

FIXING FAIR USE

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I. INTRODUCTION

Fair use traditionally has been lauded for its safety-valve function in calibrating copyright law's balance between incentives to create, and access to use, new expressive works. Courts and commentators, however, have noted that the theoretically salutary features of fair use rarely function as advertised in practice because the doctrine's "fuzzball factors" make its application deeply uncertain. Recently, the social costs of this uncertainty have increased dramatically because the class of potential fair users has grown significantly with the development of new media and because the Supreme Court has held that fair use also must serve as the First Amendment's understudy with respect to promoting freedom of expression.

This Article joins the efforts of other scholars who seek to preserve fair use's flexibility while providing greater ex ante certainty for potential fair users and copyright owners alike. Michael Madison argues for a pattern-oriented approach to fair use and would amend Section 107 to give courts greater freedom to identify the social practices that should be recognized as fair uses. While creating additional uncertainty in the short run, Professor Madison argues that a more certain law of fair use would emerge in the long run. Relatedly, Peter Jaszi seeks to generate negotiated fair use norms that would be instantiated in the business practices of content industries, particularly with respect to documentary film.

This Article proposes that copyright law achieve fair use clarification by borrowing an institutional straddle between rules and standards used in other complex bodies of law such as taxation and securities regulation – the administrative advisory opinion. Under the proposal, Congress would create a Fair Use Board in the United States Copyright Office. A potential user could petition the Board for an advisory opinion regarding whether a proposed use of a copyrighted work would be a fair use. The effect of such an opinion, if favorable, would be analogous to an IRS Private Letter Ruling or an SEC No Action Letter - the individual user would be immune from liability for that particular use but no binding precedent would be established by the ruling.

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Under the proposal, the fair use petitioner would be obliged to serve notice on the copyright owner, who would have a full opportunity to contest the petition. Either party could appeal an unfavorable ruling to the U.S. Court of Appeals for the D.C. Circuit.

The proposal would not formally change the balance of rights established in the Copyright Act. Rather, it would simply give fair use a fair chance to serve its intended function. Copyright owners would have a full opportunity to assert their rights and would be no more prejudiced by choosing not to contest particular petitions than they currently are when they choose not to pursue action against uses they deem infringing.

II. FAIR USE TODAY

A. Fair Use - Formally

[This section describes statutory fair use and its judicial interpretation. Familiarity of IPSC participants with this body of law is assumed.]

[The key point is that the fact-specific nature of the fair use inquiry combined with the mismatch between the formal factors and what appear to be the actual rules of decision, make ex ante reliance on fair use highly risky]

B. Fair Use in Action

Individuals, some educators, librarians, journalists, and a variety of other users routinely rely on fair use, notwithstanding uncertainty about its scope. Often these users also are relying on the enforcement practices of copyright owners, who have acquiesced de facto in these users' fair use determinations. A wide range of other potential users are less fortunate.

For example, in some industries, such as film, certain customs and trade practices recognized certain kinds of uses as fair, supplying sufficient certainty to exercise fair use rights for commercial works. That has now changed. Legal departments and licensing agents in companies with large portfolios of copyrighted works have discarded old understandings. In the atmosphere of fear and greed that the advent of new production and distribution technologies has bred, legal departments in media companies, once seen only as cost centers, have tried to turn themselves into revenue centers by threatening copyright litigation in order to extract licensing revenues from the targets of such threats.

Nowhere has this trend been more noticeable than in the film and music industries.

From the perspective of expressive freedom, the response to this new aggression has not been encouraging. In a few cases, strong lawyers are willing to advise that a contemplated use is likely to be judged fair, and strong clients are willing to act on such advice. In the main, however, either lawyers are unwilling or unable to provide sufficient assurance or clients are unwilling or financially unable to risk proceeding from a fair use position. Making matters worse is a near-corollary to Arrow's information paradox: a potential fair user who seeks to acquire better information about the risks of relying on fair use by asking the copyright owner whether it would be willing to grant permission or a royalty-based license for the contemplated use thereby compromises his or her fair use position.¹ As a result, potential fair users generally choose between suffering expressive harms by forgoing their desired uses or acquiescing in licensing demands that further goad aggressive legal and licensing departments into making license demands for fair uses.

1. The Bold

[This section will discuss SunTrust v. Houghton Mifflin, some reverse engineering cases, and some parody cases as examples in which users were willing to risk relying on fair use despite the high likelihood of litigation.]

