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Originality, Imitation, and Plagiarism

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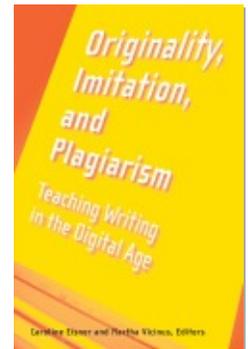
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“Fair Use,” Copyright Law, and the Composition Teacher

Martine Courant Rife

In our roles as writing teachers, we have been asked to adopt postmodern practices, including releasing old-fashioned notions of single authorship and an obsolete pedagogy that forbids plagiarism under a “detect and punish” regime (DeVoss and Porter 198; DeVoss and Rosati). Instead, we are to teach “digital ethics” and fair use. What exactly is “fair use”? This is a doctrine writing teachers need to understand because, while public figures such as Lawrence Lessig, Jessica Litman, and Siva Vaidhyanathan argue that the law needs to be changed, we have classes to teach. Writing teachers increasingly teach writing on networked computers, and therefore our need to understand the basic doctrine of fair use is as great as our need to understand the rules against plagiarism. This essay first reviews current U.S. copyright law, and then briefly traces the concept of fair use from its inception as “fair abridgment” in eighteenth-century England to its current interpretation in U.S. case law.

Overview of Current U.S. Copyright Law

U.S. copyright law has become a confusing mix of statutes and rulings that can encompass invention, imitation, compilation, and appropriation. A variety of stakeholders have fought to establish control over intellectual property (IP) for commercial purposes; in the process, the noncommercial, educational uses have come under increasing pressure. These influential interactions include the habits of writers, agents, and publishers, and such varied secondary uses as film and recording companies (Vaidhyanathan; Porter; DeVoss and Porter; Hart-Davidson; Bartow). The tension between stakeholders who wish to share and stakeholders who wish to contain and

control information is viewed as a “battle,” “war,” and “fight” (Litman; Yu; DeVoss and Porter 185). The writing student and teacher have become actors, willingly or not, in determining how copyright operates (Porter). Indeed, writing teachers are key players in these “battles” because students often have an unclear notion of what constitutes appropriate use and citation; too often their only knowledge of copyright comes from the current publicity over downloading music.

U.S. copyright law is a statutory law; therefore one must always begin by reading the statute. A full copy of copyright statute, Title 17, U.S. Code, is readily available on the Web (United States Copyright Office). Underlying the U.S. Code, the Constitution 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” (Art. 1, Sec. 8). Under Title 17, copyright holders receive a limited monopoly with respect to certain uses of their work. Section 102 of the Copyright Law of 1976 (effective 1978) states that all original, fixed works are protected, including literary, musical, and dramatic works, dance, pictures and sculptures, movies and other audiovisual works, sound recordings, and architectural works. As of 1978, works that are original and fixed do not need to be registered in order to receive copyright protection. Instead, a limited monopoly is automatically granted to the copyright owner. Because copyright protection is automatic, all works are copyrighted unless an owner opts out of the system by taking affirmative steps, such as marking his work with language that gives up any of the copyrights. To completely opt out of our current copyright regime, an author donates her work to the public domain. To partially opt out, an author might license for money or donate one or more of her “copyrights” to others. For example, a Creative Commons Attribution-ShareAlike license (Creative Commons) allows others to use the designated work noncommercially, as long as they give the copyright owner credit and allow others to use their work. The ShareAlike license divvies up the copyrights held by the owner, and makes the use of those rights conditional on certain requirements.

