiming that the convenience of digital-format, online access somehow relieves the University of the responsibility to pay the customary price for such use of third-party copyrighted works as it would have paid for using the same works to create paper coursepacks.

Such extensive and repeated taking of substantial portions of multiple copyrighted works, without permissions obtained or fees paid, and the distribution of such materials through "mirror-image" "non-transformative" copying for a non-transformative purpose, is troubling enough.[17] However, the current frenzy of dubious "transformative use" theories and claims that have distorted the Supreme Court's careful adoption of Judge Leval's articulation of the transformative use doctrine in the *Campbell* parody case could exacerbate the situation.

For example, a paper published by the Association of Research Libraries indicates that potentially worse distortions of the "transformative use" doctrine in the service of expansive fair use claims may be forthcoming within the academic community, as it argues that "an educational institution could reasonably take the position that an educational use of an entertainment product

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COLLEGE BOARD http://trends.collegeboard.org/sites/default/files/college-pricing-2013-full-report.pdf (last visited Feb. 6, 2014) (documenting that although tuition and fees at public, four-year colleges rose by 2.9 percent on average in 2013, representing the mildest increase in more than 30 years, the average "net price" – the cost after aid and grants are deducted – increased for public institutions by more than 60 percent between 2009 and 2013, from $1,940 to $3,120 per year.)

[14] *See Princeton University Press v. Michigan Document Services, Inc.*, 99F.3d 1381 (6th Cir. 1996) (*en banc*) and *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991).

[15] *See generally, Cambridge*, 863 F. Supp. 2d 1190 (N.D.Ga. 2012), *appeal pending* (11th Cir.).

[16] *See New York Times Co. v. Tasini*, 533 U.S. 483, 502 (2001) (noting that the "transfer of a work between media does not alte[r] the character of that work for copyright purposes.").

[17] *Cambridge,* 863 F. Supp. 2d at 1232 (stating that "this case involves only mirror-image, nontransformative uses").

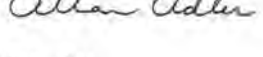
is transformative because the work is being repurposed."[18] Thus, when a teacher reproduces a work (e.g., an animated film "repurposed" for a child psychology class or a best-selling biography "repurposed" for a writer's workshop), even in its entirety, so that her students can study it, her use would be transformative.[19]

Since these "fair use" issues were not addressed in the Subcommittee's hearing on the "scope of fair use," AAP suggests that a future Subcommittee hearing should specifically examine them in the context of educational uses of copyrighted works.

Conclusion

AAP appreciates this opportunity to give the IP Subcommittee the publishing industry's perspective on the current scope of fair use. As both academic witnesses noted, the statutory text of Section 107 is not in present need of amendment. However, the inconsistent output of the judiciary in this area, as well as the evolution of copyright-related technologies and the ubiquity of copyrighted works in our daily lives, make it clear that copyright owners, users, and courts would all benefit from guidance, at a national level, regarding the appropriate application of the fair use doctrine in practical terms. Congress should consider directing the Copyright Office to: (1) provide guidance as to the relationship between specific limitations and exception and fair use; (2) engage stakeholders in the development of balanced best practices for fair use; and (3) explain the distinction between "transforming" a work as an act of fair use and "transforming" a work in the creation of a "derivative work." We look forward to continued engagement with the Subcommittee as it undertakes future hearings on other copyright issues.

Sincerely,



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[18] Jonathan Band, *Educational Fair Use Today*, ASSOCIATION OF RESEARCH LIBRARIES (Dec. 2007), http://www.arl.org/storage/documents/publications/band-edu-fair-use-today-dec07.pdf.
[19] *Id.*

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BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

HEARING ON THE SCOPE OF FAIR USE

STATEMENT OF HIGHER EDUCATION

Submitted on behalf of:
American Council on Education
American Association of Community Colleges
American Association of Public and Land-grant Universities
American Association of State Colleges and Universities
Association of American Universities
National Association of Independent Colleges and Universities

Submitted January 27, 2014

Fair use, a basic copyright law principle, is intended to advance the purpose of copyright, which as the Constitution says at Article 1, Section 8, is to "promote the Progress of Science." The fair use principle is rooted in court rulings that date as far back as 1740 (Gyles v. Wilcox, Chancery Court of England), was extensively developed in U.S. jurisprudence over many decades, and was enshrined in the Copyright Act of 1976 ("Act"). Fair use is the scale on which our nation balances, on the one hand, proprietary interests established by copyright, and on the other hand, vital public rights of communication, commentary, research, and artistic creation that are anchored in the First Amendment. The mission of American higher education — to advance education, increase knowledge through research, and foster public service — depends on the fair use principle.

Fair use ensures that copyright law does not stifle the very learning that copyright is designed to promote. Students, faculty and researchers depend on fair use to incorporate quotations, images and commentary in coursework and scholarly publications. Educational innovation depends on fair use. New digital sources of information that scholars access to develop ideas often rely on fair use. Fair use facilitates access to information for print-disabled students, faculty and researchers. Fair use protects information from deterioration and preserves knowledge for future generations.

The organizations listed above strongly support the continued viability of a flexible fair use doctrine as codified in Section 107 of the Act. We collectively represent the broad range of higher education institutions in the United States, including two-year and four-year public and

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private colleges and universities, and research universities with comprehensive graduate and professional education programs. Our members educate the vast majority of American college and university students and conduct most of the nation's basic research. As illustrated below, fair use is critical to higher education because it advances teaching, research and public service. We respectfully request that this statement be included in the hearing record.

1. Fair Use Is Essential to the Purpose of Copyright and the Legal Framework Established to Promote Creation and Dissemination of Creative Works.

The power to enact copyright law was included in the Constitution to stimulate creative expression. The nation's founders believed copyright would benefit society by promoting public access to information and thereby encourage learning. The Supreme Court has consistently emphasized that the primary goal of copyright is to serve the public interest, not the author's private interest:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.[1]

The Act's fair use provision, Section 107, is fundamental to achieving this public interest purpose. Fair use is a qualification on a copyright owner's rights as delineated in Section 106, and provides assurance that the Act's central purpose can be accomplished. The Act provides that although a copyright owner has rights with respect to copyrighted works, those rights are subject to constraints set forth in the Act, including those in Section 107. Section 107 specifies the circumstances under which portions of a copyrighted work may be used without permission from the copyright owner for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research; such uses are not an infringement of copyright. Section 107 provides a flexible fair-use standard that entails case-specific analysis of whether a particular use of copyrighted work is a fair use:

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 fair use standard's multi-factored approach ensures that public and private interests are appropriately balanced.

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[1] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

Copyright and fair use are thus bound together by the purpose of promoting knowledge and learning for the public good. Fair use empowers intellectual discourse, enriches our understanding of American and international culture, and facilitates creative expression. Without fair use, valuable uses of copyrighted works would be chilled for fear of legal challenge. Educators, scholars, the press and citizens of our nation regularly make limited use of copyrighted works of others — to make a point, to argue an issue, and to inform one another. Such everyday uses are too small in individual value to merit complex and potentially expensive licenses for the use, yet important enough in the aggregate to constitute and sustain intellectual and cultural ideas. Fair use doctrine is not an affront to copyright or owners of copyrighted works. To the contrary, it is how we celebrate those works and encourage their use in ways important to society.

2. Fair Use Supports and Advances the Core Functions of Higher Education.

The core functions of American higher education — teaching, research, and public service — are the foundation of citizenship and democracy, and a source of incalculable economic benefit to our nation. The role of higher education in America catalyzed the development of the fair use doctrine. As the Supreme Court has explained, fair use serves as a "built-in First Amendment accommodation[]"[2] and "affords considerable latitude for scholarship and comment."[3] The right to acquire knowledge and ideas is basic to our nation's schools and universities. Teachers and students must be free to inquire, to study, to evaluate and to gain new knowledge. Fair use fosters criticism, explication and correction of copyrighted works, and thus expands prior knowledge.

Higher education institutions rely on the flexibility fair use assures. Statutory fair use guidelines enable appropriate use and obviate unnecessary and overly conservative licensing requests. The availability of fair use thereby prevents the lack of access to copyrighted works when licenses are not reasonably available. For example, universities have found that several major educational publishers refuse to license content for library reserves, and that many copyright owners fail to respond to requests to use copyrighted work. If fair use applies, the university may elect to use the work, but the well-perceived risk of aggressive, misguided legal challenge may cause the university to forego the legitimate use. Universities and their faculty — who are themselves authors — recognize the important copyright rights granted to publishers and other copyright owners. Fair use must be employed, however, if the mission of higher education is to be realized.

3. Innovation in Higher Education Requires Fair Use.

Colleges and universities utilize fair use to teach and research in innovative ways. Extensive use of online resources in education is perhaps the most significant development related to fair use

[2] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003)
[3] Eldred, 537 U.S. at 220 (quotation omitted).

since the 1976 Act. Access to and dissemination of digital works for purposes of teaching, scholarship and research are essential to the education process.

Fair use enhances the capacity of the digitization of copyrighted works to stimulate innovative teaching and research. Full-text searching has been called the most significant advance in library search technology in the last five decades, for it allows scholars to perform searches in seconds that used to take days, months or even years — if the search was possible at all. "Text mining" is a new form of statistical research made possible through application of fair use to digitized works. With such works, educators can compare student papers against a database of existing works to detect plagiarism, a practice challenged as copyright infringement but acceptable under the fair use doctrine. With a flexible and adaptable standard, fair use cultivates innovation in higher education.

4. Fair Use Expands Opportunities for the Disabled.

Fair use expands educational opportunities for print-disabled persons. Digitization based on fair use is necessary to overcome disadvantages that print-disabled persons have historically faced in research, scholarship, and learning. Print-disabled persons are now able to access a universe of knowledge that in its traditional form they could not. Fair use facilitates compliance with federal nondiscrimination laws that require higher education institutions to provide reasonable accommodations to disabled persons.

5. Fair Use Facilitates Preservation and Expansion of Knowledge.

Fair use augments the provisions of Section 108 to assure preservation of information for future generations, notably through digitization of copyrighted works for scholarship and research purposes. The creation of digital copies of copyright-protected works protects them against purposeful, inadvertent, or unavoidable deterioration or destruction.

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A key Constitutional purpose of copyright law is to promote learning. As an integral part of copyright law, fair use plays a critical role in achieving this purpose. Without fair use and robust application of its flexible standards, educational, scholarship and research opportunities would be lost to the detriment of students, scholars and researchers at America's higher education institutions, and to the detriment of our nation and its economy. Thoughtful interpretation must not eviscerate the essential need for and functions of fair use in the 21st century context. To weaken fair use would be to impede teaching, learning, research and scholarship, the very "Progress of Science" the founders intended copyright to promote.

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

HEARING ON THE SCOPE OF FAIR USE

JANUARY 28, 2014

EXECUTIVE SUMMARY AND SUBMITTED COMMENTS
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SUBMITTED COMMENTS OF VICTOR S. PERLMAN
EXECUTIVE SUMMARY

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. ASMP is the oldest and largest trade association of its kind in the world. My comments are made on behalf of ASMP and its more than 7,000 members.