“Fair Use” from Its Inception to Current Interpretation in U.S. Case Law

Copyrights can be divided among different stakeholders because a copyright is a bundle of rights. While copyright law defines the kind of work

protected, it also defines the strands in this bundle of protections. Section 106 gives copyright holders exclusive rights to reproduce, prepare derivations, distribute, publicly display, and perform the copyrighted work. It is this bundle of rights that copyright holders may parse out to others, or donate completely to the public domain. To say or write, "I own the copyright in that piece" is vague. When I hear this, I wonder, which right of copyright? Instead, to be clear, one might say or write, "I own all rights conferred to me by copyright law," or, "I reserve all rights," or, "I have licensed the right to copy, perform, distribute, and display my work, but I've retained the right to create derivative works." For example, the Creative Commons ShareAlike license creates a hybrid license that conditionally gives away strands in the bundle of rights: to make derivative works, perform, publicly display, and make and distribute copies, as long as the users of those rights credit the copyright holder, and use the material for noncommercial purposes. However, a license to use is not fair use. It is a contractual arrangement set up by copyright holders. "Copyright" could become worthless under a clever publisher's agreement. It is not unheard of for publishers to offer authors contracts that give publishers all rights under the copyright statute, but leave the author with the "copyright"—an empty shell with no rights attached.

Fair use is a doctrine that preserves certain types of uses not protected by copyright. Therefore, to use a work under fair use is never to infringe on the owner's copyright. Section 107 defines fair use as codified by the courts and contains the prose we as educators so often rely on as we venture into the digital writing realm with our students:

§ 107. 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 [*sic*] 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. (U.S. Code, Title 17, Sec. 107)

Section 107 defines four elements to be used by the courts when making a fair-use determination. It also clearly states that fair use is a “limitation”; plus, the statute says the listed uses are “not an infringement.” Section 107 provides the exception to the copyright owner’s right to use. However, court interpretation has complicated this clarity. Legal scholars tell us fair use is nothing more than a skimpy sliver, or a concept now being compacted into ineffectuality (Lessig; Bartow).

The term *fair use* first arose in the American judicial system in the case of *Lawrence v. Dana* (1869). However, the concept, known as *fair abridgment*, appeared in the early English cases of *Gyles v. Wilcox* (1740), *Dodsley v. Kinnersley* (1761), *Cary v. Kearsely* (1802), and *Roworth v. Wilkes* (1807) (Duhl). While the term *fair use* did not appear in American courts until 1869, the English concept was appropriated in the 1841 case of *Folsom v. Marsh*. In the *Folsom* case, the defendant had written a biography of George Washington. The plaintiff claimed the defendant used excerpts of letters from the plaintiff’s earlier published and copyrighted biography. While the defendant had copied 353 pages of the plaintiff’s multivolume work, the copied material amounted to less than 6 percent of the total. However, the court held for the plaintiff, finding that the defendant had copied the most important material in the plaintiff’s earlier volumes. In the opinion, Justice Story set out the framework that was codified over 130 years later in Section 107 of the 1976 Copyright Act. Judge Story included concerns about how much of the original work was taken, and stated that the issue was one of whether “piracy” occurred; he factored in comparative use as well as “the nature, extent, and value of the materials thus used; the objects of each work,” considered whether there were “common sources of information” and asked if the alleged infringer had used the “same common diligence in the selection and arrangement of the materials” as the author of the original work (*Folsom*). Judge Story emphasized that writers should be able to use others’ work for “purposes of fair and reasonable criticism,” but noted that the court must “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” Judge Story’s discussion in the *Folsom* case sets forth the elements that were later folded into the four-factors fair-use test of Section 107.

Judge Story's 1841 opinion is accepted as part of our current fair-use analysis (Bartow; Duhl). However, judges struggle with case-by-case fact-specific analyses, applying the doctrine inconsistently, and they thereby increase public confusion (Duhl). This uncertainty permeates composition and rhetoric pedagogy and policy, culminating in what DeVoss and Porter describe as a potential floundering effect reflected in inconsistent teaching and professional practices (197). By studying the history of fair use along with current court interpretations, we can further our knowledge of this important doctrine and help our students contextualize both their use of the Web and their Web-composing practices. Fair use has only been considered four times by the Supreme Court since the enactment of the Copyright Act of 1976. Those four cases and their holdings are *Sony Corp of America v. Universal Studios, Inc.* (1984), *Harper & Row, Publishers, Inc. v. Nation Enterprises* (1985), *Stewart v. Abend* (1990), and *Campbell v. Acuff-Rose Music, Inc.* (1994).