Freelance photographers create more copyrighted works than any other class of creators. For that reason and others, they are the group that is the most vulnerable to copyright theft under the guise of purported "fair use." Unlike most copyrighted works, theft of a photograph is almost always of the entire photograph, not just a portion of one. Photographers find themselves losing sales to theft and competing in the marketplace with their own images in a business environment where the competion has zero production or acquisition costs. Selling stolen goods is always more profitable than selling inventory that has been created or purchased at fair market value.

In recent years, the courts have ignored the clear Congressional intent emboded in the fair use statute, §107 of the Copyright Act of 1976. The crucial words, **"...for purposes such as criticism,comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research..," have become forgotten**. The Act must be amended to give the courts clear instruction and limitation in their application of fair use by including a sentence at the end of §107 to the effect that "**Except for uses that parody copyrighted works, commercial uses of copyrighted works shall not qualify as fair uses.**" *or* "**Except for uses that parody photographs, commercial uses of photographs shall not qualify as fair uses.**"

PREPARED STATEMENT OF VICTOR S. PERLMAN

Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, and distinguished members of the Committee, I thank you for this opportunity to present the views of ASMP on behalf of its more than 7,000 members, who are primarily freelance, professional photographers. To our members, the application of the fair use defense by the courts --- and the resulting expectation by the public that almost every unauthorized use qualifies for the fair use defense --- appears to have altered fair use from a necessary and fairly balanced aspect of the Copyright Act to the exception that threatens to swallow, not just the rule, but the livelihood of many of our members.

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. ASMP is the oldest and largest trade association of its kind in the world. Freelance photographers create vastly larger numbers of copyrighted works than any other class of creators, making them more vulnerable as a group to potential misinterpretation and misapplication of the fair use doctrine than any other single class of creators of copyrighted works in the world. A simple skim of websites on the internet will show that photographs are the primary method of illustrating web content and the website more attractive to viewers. Social media websites are replete with photographs, and many of them consist of little more than photographs. Despite that, vendors like PicScout ant TinEye using image recognition software tell us that between 80% and 90% of the images that appear on the web have been posted without permission from the photographers and other copyright owners.

1. The Problem: Almost Every Infringement is Claimed to be Fair Use

The problem facing photographers is that vast and rapidly increasing numbers of people and companies that use photographs are doing so without permission from the copyright owners and, when confronted with infringement claims, reply that their uses are permitted by the fair use defense. Fair use, once a concept familiar only to copyright lawyers and a handful of others working with copyrighted content, has become a battle cry for the anti-copyright constituencies that claim that all content should be free.

A vivid example of this can be seen in the legislative positions espoused by the university, library and museum communities. Less than 10 years ago, these groups advocated vigorously for legislation to allow them to use so-called orphan works, i.e. copyrighted works of which the copyright owners could not be located. Following the recent spate of judicial decisions improperly expanding the scope and application of fair use, they have changed their position. Now, they believe that orphan works legislation is no longer necessary --- they can get all of the use of orphan works that they want through claims of fair use.

The problem for photogtaphers is exacerbated by the fact that uses are almost never made of a just a portion of a photograph; infringements are almost always of entire works, not just snippets. Thus, to the extent that infringements damage copyright holders and the values of copyrighted works, infringers using photographs damage the values of entire works, making the damage that much more significant. Photographers end up competing in the marketplace against their own images, facing substantial degradation of the value of their images. Competition is a healthy thing, but here, the competing forces have zero costs of producing or acquiring the content. Photographers compete with each other all the time, but nobody can compete with "free" and stay in business.

Freelance professional photographers are small businesspeople who are typically sole proprietors. Their training and education often extend beyond college, and with the constant and meteoric changes occasioned by developments in technology, their costs of and need for continuing training are a demanding fact of life.

Those same changes in technology have made the theft of images on the internet so easy that small children using iPads and other tablets can do it. Sadly, that technology has not developed effective means of preventing such theft.

Every year, I receive hundreds of telephone calls and e-mails from our members and other professional photographers reciting similar stories: They have discovered an unauthorized use of a photograph. The image was registered before the infringement. The photographer has contacted the infringer and issued a demand. The infringer has refused to pay a licensing fee and/or cease the infringement. Less than a decade ago, the infringer used to say, "So, sue me." Today, the infringer says, "It's fair use." The photographer wants to know what to do.

In most cases, the practical answer is, sadly, "nothing" for a number of reasons. One of the primary reasons for this is that it usually proves impossible to find a copyright attorney who will accept the case on a contingent fee basis. Lawyers have always examined the risk of not winning as one of the factors to consider in evaluating a case. Here, however, the courts have created a scenario in which any case that looks like a sure winner may well turn out to be a loser because of the courts' unwarranted and unanticipated expansion of the application of fair use.

2. The Cause: Misinterpretation and Application of Fair Use by the Courts

With the popularization of the internet, the use of photographs --- and their theft --- has skyrocketed. As mentioned above, current technology has permitted the theft, but not the prevention of theft, with incredible ease. At the same time, a culture of "everything on the internet is free" has arisen. One need only look at

Congress' recent experience with SOPA and its related legislation for a clear example of that, as well as of its prevalence and effectiveness.

In the past, copyright owners have been able to look to the courts to establish precedents that would drive the law in the proper direction to stem the tide of violations of the law. However, recent experience in the federal courts has done just the opposite: precedents have ignored what Congress said and intended in enacting §107 of the Copyright Act and have perverted the fair use defense. The all important language in the introductory paragraph of §107, **"...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research..,"** have become all but forgotten. Fair use and its related concept of "transformation" have been converted to a virtual "Get Out of Jail Free card for copyright infringers.

Rather than waste the Committee's time and effort by going repeating the history of judicial decisions and their errors in applying fair use, I urge the Committee to study the testimony and submitted statement of June Besek, of Columbia University's Kernochan Center. Fair use, which was never intended to cover uses of entire works, has now been expanded to include, not just entire works, but collections of milions of entire copyrighted works. The concept of transformation, which started as nothing more than a theory in a law review article, has now been morphed from transformation of a **work** to transformation of a **use**.

§107 was clearly intended to allow, and allow only, uses such as those made "...for purposes such as criticism,comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research..." Now, courts have decided that Congress' intentions should be ignored and have ruled that massive commercial uses of entire works are fair game for the fair use defense.

3. The Solution: Congress Must Act

As June Besek pointed out, the pendulum of judicial interpretation has swung way too far in favor of finding fair use in an overwhleming number of contexts and situations by finding "transformation" in ways that Congress never intended or envisioned. The delicate balance of interests of the public with interests of copyright creators and owners, on which the Copyright Act and its underlying authorization in the Constitution are based, are being dangerously threatened. It is time for Congress to act to force the courts to follow its instructions.

The courts have demonstrated an unwillingness to examine, let alone enforce, Congressional intent regarding fair use. Therefore it must be specifically stated in the legislation that the courts apply. A mere Congressional Resolution would not be an effective cure. Rather, the black letter law of §107 must be amended.

I would recommend that Congress consider the following as at least a starting point for drafting an amendment to §107:

Add a sentence at the end of §107 to the effect that, "**Except for uses that parody copyrighted works, commercial uses of copyrighted works shall not qualify as fair uses.**"

At the hearing, Representative Marino posed the question of whether different classes of copyrighted works ought to be treated differently for purposes of applying the fair use defense. If the Committee believes, as I do that the uses of photographs constitute a unique and specific challenge to applying the fair use defense, the language could be limited to cover only photographs: "**Except for uses that parody photographs, commercial uses of photographs shall not qualify as fair uses.**"

In this submission, I am not going to address the subject of mass digitization which, I believe, is a separate subject that has to be addressed separately and specifically by Congress.

Conclusion

The fair use doctrine is essential to the protection of the public's access to copyrighted content. However, that protection is also provided in our copyright law by the idea-expression duality and by the fact that, eventually copyrighted works fall into the public domain, and recent court decisions have created an expansion of fair use that is contrary to the intention of Congress and the delicate balance of interests inherent in the Copyright Act. The courts have ignored Congressional intent and abused its language in applying fair use. It is time for Congess to act in order to restore balance and stop the trend of "Courts Gone Wild."

Thank you for your time and consideration.

Respectfully submitted,

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Before the
United States House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
Regarding

The Scope of Fair Use

January 28, 2014

Statement of the
Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies that collectively generate more than $250 billion in annual revenues.[1] CCIA requests that this statement be included in the record of this hearing.

It is no accident that the fair use doctrine is the first limitation to follow the enumerated exclusive rights in the Copyright Act In addition to being fundamental for purposes such as 17 U.S.C. § 107's statutorily delineated "criticism, comment, news reporting, teaching, scholarship, or research," the broad contours of fair use are what help reconcile the Copyright Act's inherent limitations on free speech with the First Amendment's prohibition of the same – a fact motivating the Supreme Court's decisions in *Eldred v. Ashcroft*,[2] and more recently in *Golan v. Holder*.[3]

Although these scholarly and expressive foundations of the principle have led some to the mistaken conclusion that fair use does not apply in the commercial context, courts routinely apply it there as well to encourage unauthorized but socially desirable, transformative uses. For example, the Supreme Court's latest decision addressing fair use unanimously concluded that a commercial rap parody was fair use, in *Campbell v. Acuff-Rose Music, Inc.*[4] This provision has

[1] A complete list of CCIA members is available at http://www.ccianet.org/members.
[2] 537 U.S. 186, 219-20 (2003).
[3] 132 S.Ct. 873, 890 (2012).
[4] 510 U.S. 569 (1994).

also been extended to uses as diverse as using technology to "time-shift" television programming,[5] creating thumbnails of images for indexing on a search engine,[6] and introducing students' papers into a database in order to detect plagiarism.[7]

Nowhere is the fair use doctrine's importance to innovation more evident than in the tech industry. Since the *Betamax* decision,[8] thirty years old last week, fair use has enabled innovators to bring to market numerous new technologies. Consumers have this decision and its interpretation of the fair use doctrine to thank for a generation of technology products, from mp3 players to DVRs to smartphones, and a vast segment of online services, including search and cloud storage. Although initially feared by copyright holders, new technologies from the piano roll player to the VCR to mp3 players have in fact created more opportunities for commercial exploitation by content producers, effectively "growing the pie" for all stakeholders.

More recently, direct-broadcast satellite and Internet companies have relied on fair use last year to develop new technologies and services to benefit consumers and the public good. Dish Network's "PrimeTime Anytime" feature in its "Hopper" DVR enables consumers to record primetime content on the four major broadcast networks, and the "AutoHop" feature lets them skip over commercials. Fox sued for infringement, but the Ninth Circuit held that the treatment of fair use in the venerable *Betamax* case governed, and to the extent it did not, "commercial-skipping does not implicate any copyright interest."[9] The same issue is being litigated by ABC in New York, where Dish has so far prevailed over broadcasters.[10] More recently, a federal court held that Google's academic book-scanning project was also fair use, because of the "significant public benefits" of enabling digital search of analog texts, which provides an "invaluable research tool."[11] Although plaintiffs in the case have already indicated plans to appeal, the trial court's decision nevertheless represents a significant milestone in fair use jurisprudence favoring innovative technologies.

These are not isolated examples. Research commissioned by CCIA in 2011 and recently

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[5] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
[6] *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).
[7] *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).
[8] *See supra* n.5.
[9] *Fox Broad. Co., Inc. v. Dish Network LLC*, 723 F. 3d 1067, 1076 (9th Cir. 2013).
[10] A district court held that Dish "is likely to succeed in establishing that copying by its customers constitutes fair use of ABC's copyrighted programming." *In re AutoHop Litig.*, 2013 WL 5477495, at *7 (S.D.N.Y. Oct. 1, 2013).
[11] *Authors Guild v. Google*, 2013 WL 6017130, at *10 (S.D.N.Y. Nov. 14, 2013).

cited by the National Research Council of the National Academies[12] concluded that industries depending upon fair use and related limitations to copyright generated revenue averaging $4.6 trillion, contributed $2.4 trillion in value-add to the U.S. economy (roughly one-sixth of total U.S. current dollar GDP) and employ approximately 1 in 8 U.S. workers. Exports of goods and services related to fair use industries increased by 64 percent between 2002 and 2009, from $179 billion to $266 billion. Exports of trade-related services, including Internet or online services, were the fastest growing segment, increasing nearly ten-fold from $578 million in 2002 to more than $5 billion annually in 2008-2009.[13]

The conclusions reached by the 2011 study are borne out by the wide array of industries relying on fair use to create and innovate, often for commercial purposes. The value of fair use extends well beyond industries that bring us new technological innovation. Just in 2013 alone, the fair use doctrine came to the defense of various creative and innovative entertainment and technology defendants, representing film and theatre, the NFL, art, satellite, music, and digital books. A Broadway show's use of a 7-second clip of television was found to be fair use,[14] with the court characterizing the dispute as "a good example of why the 'fair use' doctrine exists," and accusing the litigation of "having a chilling effect on creativity."[15] A well-known "appropriation" artist's collages of copyright-protected photographs were found to be transformative fair use.[16] A movie studio prevailed with a fair use defense over piracy allegations arising from a film that paraphrasing nine words from William Faulkner.[17] An unlicensed multimedia image used in a band's live performance was found to have no effect on "the value of the piece or of [the artist's] artwork in general", and was therefore non-infringing.[18] The NFL and the Baltimore Ravens recently won a long-running copyright dispute, with the court holding that "[a]ny other result would visit adverse consequences not only upon

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[12] Stephen A. Merrill & William J. Raduchel, *Copyright in the Digital Era: Building Evidence for Policy*, National Research Council (2013), *available at* http://www.nap.edu/catalog.php?record_id=14686.

[13] Thomas Rogers & Andrew Szamosszegi, *Fair Use in the U.S. Economy* at 26-27 (2011), *available at* http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf.

[14] *SOFA Entertainment v. Dodger Productions*, 709 F.3d 1273 (9th Cir. 2013).

[15] *Id.* at 1280. The Supreme Court has explained that fair use is an "'equitable rule of reason' which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

[16] *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

[17] *Faulkner Literary Rights v. Sony Pictures Classics*, 2013 WL 3762270 (N.D. Miss. July 18, 2013).

[18] *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013).

filmmaking but upon visual depictions of all sorts."[19] The court pointed to a brief by the MPAA and film-makers when explaining that "creation itself is a cumulative process; those who come after will inevitably make some modest use of the good labors of those who came before," noting that fair use "is crucial to the exchange of opinions and ideas."[20] Underscoring the value of fair use across the economy, the court stated that "[s]ociety's interest in ensuring the creation of transformative works incidentally utilizing copyrighted material is legitimate no matter who the defendant may be."[21]

The committee's consideration of the subject of fair use should recognize the importance of fair use and related limitations in ensuring a balanced intellectual property system. In particular, the absence of technology innovators among today's witnesses should not obscure the significance of fair use to the technology industry and the broader economy. Not only does fair use serve extensive societal interests, it has enabled extraordinary contributions to the U.S. economy, which our copyright policy should seek to encourage.

[19] *Bouchat v. Baltimore Ravens Ltd. P'ship*, 737 F.3d 932, 935 (4th Cir. 2013).
[20] *Id.* at 944.
[21] *Id.* at 945.

January 31, 2014

Rep. Howard Coble, Chairman
Rep. Tom Marino, Vice-Chairman
Subcommittee on Courts, the Internet and Intellectual Property
House Judiciary Committee

Submission from the Copyright Alliance on The Scope of Fair Use

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting the ability of creative professionals to earn a living from their creativity. It represents the interests of creators and copyright owners across the spectrum of creative industries—including writers, composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers, and software developers—as well as the creative union workers and small businesses in the creative industry and the organizations and corporations that support and invest in the creative sector.

The Copyright Alliance is pleased to see the Subcommittee take the time to examine fair use, a doctrine that has been a part of U.S. copyright law nearly as long as copyright law itself has existed. We support fair use, and are dedicated to ensuring that the balance the Constitution and Congress struck to provide robust copyright protections to authors and meaningful exceptions for fair use is maintained.

I. Copyright Law Encourages Creators To Draw Inspiration From Others Regardless of Fair Use

Copyright law inherently recognizes that authors build on and draw inspiration from the work of others, a recognition that is coextensive with the protection of original expression. As Justice Story wrote nearly 170 years ago:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before…The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.[1]

Copyright doctrines such as the originality requirement, the idea/expression distinction, and the substantial similarity test work alongside fair use to ensure the progress of art and

[1] Emerson v. Davies, 8 F.Cas. 615, 619 (D. Mass. 1845).

science.

The fair use doctrine is based on a recognition that there are times when the value of allowing expression to be copied may override an author's exclusive rights. Fair use is necessary but also necessarily limited, as any public interest exception to individual rights should be. It is important to reiterate the inherent value of creative works. Authors can be inspired by and immediately build upon the ideas in existing works. Creative works can inform and teach. They can help us understand the world better or examine our own lives more clearly. This inherent value unfortunately tends to be overlooked in fair use discussions. The implication is that the ability to copy substantial portions of the original expression is the only value of creative works.

The following quote from professional prop maker Eric Hart about his recently published book, *The Prop Building Guidebook*, illustrates this point:

> You have plenty of free alternatives to seek out on your own on the Internet [on prop-making]. But you probably, like me, were not satisfied with them, and wanted someone to devote the time and energy to create a more complete and definitive prop building guide. That's exactly how I felt and what I did. This book is not a commodity. It is not interchangeable with other books out there, nor did it appear magically one day. Its publication was not inevitable. I didn't have some old prop book in front of me that I could just transcribe and update. I had to work for every sentence in that book. Some tiny phrases and charts took hours just to put together, because the information was scattered all over the place. The prop making book which most people use was published almost thirty years ago. If I hadn't written this one, it might have been another thirty years before one appeared again.[2]

II. Promoting the Creation of New Works is at the Heart of Our Legal Copyright Tradition

The creative community has helped build and shape the contours of fair use over decades of work. The understanding of fair use thus shaped delivers on the goals set by the Founding Fathers. Robust copyright protections for individual authors are critical to the development of the arts and sciences as well as for the promotion of free expression—so critical, in fact, that they are included in the Constitution, which grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[3]

Even before the Constitution had been drafted, twelve of the thirteen original colonies

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[2] *Innovation in America-The Role of Copyrights: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary, 113th Cong. 17-21* (2013) (testimony of Sandra Aistars, Executive Director, Copyright Alliance)(App. A).
[3] U.S. Const. art. 1 § 8, cl. 8.

had enacted copyright laws to protect authors.[4] These acts emphasized basic principles that remain true to the present—Massachusetts, for example, declared that "the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons."[5] Only granting authors the "legal security of the fruits of their study" ensures these contributions.[6]

More recently, the Supreme Court has affirmed these principles. For instance, in *Harper & Row v. Nation Enterprises* the Court said "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[7]

Fair use, when appropriately scoped, complements and serves these long-standing goals. "[T]he author's consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained."[8] Although fair use is necessary, it also must remain limited. As James Madison observed of the Copyright Clause, "The public good fully coincides … with the claims of individuals."[9] The Copyright Office endorsed this view in 1961 explaining that the interests of both authors and the public "will usually benefit from the widest possible dissemination of the author's works."[10] Noting that some limitations and conditions on copyright are essential when the interests of the public and authors' interests conflict, the Office cautioned that such restrictions on copyright

> [S]hould not be so burdensome and strict as to deprive authors of their just reward. Authors wishing copyright protection should be able to secure it readily and simply. And their rights should be broad enough to give them a fair share of the revenue to be derived from the market for their works.[11]

In the same report, the Copyright Office discussed the doctrine's contours, which are currently reflected in the four-prong test spelled out in 17 U.S.C. § 107. "[B]roadly speaking,

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[4] 8-7 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, App. 7 (Matthew Bender, Rev. Ed. 2013)
[5] 8-7 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, App. 7[C] (Matthew Bender, Rev. Ed. 2013) (citing Acts and Laws of the Commonwealth of Massachusetts 236 (Boston, B. Edes & Sons 1781-['83])).
[6] *Id.*
[7] Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985).
[8] Horace G. Ball, Law of Copyright and Literary Property 260 (1944).
[9] The Federalist No. 43 (James Madison).
[10] Staff of H. Comm. on the Judiciary, 87th Cong., Report of the Register of Copyright on the General Revision of the U.S. Copyright Law 6 (Comm. Print 1961).
[11] *Id.*

[fair use] means that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner's market for his work."[12]

When applied in this manner, fair use can foster creativity by enabling independent creators to use copyrighted works in ways that produce new cultural contributions that would not be possible otherwise. Without fair use, for example, individuals may not always be able to produce transformative parodies or criticism of original works because authors may be reluctant to grant permission for such uses. Generally, creators of all types regularly rely on fair use. Copyright Alliance members in particular have an extensive history of defending the doctrine in court.[13]

III. Some Courts Have Misapplied the Fair Use Doctrine

While no legislative changes regarding fair use are necessarily ripe at this point, there is a concerning trend in copyright litigation. In recent decisions, courts have erroneously enabled the expansion of fair use as a catch-all doctrine that subverts the goals of copyright to the ultimate detriment of the public interest. As *Nimmer on Copyright* explains "if the 'progress of science and useful arts' is promoted by granting copyright protection to authors, such progress may well be impeded if copyright protection is virtually obliterated in the name of fair use."[14]

Other influential voices echo this sentiment. Barbara Ringer, the late Register of Copyrights who played a pivotal role in the last general revision of the Copyright Act, observed that "freedom of speech and freedom of the press are meaningless unless authors are able to create independently from control by anyone, and to find a way to put their works before the public. Economic advantage and the shibboleth of 'convenience' distort the copyright law into a weapon against authors."[15] When the Supreme Court blessed the "transformative use" test in *Campbell v. Acuff-Rose*, Justice Kennedy's concurrence cautioned, "If we allow any weak transformation to qualify as parody, . . . we weaken the protection of copyright. And under-protection of copyright disserves the goals of copyright just as much as overprotection, by

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[12] *Id.* at 24.