In *Sony* the Court held that sale of VCRs did not equal contributory infringement of the plaintiff's copyrights. The Court concluded that since most VCR use was private, legal taping for later viewing, and that the plaintiffs had failed to establish harm to the potential markets for Universal Studios, that VCRs fell under fair use. In *Harper & Row*, former president Gerald Ford's memoirs were being prepared for publication by Nation Enterprises. Harper & Row published a magazine article containing excerpts. Using a fact-specific analysis, the Court held that the publication by Harper & Row, prior to the memoir release by Nation Enterprises, harmed the potential market. The Court held the use was not fair use. In *Stewart* the Court focused on copyright protection of the owner's exclusive right to create derivative works. Cornell Woolrich is the author of the story "It Had to be Murder." *Rear Window* is based largely on Woolrich's story. When MCA rereleased the film, suit was brought. The Court held that the film was not a "new work" falling under the protection of fair use. Other factors taken into account by the Court were the commercial nature of the work, the fact that the original work was creative rather than factual, and the fact that the rerelease harmed the copyright holder's ability to find new markets. In the final Supreme Court opinion, *Campbell*, 2 Live Crew created a parody of the Roy Orbison song "Pretty Woman." Balancing the four factors set forth in the fair-use doctrine, the Court held that the defendant's use was fair. The Court noted that the public-interest benefits of transformed songs were important, but remanded the case to the lower court for consideration on the issue of harm to the copyright holder's market.

To these four Supreme Court cases, I am going to add a fifth: *MGM v. Grokster* (2005). Even though *Grokster* did not directly consider fair use, it did directly interpret and narrow the holding in *Sony*. Disturbingly, the majority opinion failed to mention fair use as a factor in its considerations, while Justices Ginsberg and Breyer (in their respective concurrences) only mention the concept in passing (Porter and Rife). In *Grokster* the Court discussed the *Sony* case as it considered whether P2P (person-to-person) software distributors StreamCast and Grokster were vicariously liable for the copyright infringing uses of individual users of their software. The Court vacated the judgment of the lower court and found Grokster and StreamCast could be liable for damages and subject to injunction. The Court narrowed the protection of *Sony* (and thus the protection of fair use), stating that the Ninth Circuit holding in favor of Grokster was imbued with a misreading of *Sony*. Thus a determination of infringement in P2P contexts (dual-use distribution technologies) depends on a two-part test pursuant to *Grokster*. First one looks to the *Sony* safe harbor to see if there is substantial noninfringing use. If the use passes this standard, one then looks to whether the distributor showed intent to induce others to infringe.

In *Grokster*, the Court said that the supposed central question in *Sony*, whether or not substantial noninfringing uses exist for a certain product, is *not* the sole determining question on the issue of legal liability. The question instead is *What is the intent of the distributor?* If it is to cause others to infringe, then the distributor is liable regardless of whether or not substantial noninfringing uses are possible. In his concurrence Justice Breyer stated that the Court had gone from an environment of certainty (are there substantial noninfringing uses?) to an environment of uncertainty (what is the intent?). It is important to note that Justice Souter, who wrote the main opinion, never mentioned fair use. We could read *Grokster* as saying that what was once fair use, the private copying via taping of copyrighted materials (TV programs, music) is no longer defined as fair use. On the other hand, we might read *Grokster* as placing a lot of stock in "intent." We might draw the conclusion that as long as we as educators do not *intend* to break the law we are safe from liability (Porter and Rife). In *Grokster*, the Court rhetorically read a number of organizational communications in order to make its determination on whether or not intent to induce infringement was present. I conclude from the *Grokster* case that it is not enough simply to hold our good-faith intent in mind; we must also document and reflect on how we teach others to use technology that includes replicating work by others.