[13] Terry Hart & Evan Sheres, *How the Copyright Industries Defend Free Speech*, Copyright Alliance (Oct. 23, 2012), https://copyrightalliance.org/2013/10/how_creative_industries_defend_free_speech#.UuwC0Hla-DX (explaining "As responsible stewards of the public interest, they have on numerous occasions taken it upon themselves to protect fair use, storytelling and parody… Their efforts ensure that free speech, copyright, and fair use continue to create the environment necessary for a free society to flourish").

[14] 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[E][1] (Matthew Bender, Rev. Ed., 2013).

[15] BARBARA RINGER, DEMONOLOGY OF COPYRIGHT 19 (1974).

reducing the financial incentive to create."[16]

Not all calls for expanding fair use arise out of pecuniary interest; some are sincere and well-intentioned. In these instances, it is even more important to recognize the dangers of over-extending fair use. The Copyright Office has previously explained:

> [T]he revolution in communications has brought with it a serious challenge to the author's copyright. This challenge comes not only from the ever-growing commercial interests who wish to use the author's works for private gain. An equally serious attack has come from people with a sincere interest in the public welfare who fully recognize (in the words of Sir Arthur Bliss) "that the real heart of civilization, the letters, the music, the arts, the drama, the educational material, owes its existence to the author"; ironically, in seeking to make the author's works widely available by freeing them from copyright restrictions, they fail to realize that they are whittling away the very thing that nurtures authorship in the first place. An accommodation among conflicting demands must be worked out, true enough, but not by denying the fundamental constitutional directive: to encourage cultural progress by securing the author's exclusive right to him for a limited time.[17]

It is also important to recognize that some lines have been blurred due to new communications technologies. For example, advocates for further expansion of fair use often point to instances of noncommercial or not-for-profit uses of protected works, such as fan fiction. These assertions are problematic for two reasons. First, commercial for profit intermediaries commonly disseminate these non-commercial works and interfere with creators' copyright. Second, the noncommercial nature of a use does not automatically make it into a fair use. Pursuant to the Copyright Act, there are three other factors at play – the nature of the copyrighted work, the amount and substantiality of the portion used un relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.[18]

Several recent court decisions that have diverged from traditional fair use principles and undermine the ultimate purpose of copyright law:

- *Cambridge Univ. Press v. Becker*, 863 F.Supp.2d 1190 (N.D. Ga. 2012): The court's arbitrary, quantitative approach to fair use unjustifiably affords lower protection to scholarly works. The decision also ignores the incentives of independent authors to contribute to larger works.

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[16] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 599 (1994) (Kennedy, J., concurring) (referring to the test described in Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)).

[17] U.S. COPYRIGHT OFFICE, SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, XV (1965).

[18] 17 U.S.C. § 107 (2) – (4) (2011).

- *Prince v. Cariou*, No. 11-1197 (2d. Cir. Apr. 25, 2013): The Second Circuit's holding that a use does not have to reflect on the original work in some way (through, for example, criticism or commentary) directly contradicts Supreme Court precedent and threatens to eliminate a copyright owner's exclusive right to create derivative works provided by Congress through the Copyright Act.[19]
- *Authors Guild v. Google*, 770 F.Supp.2d 666 (S.D.N.Y. 2011): The court's analysis of the market harm was highly speculative. The court failed to consider the potential market effect should mass digitization become widespread.

Outside of the courts, there have been recent examples of derivative uses that some have argued should be considered fair use. For example:

- In November 2013, a startup children's toy developer, Goldieblox, released an advertisement that incorporated an unauthorized "remix" of the Beastie Boys' song *Girls*. The company sought a legal declaration that the video is covered by the fair use doctrine and does not constitute copyright infringement.[20] Under the company's argument, the fair use requirement that a new work comment on or critique in some way the original work is virtually diluted. In addition, arguments for fair use in this case also override the presumption that commercial uses are not considered fair. There is no public interest in the unfettered vending of plastic toys, at least not one compelling enough to strip authors of their right to say no. Such an interpretation also raises issues of implied endorsement. Fair use should not be used to conscript artists' expression to support commercial goods and services against their will.
- The Ninth Circuit has held that image search engines that return results in the form of thumbnail versions of copyrighted images engage in fair use, in part because the small size and low quality of the reproduction causes little market harm.[21] However, there is no plausible fair use argument when search engines begin offering (and directly monetizing) full size, high-quality versions of images in search results. For one, such a use clearly usurps the market of such copyrighted works, for example, by steeply reducing the "click-through" rate to the author's website.[22]

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[19] *Id.* at § 106 (2).
[20] Kyle McGovern, *Toy Company Sues Beastie Boys, Rick Rubin over 'Girls' Parody Commercial*, SPIN, Nov. 22, 2013, *available at* http://www.spin.com/articles/toy-company-sues-beastie-boys-rick-rubin-girls-parody-commercial/.
[21] *See* Kelly v. Arriba Soft. Corp., 336 F.3d 811 (9th Cir. 2003); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (2007).
[22] *See* Shahzad Abbas, *How Google's Image Search Update Killed Image SEO*, DEFINE MEDIA GROUP (Apr. 15, 2013), http://www.definemg.com/how-googles-image-search-update-killed-image-seo/.

In contrast, the following decisions appropriately interpreted Section 107:

- *Associated Press v. Meltwater U.S. Holdings, Inc.*, No. 12-1087 (S.D.N.Y. Mar. 21, 2013): Meltwater, a news reporting service that monitors online news services, scrapes and distributes headlines and verbatim excerpts of articles to paid subscribers. Despite being confronted with a novel service, the court correctly held that Meltwater's copying of Associated Press articles was not a fair use. The court concluded that Meltwater was engaged in the same business as AP as the low click-through rate of Meltwater demonstrated that customers saw the service as a substitute for the original articles.
- *Bouchat v. Baltimore Ravens*, 619 F.3d 301 (4th Cir. 2010): The incidental reproduction of a copyrighted team logo in a historical documentary was correctly found to be fair use by the Fourth Circuit.

IV. Fair Use Should not be "Exported" Through Free Trade Agreements

While fair use has long been a part of U.S. copyright law, it is rarely seen in other countries. Although other countries do have limitations and exceptions as part of their copyright laws, these generally take the form of specific and enumerated lists of permissible uses.[23] As a flexible doctrine, fair use is workable only by reference to the decades of court precedent that have fleshed out its contours. Without this precedent to guide courts, decisions in other countries would have profound and unpredictable results. Further, the majority of foreign countries operate under civil law rather than common law, meaning their courts are not bound by prior decisions at all.

In his written testimony, Prof. Peter Jaszi writes,

> "Finally, let me suggest – in the strongest terms -- that you approach with extreme caution any proposal to facilitate short-form, non-precedential determinations of fair use disputes – whether by administrative or judicial means. Fair use decisions belong in the Article III courts, and the continued development of the doctrine, over time, has been the result of the accrual of precedents from the federal judiciary. Tampering with this proven scheme could only work mischief with the functioning of this important doctrine." [24]

Though we disagree with his opposition to "short-form, non-precedential" dispute resolution, such as the copyright small claims proceeding proposed by the U.S. Copyright Office, and note that he later contradicts the importance he places on precedence when recommending

[23] *See e.g.* Ley N° 20.435 que Modifica la Ley N° 17.336 sobre la Propiedad Intelectual [Law No. 20.435 that modifies Law No. 17.336 on Intellectual Property], art. 71, Abril 23, 2010 DIARIO OFICIAL [D.O.] (Chile).

[24] PETER JASZI, FAIR USE NOW 7 (2014) (Testimony of Professor Peter Jaszi, at Hearing on "The Scope of Fair Use" before the House Judiciary Committee Subcommittee on Courts, Intellectual Property and the Internet).

the export of the fair use doctrine through international agreements, we do agree that the "accrual of precedents" is what makes fair use work in the U.S.

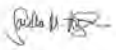
For these reasons, it is inappropriate to include the doctrine in free trade agreements. We urge the Subcommittee to resist efforts to do so.

V. Guidelines for Best Fair Use Practices are the Best Solution at This Point

Though no legislative changes are needed for fair use, there are nevertheless areas where the doctrine is still vague. Greater clarity and guidance would be useful to creators, users, and intermediaries moving forward. The U.S. Copyright Office is in the best position to facilitate such discussions due to its neutrality, expertise, and familiarity with relevant stakeholders.

This would not be the first time the Judiciary Committee would promote the development of guidelines for best fair use practices. The 1976 Copyright Act was the first to recognize the doctrine of fair use in a statutory provision. The general statutory language is a result of concerns voiced by opposing sides about specifics. A House Report explains, "The specific wording of Section 107 as it now stands is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes."[25] After the Act was signed into law, stakeholders sought greater clarity for specific contexts. In June 1975, Judiciary Committee Chairman Robert Kastenmeier encouraged educational institutions and author/publisher groups to get together to collectively generate such guidelines. The result was the "Agreement On Guidelines For Classroom Copying In Not-For-Profit Educational Institutions With Respect To Books And Periodicals."[26] In April that same year, several music and educational organizations released "Guidelines for Educational Uses of Music."[27]

Respectfully submitted,



Sandra Aistars
Chief Executive Officer
Copyright Alliance

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[25] H. R. REP. NO. 94-1476, at 66 (1976).
[26] AD HOC COMMITTEE ON COPYRIGHT LAW REVISION, AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS (1976), *available at* http://www.unc.edu/~unclng/classroom-guidelines.htm.
[27] AD HOC COMMITTEE ON COPYRIGHT LAW REVISION, GUIDELINES FOR EDUCATIONAL USES OF MUSIC (1976); *available at* http://copyright.musiclibraryassoc.org/Resources/EducationalUseOfPrintedMusic.

Testimony of

Future of Music Coalition

On
"The Scope of Fair Use"
Hearing

House Subcommittee on the Courts, Intellectual Property and the Internet

January 28, 2014

House Subcommittee on the Courts,
Intellectual Property and the Internet
2138 Rayburn Office Building
Washington, DC 20515

January 28, 2013

Dear Chairman Goodlatte, subcommittee Chairmen Coble and Marino and members of the committee:

We are honored to submit the following testimony for the record in this hearing on the scope of fair use.

Future of Music Coalition (FMC) is a national nonprofit education, research and advocacy organization for musicians. Our work over the past thirteen years has centered on the ability for musicians and composers to reach potential audiences and be compensated for their work. We also pay close attention to artists' ability to access and—depending on circumstances—incorporate existing creative expression as a means of further enriching our culture.

In many ways, current conversations about fair use are emblematic of the space FMC occupies. Our organization and the many artists with whom we engage have first-hand experience with copyright and its allowances and limitations. As artist advocates, performers, recording artists, independent label owners, journalists, academics, technologists and consumers of culture, FMC often finds itself at an intersection of a range of interests. Our comments in this proceeding will reference just some of these intersections—specifically those relevant to musicians and composers.

We must begin by recognizing the importance of fair use to a functional copyright regime that allows for the advancement of culture, even where—under certain conditions—its evolution involves the use of copyrighted material in new works. We believe that the current scope of fair use as outlined in statute is up to the task of serving those who would make use of existing works in new forms of expression, as well as those whose

rights may be infringed upon. Many artists and rightsholders understand the importance of fair use as a limited exception in copyright law, because fair use is part of what allows them—in certain specific instances—to utilize aspects of existing expression in new works. Fair use can also be seen as part of America's free speech traditions, as it allows for the kind of criticism and commentary that is integral to a democratic society. However, it is important to note that fair use does not give free rein to just take someone else's expression. Artists and copyright owners are granted limited-time, exclusive rights under the law in part because these rights incentivize the creation of new works, from which the public derives benefit. There will always be uses deemed by the courts to be irreconcilable with the four-factor test laid out in section 107 of the Copyright Act, which are as follows:

> (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.

We recognize the establishment of fair use as an affirmative defense against infringement claims, but feel strongly that fair use—even were it to be expanded—is insufficient to address the majority of practical concerns faced by creators in the digital marketplace. Still, there is much to be said for the current process of adjudication that over time results in a more comprehensive understanding of this doctrine and its application. At this point, however, it seems imprudent to modify existing statute around fair use when there remains much to be done to improve how copyright functions within specific environments, such as music licensing and emerging digital business models.

Fair use takes center stage

Recent controversies around the use of unlicensed recordings and compositions have exacerbated tensions between those whose livelihoods depend to no small extent upon the exclusivities granted under copyright law and new users—often commercial—who seek to incorporate some or all of an existing work.

While litigation can serve to provide greater clarity around contested uses, it is not always necessary. Some uses advanced as "fair" may not satisfy the requirements of the four-part test, regardless of how the analysis is weighted. For example, it seems unlikely that the use of a complete lyric by a popular commercial website—even with annotation—is sufficiently transformative enough to satisfy the first factor, while there is a strong case to be made that such a use harms the market for the existing work.[1] Going further, the Copyright Act specifically lists annotation as part of the bundle of activities described as a "derivative" right exclusive to the owner of a work. The music lyric site Rap Genius—which was among the sites that recently came under fire from the National Association of Music Publishers for unlicensed publication of song lyrics[2]—apparently recognizes that claims to fairness may not hold up under judicial scrutiny and is now securing the required permissions from rightsholders.

Other uses may not be so cut-and-dry. The Beastie Boys' recent skirmish with upstart toy company GoldieBlox inspired strong public reactions on all sides of this issue, but hasn't really done much to improve understanding of the fair use doctrine among music fans (or even some copyright attorneys). In this instance, GoldieBlox posted an online advertisement called "GoldieBlox, Rube Goldberg & The Beastie Boys" that used music from the Beastie Boys' "Girls," a song loaded with juvenile—and likely tongue-in-cheek—sexism. The GoldieBlox ad replaced the song's lyrics with more positive messages about girls engaging in physics and engineering. The video subsequently earned millions of views. At the heart of the controversy is whether the company's use of "Girls" in what was clearly a marketing campaign is sufficiently transformative due to its

[1] "Future of Music Coalition." *Unlicensed Lyric Sites Hit With Takedown Requests.* N.p., n.d. Web. 27 Jan. 2014.
[2] "NMPA Targets Unlicensed Lyric Sites, Rap Genius Among 50 Sent Take-Down Notices." *Billboard.* N.p., n.d. Web. 27 Jan. 2014.

purported commentary on the viewpoints expressed in the original song. Also at issue is the Beastie Boys' longstanding prohibition of their music being used in any advertisement, as stipulated in the will of deceased band member Adam Yauch. While the incident has elicited heated responses from any number of quarters, it has yet to inform our understanding of the fairness of this particular use as any verdict is still forthcoming.

The law appears conflicted with regard to the ability of a work to be used in such a manner—the most analogous music-world ruling states that advertising should be afforded "lesser indulgence" than other commercial uses (like selling CDs featuring a portion of an existing work).[3] This puts the Beastie Boys on much firmer ground. However, there is another case in which a popular photograph was parodied to advertise a movie, and this was ultimately deemed fair.[4] Another notable aspect of the Goldieblox incident is procedural: the toy company requested judgment from a court regarding the appropriation; typically fair use is invoked as a defense against an infringement claim. Many observers considered this move to be provocative.

We reference these developments not as hard-and-fast examples of fair use in the courts (or even the court of public opinion), but rather to highlight how the application of the doctrine is highly factor-dependent. This is as it should be—each case is different, and outcomes aren't pre-determined. The adaptability of the doctrine to new circumstances is a key to its utility. Determining fair use is not something that should or can be accomplished in broad strokes, yet its provisions remain a crucial part of our copyright law—one that benefits artists as well as the public.

Fair use and remix culture

While it is possible that some uses based around activities commonly known as "remixing" or "sampling" may indeed be deemed fair use should they ever be litigated,

[3] "Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)." *Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)*. N.p., 07 Mar. 1994. Web. 27 Jan. 2014.
[4] Judge Newman, Jon O. "Leibovitz v. Paramount Pictures." *Findlaw*. United States Court of Appeals, Second Circuit, n.d. Web. 27 Jan. 2014.

an expansion of the doctrine is not necessary to ameliorate tensions between remixers and rightsholders. In fact, doing so may make it more difficult to establish a functional marketplace for sampling due to the doctrine's most common application as an affirmative defense, as well as the interdependent analysis of factors necessary to making a determination.

A number of infringement suits have been resolved (sometimes to conflicting ends) without fair use being invoked. Justification for *de minimus* use of compositions in new works can be found in case law,[5] yet sound recordings have not been afforded this degree of flexibility. As Judge Ralph Guy expressed in *Bridgeport Music v. Dimension Films, et al.* (410 F. 3d 792 [6th Cir. 2005]), "Get a license or do not sample." As the defendant in that case did not invoke fair use, it remains to be seen how a court would respond in a fair use affirmative defense implicating sound recording(s).

Still, the practical result of this ruling is has been that, while a marketplace for sampling exists, it is slanted to favor those who can afford to pay the often-hefty costs of obtaining the necessary permissions. FMC believes that a marketplace for sampling should serve the interests of all parties, including recording artists, composers and those seeking to use elements of existing works in new forms of expression.

As Northwestern University Professor Peter DiCola and University of Iowa professor Kembrew McLeod write in their book, *Creative License: The Law and Culture of Digital Sampling:*[6]

> "The Bridgeport court read the section as an extension of the rights of the sound recording copyright holders to everything not explicitly reserved to the public. Yet section 114(b) is better understood as a limitation on rights with respect to sound recordings.... Congress could revise section 114(b) to clarify its meaning. One approach would involve setting a quantitative threshold for *de minimis* use,

[5] "Newton v. Diamond 349 F.3d 591 (9th Cir. 2003)." *Music Copyright Infringement Resource*. N.p., n.d. Web. 27 Jan. 2014.
[6] Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Duke University Press, 2011).

> such as one second of the sampled recording or 1 percent of its length. Another approach is to allow the federal court to determine the *de minimis* threshold on a case-by-case-based. Outside of the Sixth Circuit, courts need not following the holding of Bridgeport and could apply a more defensible interpretation of section 114. The problem is that most cases never reach a judicial opinion, instead parties tend to settle beforehand because of the high cost of litigation."

A *de minimus* solution is not the only possible approach to establishing a more functional marketplace for sampling. In recent comments to the USPTO and NTIA in their joint copyright "green paper," Jeremy Peters of independent music label and publishing company Ghostly International advocates for the removal of the minimum per-song mechanical royalty rate in favor of a time-based approach (a methodology Peters would also extend to the master use).[7] Peters asserts that this proposal:

> "...allows for a commercialization of those original works at a scale that is not currently possible given the unpredictability of a licensing fee... It also takes the process of figuring out these rights and an artificial roadblock to creativity out of the hands of lawyers and consultants whose fees are out of reach for budding creative. In the current model, it is well known that only a small portion of these remixes are appropriately licensed."

These proposals and others are worthy of exploration, and may be an appropriate place for statutory amendment. As FMC notes in our own comments in the USPTO/NTIA proceeding:

> "Access to ownership information is limited; financial costs and transactions costs are prohibitively high; and there is a lack of published, transparent pricing. The challenge in addressing these obstacles is finding a solution that both facilitates a smooth, frictionless market for legitimate sampling and insures that copyright holders are fairly compensated."

[7] Peters, Jeremy. "Comments of Ghostly International in USPTO/NTIA 'Copyright Policy, Creativity and Innovation in the Digital Economy'" *National Telecommunications and Information Administration*. Ghostly International, n.d. Web.

All of this is to say that there are a number of ideas worth exploring within the framework of copyright and licensed use before tinkering with the statute that undergirds unlicensed fair use. In addition to a closer examination of Sections 114 and 115, areas in which Congress can play a positive role in the marketplace for copyright include: supporting comprehensive and interoperable registries; setting obligations to compensate creators under fair terms; closing the terrestrial radio royalty exemption; and establishing basic rules of the road for Internet Service Providers to preserve a level online playing field.

UGC and noncommercial exceptions

Every so often the idea is floated that expanding fair use to include non-commercial exceptions may mitigate tensions within copyright and user-focused technologies. While we are sensitive to the fact that millions of Americans have a limited practical understanding of their rights as users of copyrighted material (or even as authors of creative works), we do not believe that magic wand waving will result in favorable outcomes for today or tomorrow's artists. Instead, we encourage experimentation in the licensing space to make it easier for those who would use portions of existing works in user uploaded material, along with a greater acknowledgement on behalf of rightsholders that many of these uses are unlikely to create market harm. As songwriter and recording artist David Lowery mentions in his testimony before this subcommittee:

> "There are…several emerging-market and permission-based solutions that allow the public to create amateur and fan remixes while protecting the rights of other creators. YouTube and the National Music Publishers Association currently have a licensing agreement where users can upload videos and remixes incorporating music from a multitude of songwriters without seeking individual permissions. In this arrangement, songwriters and music publishers share the ad revenue that these videos generate."

Debates over the specifics of compensation within these arrangements aside, such

developments should be seen as positive, at least with regard to technology's ability to facilitate new markets while preserving the exciting dynamics of expression and interactivity that have come to define our networked culture. However, there remain limits to the effectiveness of technology in determining whether a use should be allowed or disallowed under the safe harbor provisions outlined in section 512 of the Digital Millennium Copyright Act. Full reflection on these matters is outside the scope of this testimony, but we would be remiss to not comment on the difficulties in making fair use determinations in an environment where internet services' compliance with takedown notices are increasingly automated.

Conclusion

The scope of fair use is necessarily imprecise, yet properly drawn. Even when it seems to be nothing but nuance, the doctrine remains an important component of US copyright law, one that musicians and other creators frequently utilize. Fair use helps facilitate the creation of new works from which the public draws benefit, and it safeguards the critical discourse and individual expression essential to a democratic society. We appreciate the opportunity to submit this testimony and look forward to engaging in the subcommittee's ongoing review of existing copyright law.