According to Duhl, the first four cases show the Supreme Court's reluctance to define clear boundaries for the fair-use doctrine. As a result, both copyright holders and users/remixers like us and our students are held in a legal limbo. And why should the Court make any concrete, universal determinations when no pressure is applied? The industry stakeholders would rather the educational institutions live in fear, adopting limiting and restrictive IP policies; these interests would rather we did not know exactly how to operate, and that we work under concerns of infringement liability. The uncertainty of the fair-use doctrine in educational settings is amplified by the lack of a Supreme Court opinion. On the other hand, because of quickly changing information streams and technological innovation, the uncertain, open-ended language of the fair-use doctrine may serve us well (Rife). To gain a better grasp of the language that is there, to push on the boundaries of legal interpretations of that language, to exploit the slipperiness of the U.S. fair-use doctrine for purposes of education, is to give ourselves and our students the critical agency we and they need in order to compose robust texts, including multimedia texts, in the digital age. Our understanding of the fair-use doctrine can be improved significantly by looking not only at the Supreme Court opinions, but also at the lower-court judicial opinions, some of which have dealt directly with determinations of fair use in an educational-copying context. In the 1914 case of *Macmillan v. King*, the court held that it was not fair use for a tutor to create an outline, incorporating quotes and following the organizational structure of a Harvard University professor's economic textbook. In a later 1962 case, the court held that when a teacher distributed a musical arrangement adapted from a copyrighted musical composition, it was not fair use (*Wihitol*). In *Encyclopedia Britannica Educational Corp. v. Crooks* (1982) the court held that the practice of a nonprofit educational services cooperative, in taping educational, state-funded television programs for collection and nonprofit, scholastic viewing later, was not a fair use. The next year the court held it was not a fair use for a home economics teacher to make "fifteen copies of an eleven page excerpt of a thirty-five page cake decorating booklet for her students" (Bartow 11).

Pursuant to a line of cases commonly referred to as the copy-shop cases (*Basic Books*, *Harper & Row v. Tyco*, *Addison-Wesley*, *Princeton University Press v. Michigan Document Service, Inc. [MDS]*), settlements have been made such that course packs cannot be copied unless accompanied by written permission of the copyright holder, or a statement from faculty members certifying the copies were in compliance with guidelines. Universities have thus

agreed to adopt guidelines, and if faculty do not follow the guidelines, they face personal liability. The *Princeton v. MDS* is worth special remark since it includes three major presses, Princeton University Press, Macmillan, and St. Martin's Press suing a photocopy shop, Michigan Document Services (MDS). The court found MDS's copying to be a willful infringement. Damages against MDS were \$30,000 statutory damages, \$326,318.52 attorney's fees, and injunctive relief. In *MDS* the publishers targeted Mr. Smith (like MGM targeting Grokster), a fair-use crusader and owner of MDS, and brought him down. The *MDS* case reminds us always to do a complete rhetorical evaluation of case law and consider all stakeholder interests when making a fair-use determination. We are stakeholders on both sides of the issue, the copyright holders and those who need to use others' works in order to do writing and research. Ann Bartow asserts that under current court rulings, the reproduction of copyrighted materials for educational purposes is a "commercial" use; since any commercial use creates a presumptive harm to the copyright holder's market, and market harm is the single most important factor in current judgments, reproducing copyrighted material for educational use no longer falls under fair use.

Bartow reminds us that the Internet has so blended public and private, commercial and noncommercial, that every use is deemed "commercial." How these photocopying cases translate to other kinds of copying or remixing that go on in the classroom and beyond, remains uncertain. We can suspect that big media and publishers, once their attention is had, will unify for strength. Bartow argues that the courts could easily find faculty members as liable, if not more liable, than the copy shops. She speculates that the reasons that faculty members are usually not sued might be fear of bad press, or because under Section 504 of the Copyright Act, multiple-copying educators are only liable for actual damages, which are usually nominal. In order to maintain such limited liability, educators must be acting under a good-faith belief that they are not infringing. How can any of us be acting under "good faith" if we do not understand basic copyright law and fair use? And how can we expect our students to act in "good faith" if we do not teach them what the issues are? Additionally, if our institutions have restrictive guidelines that we disobey, you can bet that the courts will not listen to our pleas when we explain. Judges love to use "official guidelines" as heuristics for evaluation. Our institutional guidelines will be used, and the courts will tell us that, if we do not approve of the guidelines, we should change them rather than engage in blatant civil disobedience.