Casey Rae
Interim Executive Director
Future of Music Coalition

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON COURTS, INELLECTUAL PROPERTY AND THE INTERNET

HEARING ON THE SCOPE OF FAIR USE

STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. In this statement, LCA describes how all types of libraries rely on fair use in order to serve their users and meet mission; how the federal government relies on fair use in the patent examination process; and how rights-holders rely on fair use in the development of new works. LCA requests that this statement be included in the record of this hearing.

I. Fair Use and Libraries

Fair use is integral to the ability of libraries to achieve many facets of their missions. These include preservation of and providing access to our cultural, historical, local and scientific heritage; supporting and encouraging research, education, literacy and lifelong learning; and providing a venue for community engagement on a host of issues.

Today, researchers, students and members of the public engage in sophisticated searching and manipulation of information including ready access to data, image files and

more. Increasingly, the information available is both current and historical as many libraries and others such as Google and the Internet Archive digitize special collections that are rich in the cultural and political history of our Nation.

Each day teachers teach, students learn, researchers advance knowledge, and consumers access copyrighted information by relying on exceptions in the Copyright Act such as fair use. Fair use permits the use of copyrighted material without permission from the copyright holder under certain circumstances. For libraries and their users, the fair use doctrine is the most important limitation on the rights of the copyright owner—the most important "safety valve" of U.S. copyright law for the public.

Fair use, codified under Section 107 of the Copyright Act, allows reproduction and other uses of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship and research. The statute sets forth four factors to be considered in determining whether a use is fair, including the character of the use, the nature of the work, the amount used in proportion to the whole, and the impact on the market for the work. There is no fair use checklist, and there is no need to import from other sections of the law the detailed list of conditions, prohibitions, and exclusions such as those found in the TEACH Act, 17 U.S.C. 110(2), concerning distance education. Importantly, there is no bright line for fair use. Thus, fair use is inherently ambiguous and not easily defined but critically important in ensuring legitimate access to copyrighted works.

Library patrons routinely rely on fair use. A professor might copy a few pages from a text found in a library to share with her class. Or a student may include a quotation in a paper from a novel available via the library. In addition to a fair use by a

library patron, libraries rely upon fair use in support of a number of library activities. While the Copyright Act does contain explicit exceptions for libraries and archives in Section 108, these exceptions do not cover every circumstance under which a library might need to use a work. Section 108 specifically provides that "[n]othing in this section…in any way affects the right of fair use as provided by section 107…" Some activities where libraries may rely on fair use include the following.[1]

A. Mass Digitization

Libraries rely on fair use to support digitization of works in their collections and to support the use of large-scale shared digital repositories for particular purposes. For example, the HathiTrust Digital Library contains millions of scanned works from over sixty partner institutions. The court decision in *Authors Guild, Inc. v. HathiTrust*[2] held that digitizing the works was fair use when done for the purposes of creating full-text searches, preservation, and providing access to users with disabilities. Each of these activities standing alone, the court ruled, are fair use.

B. Access to Orphan Works

U.S. libraries hold large collections of orphan works, particularly in large research libraries. Some studies have concluded that up to 55 percent of books in U.S. research libraries are orphans.[3] A much larger percentage of the material in special collections, such as photographs and ephemera, are orphans. Orphan works can easily become lost or inaccessible to the public without the stewardship of libraries. Libraries rely on fair use to

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[1] These activities are discussed in greater detail in *How Flexibility Supports the Goals of the Copyright System: Fair Use and the U.S. Library Experience*, February 15, 2013, http://www.librarycopyrightalliance.org/bm~doc/lca-flex-library-experience-15feb13.pdf.
[2] *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351 (HB), 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012).
[3] Resource Packet on Orphan Works: Legal and Policy Issues for Research Libraries, http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf, September 13, 2011.

move forward with digital preservation and tailored access programs. For example, many of the works in the HathiTrust collection are orphans, and the Library of Congress relies on fair use in providing some of the American Memory collections. Fair use is especially well suited to providing access to orphan works for libraries' non-commercial purposes because fair use is equitable in nature and can accommodate problems that arise from evolving situations, such as the inability to identify a work's copyright owner.

C. Access to Users with Print Disabilities

New technologies present opportunities for libraries to increase accessibility to those users who require accessible format copies of materials. Such technologies include digital and audio readers, text-to-speech functionality in web browsers, and specific-purpose screen access technologies that allow for font size and background lighting adjustments as well as make it possible for people with print disabilities to "move" within a text document using the table of contents, chapter headings, and sub-headings. The Copyright Act does include a specific exception to allow libraries to assist people with print or other disabilities, but it is relatively narrow in scope. The judge in the recent *HathiTrust* case held that Section 121 allowed creating digital versions of works to provide accessible formats to users with print disabilities, particularly for education and scholarship purposes. Importantly, though, he also noted that, if Section 121 had not applied, then the more flexible fair use provision would also cover these activities by U.S. libraries. Flexibility can, therefore, help provide access where a specific-purpose exception was not drafted with sufficient openness to anticipate and accommodate new approaches.

D. Code of Best Practices in Fair Use for Academic and Research Libraries

Finally, the "Code of Best Practices in Fair Use for Academic and Research Libraries"[4] has enhanced the ability of librarians to rely on fair use by documenting the considered views of the library community about best practices in fair use, drawn from the actual practices and experience of the library community itself. Specifically, the Code identifies eight situations that represent the library community's current consensus about acceptable practices for the fair use of copyrighted materials. The Code then describes a carefully derived consensus within the library community about how those rights should apply in certain recurrent situations. These include: supporting teaching and learning with access to library materials via digital technologies; using selections from collection materials to publicize a library's activities, or to create physical and virtual exhibitions; digitizing to preserve at-risk items; creating digital collections of archival and special collections materials; reproducing material for use by disabled students, faculty, staff, and other appropriate users; maintaining the integrity of works deposited in institutional repositories; creating databases to facilitate non-consumptive research users (including search); and collecting material posted on the world wide web and making it available.

II. Fair Use and the U.S. Government

The U.S. government also relies on fair use. A recently issued opinion from the general counsel of the U.S. Patent and Trademark Office (USPTO) found that copying and distribution of non-patent literature for use in providing those copies to applicants during patent examination, providing certified copies of entire patent application file histories to the members of the public, and applicants making copies of non-patent literature for submission to USPTO during the patent examination process were all

[4] http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf.

considered fair use.[5] In finding that fair use applied, the general counsel noted that the use by USPTO was transformative because the purpose of its use was different from the purpose for which the articles were written and would not affect the market of the non-patent literature.[6]

In 1999, the Department of Commerce requested an opinion regarding government reproduction of copyrighted material following an attempt by the Copyright Clearance Center, Inc. to negotiate licenses with several federal government agencies permitting these agencies to photocopy copyrighted materials in exchange for a fee.[7] The opinion cautions against such licenses, noting that any agreement "should seek to limit the scope of the licensing agreement so as not to cover those photocopying practices that the agency, in good faith, concludes are not infringing."[8] The opinion cites fair use as a critical component in fulfilling the constitutional rationale of the copyright system, noting that "From the 'infancy of copyright protection,' courts have found it necessary to provide some opportunity for fair use of copyrighted materials in order 'to fulfill copyright's very purpose, [t]o promote the Progress of Science and useful Arts.'"[9]

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[5] Bernard Knight, USPTO General Counsel, *USPTO Position on Fair Use Copies of NPL Made in Patent Examination* (Jan. 19, 2012), http://www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse_of_CopiesofNPLMadeinPatentExamination.pdf. *See also* Jonathan Band, *A New Day for Website Archiving 2.0*, 8-11 (2012), *available at* http://www.arl.org/storage/documents/publications/band-new-day-for-archiving-2.0-23feb12.pdf (summarizing the general counsel's opinion and noting that "The USPTO is the executive branch agency with greatest expertise in intellectual property law" and that this agency "conclude[d] that its photocopying and distribution of entire articles is a transformative use because the purpose of its use is different form the purpose for which the articles were written."). Several courts have also recently held that the photocopying of articles in the course of the patent prosecution process is fair use. *See, e.g., American Institute of Physics v. Schwegman Lundberg & Woessner, P.A.* (D. Minn. 2013).

[6] The importance of fair use was recognized by the Department of Commerce in its recent Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy and the Office of the U.S. Trade Representative in the context of the negotiations on the Trans Pacific Partnership Agreement.

[7] Randolph D. Moss, Acting Assistant Attorney General, *Whether and Under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing "Fair Use" Under Section 107 of the Copyright Act of 1976*, Apr. 30, 1999, *available* at http://www.justice.gov/olc/pincusfinal430.htm.

[8] *Id.*

[9] *Id.* (*citing Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

Additionally, the opinion points out that the public interest, such as that advanced through government photocopying, is considered in a fair use inquiry and while "the point is less clearly established, the fair use doctrine may be understood to contemplate permitting uses that serve 'not only…the purpose of copyright but also…other socially recognized purposes."[10]

III. Fair Use and Rights-Holders

Fair use is critical in achieving balance in the copyright system, not only for libraries and consumers of copyrighted content, but also for content producers and rights-holders. Although rights-holders of copyright often bring suit against alleged infringers of copyright when they themselves are sued for infringement, rights-holders rely on the fair use right and point to its importance in achieving the ultimate aim of the copyright system in promoting the progress of science and protecting the First Amendment.

A clear example is the recently decided case, *Bouchat v. Baltimore Ravens*, where the Fourth Circuit ruled in favor of fair use where the Baltimore Ravens' "Flying B" logo was used in films and in exhibits in the Baltimore Ravens' stadium.[11] The Fourth Circuit emphasized the importance of fair use, noting:

> While copyright law rewards the owner, "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Sony Corp.*, 464 U.S. at 429 (internal quotation marks omitted). As a result, Congress has attempted over the years to balance the importance of encouraging authors and inventors by granting them control over their work with "society's competing interest in the free flow of ideas, information and commerce." *Id.* at 429. Absent any protection for fair use, subsequent writers and artists would be unable to build and expand upon original works frustrating the very aims of copyright policy. For creation itself is a cumulative process; those who come after will inevitably make some modest use of the good laborers of those who came before. *See* Br. for

[10] *Id.*
[11] *Bouchat v. Baltimore Ravens*, Nos. 12-2543, 12-2548, 2013 WL 6617327 (4th Cir. Dec. 17, 2013).

> Int'l Documentary Ass'n, Motion Picture Ass'n of Am., Inc. & Film Indep. As Amici Curiae ("IDA Brief") at 9…
>
> Fair use, then, is crucial to the exchange of opinions and ideas. It protects filmmakers and documentarians from the inevitable chilling effects of allowing an artist too much control over the dissemination of his or her work for historical purposes. Copyright law has the potential to constrict speech, and fair use serves as a necessary "First Amendment safeguard[ ]" against this danger. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).[12]

Not only did the defendants in *Bouchat* rely on fair use, but the International Documentary Association, Motion Picture Association of America, Inc., and Film Independent filed an amici brief in support of the Baltimore Ravens and the National Football League (NFL) Enterprises, advocating strongly for fair use. The brief noted that "If this Court accepts Bouchat's expansion of *Bouchat IV* and adopts the rule he seeks, that decision would fly in the face of the controlling fair use standard articulated by the United States Supreme Court… This conflict, in turn, would significantly—and negatively—influence amici's ability to engage in the precise type of cultural discourse copyright law intends to promote."[13]

Rights holders and traditional users of copyright alike thus rely on fair use as a critical First Amendment safeguard that promotes creativity. Fair use exists as an important limitation on copyright and, as the film associations filing as amici in *Bouchat* pointed out, reliance on existing works is essential in promoting the creation of new works:

> Much creative culture is iterative; new works often do not arise in a vacuum, but rather are influenced by and draw upon the creative works that came before. As the Supreme Court held in *Campbell*, highly

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[12] *Id.*

[13] Br. for the International Documentary Association, Motion Picture Association of America, Inc., and Film Independent as *Amici Curiae*, p. 2-3, *Bouchat v. Baltimore Ravens*, Nos. 12-2543, 12-2548, 2013 WL 6617327 (4th Cir. Dec. 17, 2013)

> transformative works lie at the heart of fair use's protection: they are the new expression that copyright law is meant to promote.[14]

Amici film associations provided numerous examples where creators of new content, relying on existing copyrighted works, successfully argued in favor of fair use findings. These defendants included producers of musicals, book publishers, and television networks.[15]

Accordingly, rights holders are also reliant on fair use in the creation of new content, including for commercial uses. Indeed, in finding in favor of fair use in *Bouchat*, the Fourth Circuit recognized that, "the NFL may not arouse sympathies in the way that a revered artist does, but the consequences of this case reach far beyond its facts. Society's interest in ensuring the creation of transformative works incidentally utilizing copyrighted material is legitimate no matter who the defendant may be."[16]

In another recent case, large publishers relied on fair use in the development of a database product they brought to market. In *White v. West Publishing Corporation*,[17] White alleged that West Publishing and Reed Elsevier infringed its copyrights when they

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[14] Br. for the International Documentary Association, Motion Picture Association of America, In., and Film Independent as *Amici Curiae*, p. 9, *Bouchat v. Baltimore Ravens*, Nos. 12-2543, 12-2548, 2013 WL 6617327 (4th Cir. Dec. 17, 2013).

[15] *Id.* (Applying *Campbell*, courts across the country have held that the use of copyrighted works in the context of historical, biographical, and other non-fictional works may be transformative, especially where necessary to accurately portray history. *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, No. 2:08-cv-02616, slip op. at *8 (9th Cir. Mar. 11, 2013) (producer's use of seven-second clip from The Ed Sullivan Show in the musical Jersey Boys to mark a historical point in the Four Seasons' career was transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (book publisher's use of Grateful Dead concert posters in illustrated history of the band was transformative where publisher used the posters as "as historical artifacts to document and represent the actual occurrence" of events); *Warren*, 645 F.Supp.2d at 419 (use of artist's work in biography/retrospective chronicling his career held transformative); *Monster Commc'ns., Inc. v. Turner Broad. Sys., Inc.*, 935 F.Supp. 490, 493–94 (S.D.N.Y. 1996) (television network's use of approximately one minute of boxing footage was transformative in biography of Muhammad Ali); *Hofheinz v. AMC Prods., Inc.*, 147 F.Supp.2d 127, 137 (E.D.N.Y. 2001) (television network's use of film clips from monster movies in documentary about that film genre held transformative); *Hofheinz*, 146 F.Supp.2d at 446–47 (television network's use of film clips from actor's early motion picture appearances in feature-length biography held transformative).

[16] *Bouchat v. Baltimore Ravens*, Nos. 12-2543, 12-2548, 2013 WL 6617327 at *10 (4th Cir. Dec. 17, 2013).

[17] No. 12-CV-1340 (S.D.N.Y. Feb. 8, 2013).

acquired copies of White's briefs through the court's Public Access to Court Electronic Records (PACER) system, captured metadata, and placed them in a searchable database. Asserting fair use, the publishers filed a motion for summary judgment, which the court granted.

Although Reed Elsevier and other publishing companies have often brought infringement suits where they opposed defendants' claims of fair use, as a defendant in *White v. West Publishing*, Reed Elsevier acknowledged the critical role that fair use plays in the copyright ecosystem. In its memorandum in support of its motion for summary judgment, Reed Elsevier noted that

> "Fair use" exists as a necessary tool to further the goals of copyright law. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts.'" (quoting U.S. Const., Art. 1. §8, cl. 8)).[18]

Reed Elsevier further argued that while its database relies on the use of works created by others, "By offering a vast, searchable library of enhanced versions of publicly filed legal documents, Lexis has created a public benefit that disseminates information, encourages the development of individual knowledge and legal skills, and assists in the creation of new works."[19]

The memorandum filed by Reed Elsevier argued that each of the four fair use factors tilts in favor of a finding of fair use, in particular the transformative nature of its use in the Lexis database.[20] In addition to addressing each of the four fair use factors individually, Reed Elsevier notes that its product provides a public benefit and that such

[18] Memorandum of Law in Support of Defendant Reed Elsevier Inc.'s Motion for Summary Judgment, *White v. West Publishing Corp.* No. 12-CV-1340 (S.D.N.Y. Feb. 8, 2013), at 9.
[19] *Id.*
[20] *Id. at 9-16.*

"benefits provided by Lexis thus outweigh any hypothetical harm to the Plaintiff and favor a finding of fair use."[21] The memorandum points to the fact that Lexis "provides the opportunity to learn about new areas of law, analyze successful and unsuccessful legal arguments, and research specific jurisdictional formats and related issues," and also points to the "well-established right of public access to judicial records."[22]

Rights-holders depend on fair use when creating new content: new films,[23] new databases,[24] new musicals,[25] new works of visual art.[26] As Sandra Alstairs, the President of the Copyright Alliance, stated, "Fair use is a core part of copyright law. It is a doctrine all artists and creators depend on daily."[27]

Conclusion

Everyone relies on fair use: libraries, students, teachers, government agencies, patent applicants, artists, and media companies. Fair use, in addition to reflecting in the copyright law the First Amendment-based principle of free speech, provides the basis for our most important day-to-day activities in scholarship, education, and learning. Fair use is a robust and evolving doctrine as interpreted by the courts. The Library Copyright Alliance believes that section 107 of the Copyright Act requires no change given how it is successfully employed by so many diverse constituencies.

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[21] *Id.* at 21.
[22] *Id.*
[23] *Faulkner Literary Rights v. Sony Pictures Classics*, (N.D. Miss. July 18, 2013).
[24] *Authors Guild v. Google* (S.D.N.Y. 2013).
[25] *SOFA Entertainment v. Dodger Productions*, 709 F.3d 1273 (9th Cir. 2013).
[26] *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).
[27] Sandra Alstairs, Happy Fair Use Day, May 4, 2012, http://www.copyrightalliance.org/2012/05/happy-fair-use-day - .UuVBYmQo7bh.

Statement of
Marc Maurer, President
The National Federation of the Blind

January 28, 2014

Hearing on "The Scope of Fair Use"
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

The purpose of copyright, according to the United States Constitution, is "to promote the Progress of Science and useful Arts."[1] When blind individuals have access to the universe of culture and knowledge contained in copyrighted works, they are transformed into consumers of the arts and information and imbued with the potential to contribute to the academic, cultural, and scientific advancement of society. Enabling blind individuals to access copyrighted materials thus furthers the central goal of copyright. Both sections 107 and 121 of the Copyright Act are critical for actualizing this goal and integrating blind individuals into the fabric of our increasingly information-driven society.[2] Mass digitization of copyrighted works represents a revolutionary leap forward for the blind and therefore benefits society as a whole. The recent case law permitting mass digitization serves the goals of copyright by offering revolutionary access to information for the blind, while causing no harm to the interests of copyright holders. Therefore, the National Federation of the Blind ("NFB") respectfully requests that this Subcommittee leave fair use, as codified in section 107, as is.

I. Both Section 121 and Fair Use Are Necessary to Provide the Blind With Equal Access to Information.

It would be impossible for blind individuals to participate in modern society and access our cultural lifeline of newspapers, books, and scholarly journals if they were required to ask for permission from copyright holders each time they wanted to copy a work into an accessible format. Section 121 offers an important safe harbor that permits the unauthorized copying of copyrighted materials for distribution to the blind in certain circumstances. Specifically, section 121(a) provides that:

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[1] U.S. Const., Art. I, §8, cl. 8.
[2] 17 U.S.C. §§ 107, 121.

> [I]t is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

Section 121(d)(1) defines "authorized entity" as "a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities." Although critical, section 121 leaves major gaps in both the types of copyrighted works that may be made accessible for blind individuals and in who is permitted to make and distribute these accessible copies.

For example, it is not always clear whether illustrations and diagrams qualify as "literary works." In addition, section 121 does not explicitly address the creation of recorded descriptions or tactile versions of these images for blind individuals. Because of these uncertainties, only fair use ensures that a blind individual can appreciate a visual work of art or access a scientific diagram. With the increasing focus on promoting science, technology, engineering, and math ("STEM") education, providing blind students with access to diagrams and images of equations is critical if blind individuals are to enter STEM fields. Benetech, a nonprofit technology company that operates programs to copy and disseminate accessible texts to individuals with print disabilities, established its Digital Image and Graphic Resource for Accessible Materials ("DIAGRAM") project in 2010, with the goal of providing access to image and graphic content to individuals with print disabilities.[3] As part of DIAGRAM, Benetech has created the Poet image description tool for creating and editing crowd-sourced image descriptions, including accessibly transcribed math equations, flow charts, and Venn diagrams—all necessary for blind

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[3] DIAGRAM Center, *Overview*, http://diagramcenter.org/about.html (last visited Feb. 3, 2014).

students to have equal access to their general education curricula.[4] Such important work should not rest on the uncertain legal protection offered by section 121. Instead, Benetech, and other organizations like it, must be able to rely on fair use as the doctrine stands today to support its critical work.

Fair use is also necessary to supplement section 121 for other types of copyrighted works. Because dramatic works are excluded from section 121's safe harbor, section 121 provides little help to the blind drama student who needs access to plays. A blind musician may also have to look beyond section 121 to lawfully copy printed sheet music into Braille. Only fair use provides the necessary certainty for the making of accessible copies in each of these cases.

Section 121 also limits who may make accessible copies for the blind. Because an individual does not qualify as an "authorized entity," section 121 provides no safe harbor for blind individuals who regularly copy works into accessible formats through the use of a refreshable Braille display, screen-reading software, or Kurzweil scan-and-read software. Nor does it protect friends, family, volunteers, educators, Braille transcriptionists, and a host of other individuals who do valuable and important work making print materials accessible to those with print disabilities. Without fair use, this private, non-commercial use would be unlawful. Copyright holders could sue not only individuals, but also larger entities, like the NFB, under a theory of secondary liability, because they provide devices that allow blind individuals to make their own accessible copies. Only fair use offers blind individuals the legal protection to take accessibility into their own hands and independently and efficiently create accessible copies of texts for their own use.

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[4] DIAGRAM Center, *Poet Image Description Tool*, http://diagramcenter.org/development/poet.html (last visited Feb. 3, 2014).