While Bartow recommends active assertion of our copyrights, even subversion of overly restrictive rules, Lessig tells us that our overreliance on fair use restricts our ability to freely exchange information without fear of legal liability (139–45). Lessig rightly points out that since under our current law, every use is a *regulated* use (because of automatic copyright protection on all fixed works), our *only* justification for unauthorized use is "fair use." Because the fair-use doctrine was not created to bear this burden, he argues (145), the law should be changed.

Yes, the law needs to be changed, but it seems unlikely at the present moment especially since automatic copyright protection is needed for the United States to be in compliance with international IP treaties. In the meantime, as educators we must operate under some understanding of the doctrine as it stands. Of course we should be concerned with fair-use policy and the trend of recent U.S. courts that repeatedly emphasizes the "property rights of the author as the paramount purpose of copyright law" (Vaidhyanathan 80). At the end of the twentieth century and the beginning of the twenty-first, U.S. courts have repeatedly emphasized the protection of property rights of the publishers and media conglomerates as the paramount purpose of copyright law. For example, the recent post-*Grokster* Seventh Circuit fair-use case, *BMG Music, et al. v. Cecilia Gonzalez* (December 2005), held that private downloading of music from the Internet was not a fair use even though the individual already owned some of the CDs featuring the downloaded songs because doing so impinged on the copyright holder's ability to enter new markets. Courts are increasingly focusing on the market impact of any use. Pursuant to *Gonzalez*, even though money or profit is not sought by the user of copyrighted works, the user can still be held to infringe on others' markets. U.S. copyright law has almost been rewritten by the courts and Congress so as to eliminate any consideration whatsoever based on public good.

Writing scholars and teachers are in a unique position to engage in civic participation, advocacy, and teaching, so as to emphasize the public good in sharing information as fully as possible, while still giving credit. It might be that we as educators need to convene and craft our own fair-use guidelines that will allow us to be able to teach in digital environments. After all, our students are not normally selling their classroom assignments for money, and yet under *Gonzalez*, their cutting and pasting of images and texts off the Web could be interpreted as impeding the copyright holders' ability to enter the "new" market of new media composing in the educational setting.

Conclusion

I encourage digital literacies if students can situate their fair use of material within the current copyright regime. Students should be introduced to basic IP concepts and categories such as trademark, service mark, copyright, and plagiarism, and should know where to find needed definitions effectively and efficiently. Students should be able to make at least cursory evaluations regarding where information comes from, who owns it, and what rights are offered. Working with students to uncover the intricacies of IP law and fair use, focusing on key legal cases, helps students understand the economic, legal, and social issues surrounding the use of information. By discussing legal damages assessed in various infringement cases, by talking about lawsuits such as *Folsom*, *Sony*, *Campbell*, *Napster*, *Grokster*, *Google Print*, and *Kelly v. Arriba Soft*,¹ students can understand the potential implications of using others' work. By looking at culturally significant perspectives embodied in law and governmental agencies, such as the United States Patent and Trademarks Office's database of Native American insignia, students can make autonomous decisions about their own comfort level and definition of ethical and legal use. There are no fixed lines or rules here. Students need to know what their options are in order to act responsibly and within their own political, social, and personal beliefs. Studying the history of fair use helps them understand the impact of recent court decisions. As educators, the discourse of fair use should be just as much ours as is the discourse of "writing."

Note

1. *Google Print* and *Kelly* are both search engine fair-use cases. *Kelly* held that the use of thumbnail images as search tools was a fair use (Band). The American Association of Publishers lawsuit against Google Print is still being decided at this writing; however on January 25, 2006, Electronic Frontier Foundation carried a story reporting that the Nevada District court ruled that the Google cache is a fair use. This holding could influence the larger *Google Print* case (see "Google Cache").

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