Although section 121 could be expanded to allow for each of the uses described above, without fair use, there would be great legal uncertainty regarding future advances in accessibility. The beauty of section 107 is that its criteria are flexible and can be applied to changing technology. With rapid advancements in accessibility software and technology, any fixed list of permitted uses, like the types of permitted copies described in section 121, will soon become outdated and awkward to apply. With the growth of crowd-sourcing, for example, defining who the copier and distributor are will become increasingly complex. The fair use factors, however, can keep pace with rapidly changing technology and therefore remain an important source of legal protection for uses that promote the purpose of copyright.

II. The Fair Use Holding in the Hathitrust Case Causes No Market Harm, Is Limited in Scope, and Provides the Blind with Revolutionary Access to Information.

The recent decision in *The Authors Guild, Inc. v. Hathitrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012),[5] offers a perfect example of the importance of fair use in promoting equal access to information for the blind and of the absence of any harm to copyright owners in providing this access. *Hathitrust* involves the digitization of several academic libraries' full collections. With digitization, the university libraries were able to create accessible versions of millions of texts that had previously been out of reach to blind students and faculty. The libraries have reserved access to the full texts of copyrighted works only for students and faculty with certified print disabilities.

The *Hathitrust* mass digitization was revolutionary for the blind: blind students went from access to libraries that contained a total of only about 200,000 accessible books nationwide,

[5] An appeal is currently pending before the United States Court of Appeals for Second Circuit. *See* No. 12-4547-cv (2d Cir.)

waiting weeks or months for limited, ad hoc access to required course reading, and no meaningful opportunity to engage in library research to access to over ten million texts at their fingertips, with the ability to browse titles, skim through book chapters, and consult tables of contents and indices and perform research on par with their sighted peers.[6] Because the *Hathitrust* digital library grants blind individuals "the unprecedented ability . . . to have an equal opportunity to compete with their sighted peers in the ways imagined by the [Americans with Disabilities Act]," the court held that the *Hathitrust* libraries' making of digital copies was protected as fair use.[7]

Importantly, this revolutionary access for the blind came at the expense of no one. First, only those with certified print disabilities are granted access, through a secure, password-protected portal, to the full texts of copyrighted works in the *Hathitrust's* digital collection. Others can search the collection for particular terms and view short snippets of text where their search terms appear, but they cannot fully view works that are still in copyright.[8] To view the full text, sighted borrowers must check the physical book out of the library or purchase their own copy. Thus, the mass digitization of the *Hathitrust* university libraries has had no negative effect on the demand for obtaining authorized copies of texts.[9]

Second, providing access to the blind did not harm any existing market for accessible books. As the court noted in holding that the *Hathitrust's* use of digital copies to provide access

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[6] See *Hathitrust*, 902 F. Supp. 2d at 449 (noting that "academic participation by print-disabled students has been revolutionized by the [*Hathitrust* digital library]").
[7] *Id.* at 464.
[8] The copies of the *Hathitrust* universities' collections retained by Google are also available only in the form of snippets, not as full texts. *The Authors Guild, Inc. v. Google, Inc.*, -- F. Supp. 2d --, No. 05-8136, 2013 WL 6017130, at *3 (S.D.N.Y. Nov. 14, 2013).
[9] *Id.* at 463, 464 n.30 (rejecting the Authors Guild's arguments of market harm as "conjecture" and "speculative, and, at best, minimal")

for the blind was transformative, "[p]rint-disabled individuals are not considered to be a significant market or potential market to publishers and authors."[10] Indeed, on the whole, publishers, authors, and e-book platform developers have not only failed to promote the accessibility of digital books, but have actively worked to frustrate it. The *Hathitrust's* promise of millions of accessible titles is transformative precisely because it is the only opportunity the blind have ever had, and are likely to ever have, to access vast library collections. If there were a market to be harmed by this access, then the need for the *Hathitrust* digital collection would not be so urgent. Instead, the *Hathitrust* opens a universe of information to blind individuals while harming no one.

The *Hathitrust* digital library promotes the purpose of copyright by allowing the blind to partake in advancing the "Progress of Science and useful Arts." To actualize the goal of copyright, the *Hathitrust* court correctly applied section 107 to the facts of that case. Congress likely never considered the prospect of a digital collection of over ten million titles when it enacted the Copyright Act in 1976. Yet in including a flexible fair use framework, Congress successfully ensured that the lofty goals of copyright would remain relevant and capable of application as technology advanced forward at a rapid pace. The need for a flexible and adaptable fair use doctrine to protect uses that advance the purpose of copyright and harm no one, like uses that promote accessibility for the blind, remains critical today. Therefore, section 107 should remain as written in any revision to the Copyright Act.

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[10] *Id.* at 461.

Testimony of
Sherwin Siy, Vice President, Legal Affairs
Public Knowledge

Before the
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Hearing On:
"The Scope of Fair Use"

Washington, DC
January 28, 2014

Testimony of
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Before the
Committee on the Judiciary
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Hearing on: "The Scope of Fair Use"

January 28, 2014

Chairmen Goodlatte and Coble; and Ranking Member Conyers:

Public Knowledge again appreciates the opportunity to submit its comments to the record in this continuing review of current copyright law. As an organization devoted to promoting innovation and creativity through balanced copyright law, we recognize the centrality of fair use to copyright law, providing an essential safeguard for the First Amendment and other critical values within copyright. We wish to make two particular points with regard to fair use. First, that to the extent that the doctrine's reach can be described as "expanding," it is only doing so in proportion to the expanding effect of copyright law on society. Second, while the lack of certainty in fair use can be greatly overstated, a number of clear cases of legitimate uses could be more formally recognized.

Fair Use "Expands" In Proportion to the Expansion of Copyrights

This critical role is accomplished through a fact-based inquiry, designed to account for cases where rigid application of set rules would lead to unjust or unreasonable results that would hinder and not promote the progress of knowledge. In other words, a key part of fair use's reason for existence is its flexibility in the face of new situations.

As the Committee has noted many times, copyright law today faces no shortage of new situations, and courts' application of fair use is a critical part of keeping copyright law from

being outpaced by those changes. This is why it's odd to see suggestions that fair use is expanding, as though its development is somehow eroding the rights of copyright holders. This would only be true if the scope of copyright law itself were static. It is not. In at least three different ways, technological progress has created new ways for legitimate uses to run afoul of copyright law

First, as digital technology becomes a ubiquitous part of everyday life, so does the act of copying. Whereas, just a few decades ago, most people's interactions with copyrighted works were deliberate and did not involve any copying, today, nearly any use of digital media involves making at least a temporary copy, often without the user realizing it. Absent fair use, many of those copies can fall into the gaps between more specific, rule-bound limitations and exceptions.[1] As private acts of copying not only become more common, but more observable (the sending of an email attachment is more traceable than the mailing of a photocopy), more and more of us will need to rely upon fair use, instead of merely a lack of enforcement, to go about our daily lives.

Second, the need to store, organize, and process information for internet-connected users requires systems and services that can process information, including copyrighted works, in ways that will involve making copies and occasionally displaying them. Recently, a case involving Georgia State University showed that, in most cases, educators could put course reading materials in an electronic reserve, allowing digital access to the library's books in a beneficial update for students, libraries, and professors.[2] The Southern District of New York has likewise repeatedly held that scanning books in order to catalog, index, and study them was a fair use as

[1] This is not to downplay the importance of many of those dedicated exemptions, which provide additional clarity in many easily-anticipated scenarios.
[2] *Cambridge Univ. Press v. Becker*, 2010 U.S. Dist. LEXIS 142236 (N.D. Ga. Sept. 21, 2010).

well.[3] These new uses are not only harmless to the rights of copyright holders; they are necessary to make the promise of digital information real by making copyrighted works more findable and accessible to readers, viewers, and audiences.

Third, new technological tools have made new types of creativity possible. Fair use's role in promoting new works of art also must keep pace with new forms of creating and appreciating creative works. Just as composers have long quoted musical phrases of previous works as reference (such as Tchaikovsky's use of "La Marseillaise" in the "1812 Overture"), media artists today can sample small portions of existing works not only through composition but through the use of technology, quoting and referencing through the use of clips and samples.

As the technology to make these digital quotations moves from the hands of professional studios to any aspiring artist, courts have had to bring the line-drawing of fair use from older media to newer. This is an ongoing process for the courts, as
a number of cases still draw a difficult-to-rationalize distinction between copying a second's worth of a musical composition and copying a second's worth of a sound recording. Yet in other media, now that the concept of sampling as quotation is less foreign, fair use is navigating the mapping of its application from glossy magazines and sheet music to digital files of video and sound.

In other words, to say that fair use is expanding is only to say that it is taking into account the broader effect that copyright laws have on our lives today. As our daily activities become increasingly intertwined with copyrighted works and copies, perfectly innocent activities would, without fair use, lead to near-universal infringement liability. Fair use allows us to develop new

[3] *Authors Guild, Inc. v. Google Inc.*, 2013 U.S. Dist. LEXIS 162198 (S.D.N.Y. Nov. 14, 2013); *Authors Guild, Inc. v. Hathitrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (finding use of images as thumbnails for search engines fair).

technologies and new works, and allows those new creations to become legal and prosaic without requiring constant legislative attention to each new development.

Certainty and Uncertainty in Fair Use

Fair use is frequently bemoaned as being an uncertain doctrine. Some have characterized uses as being presumptively unfair unless first proven in court. Others have claimed that fair use is merely "the right to hire a lawyer," since zealous plaintiffs can press for a settlement knowing that a smaller user might not be able to afford the cost of raising their defense in court. However, this uncertainty can easily be overstated.

In most cases, fair use is relatively clear. A number of regular fair uses have emerged and been catalogued; leaving aside the bluster of attorneys engaged in litigation and battling public relations departments, objective legal observers can predict fair use outcomes with some regularity.[4] There will always, of course, be close cases, especially where very new fact patterns are presented, but certain uses, like political speech, criticism, and personal uses like time-shifting, are predictably found to be fair by courts. By the same token, although any defendant might include a fair use argument as part of her defense, courts easily dispose of frivolously raised defenses.

However, even with this level of certainty, there is an asymmetry in how the process treats plaintiffs and defendants who try to ignore the contours of fair use. An overeager plaintiff might bring a clear fair user to court, or to settlement negotiations. Meanwhile, a defendant spuriously claiming fair use adds at most a small amount of inconvenience to an already-in-progress lawsuit. While an overuse of plaintiffs' claims will initiate more litigation, an overuse of an affirmative defense does not.

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[4] *See, e.g.*, Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549 (2008); Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47 (2012).

So, while fair use has created predictable results in a wide range of areas, we still see pointless lawsuits that should be more clearly decided earlier. Wider recognition of fair uses not specified in the statute, but well-established by the courts, could prevent such unnecessary litigation.

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As Judge Leval put it in his influential article, "Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. Ito the contrary, it is a necessary part of the overall design."[5] As a doctrine, it has existed nearly as long as the roots of our copyright laws, persisting, evolving, and being refined in the courts as businesses, technologies, and statutes come and go. Any attempts to narrow or constrain it potentially foreclose developments that could promote the progress of science and the useful arts. Its constant evolution is therefore absolutely indispensable to copyright.

[5] Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990).