2. The Rest

Unlike these exceptional fair users, however, most potential fair users lack the resources to defend themselves or they do business with commercial distributors who insist on copyright clearances for all uses no matter how strong the argument for fair use may be. For example, in *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, Pat Aufderheide and Peter Jaszi interviewed a number of documentary filmmakers

¹ Arrow's paradox is

The fair use conundrum is not quite a corollary because asking for a license prejudices but does not destroy the user's fair use case. The prejudice to the fair use case may not be self-evident. Primarily, the presence of a licensing alternative influences the fourth, harm-to-the-market, inquiry. CITES. Moreover, although intent is not formally an element of fair use analysis, as a practical matter, it often is. CITES

whose expressive choices have been chilled by an inability to assert their fair use rights.² A few samples include:

When Linda Goode Bryant was working on *Flag Wars*, a documentary chronicling conflict between African-Americans and newly-arrived gay and lesbians in a gentrifying area, she had to sacrifice a scene involving a principal character, Linda Mitchell. Mitchell was singing along with the radio while painting her front porch. To ensure the clip could be included in the film, Bryant attended a producer's academy sponsored jointly by POV and WGBH in Boston on the subject of music rights. The lawyer there assured her that such a situation "shouldn't be a problem. But in reality, it seems that there is a problem, because we met the criteria [cited by the PBS lawyer to be able to claim fair use] with the Linda Mitchell moment and we had to cut her out [anyway]." After consulting with public TV documentary series POV staffers and Sony, the music publisher, the consensus was that ultimately the musician/songwriter would be uncooperative and to just cut the scene. "It was a shame, because it was a moment which really showed an aspect of her character which was important."³

"I haven't used fair use in the last ten years, because from the point of view of any broadcast or cable network, there is no such thing as fair use," said **Jeffrey Tuchman**. "I'm not speaking here of news networks. Every headline I use, even historical headline, even without news photographs, even without the masthead, every magazine cover, I have to get the rights to. Is that true of every one of my colleagues? I know that some people play fast and loose, but it's likely to come back and bite you, maybe because somebody is going to sue you, maybe because your rights bible is incomplete. Everyone is fearful of rights issues on every level."⁴

"If you're doing a feature DVD or for theaters, you can't invoke fair use," said **Robert Stone**. "Or that is, you can say whatever you

² See <http://www.centerforsocialmedia.org/rock/index.htm>

³ *Id.* at 18.

⁴ *Id.*

want, but at the end of the day you can't sell your film—the corporations and the lawyers define what the terms are.”⁵

To be sure, fair use is not entirely dead, even in the film industry. Instead, it has been driven underground. Auderheide and Jaszi report that:

[F]air use may be more commonly used than people are willing to admit, precisely because of the surrounding legal ambiguities. The majority of filmmakers interviewed discussed or referred to, off the record, invocations of fair use that they refused to specify or go on the record about, for fear of attracting legal attention.⁶

The confusion caused by the fair use doctrine extends to schools and libraries, as well. Educators often wonder if their classroom activities will infringe copyright, or if they can rely on fair use. Examples of such questions include: whether creating a computer program that explains the answers to math book problems is allowed;⁷ whether student's free hand drawings of copyrighted characters can be put into a school magazine;⁸ whether videotaping different versions of a scene from *Macbeth* for comparison is infringement;⁹ whether student-made videos containing commercial music and video clips may be shown on the schools closed-circuit television station.¹⁰ An example of a question by a librarian is whether the library can put images of covers of recommended book on their children's website.¹¹

A more sizable controversy has emerged between the Association of American Publishers and the University of California over the university's "electronic reserve system."¹² The school has developed a new system, whereby students get required reserve materials online with a password, rather than physically going to the library and photocopying pages from reserved books.¹³

⁵ *Id.*

⁶ *Id.* at 28

⁷ See Carrie Russell, *Carrie on Copyright*, SCHOOL LIBRARY JOURNAL, June 01, 2003, at 41 (Carrie Russell, the American Library Association's copyright expert answers questions on fair use, but states that her opinions should not be taken as legal advice).

⁸ See Carrie Russell, *Carrie on Copyright*, SCHOOL LIBRARY JOURNAL, Sept. 01, 2002, at 39.

⁹ See Carrie Russell, *Carrie on Copyright*, SCHOOL LIBRARY JOURNAL, June 01, 2003, at 35.

¹⁰ See Carrie Russell, *Carrie on Copyright*, SCHOOL LIBRARY JOURNAL, April 01, 2002, at 43.

¹¹ See Carrie Russell, *Carrie on Copyright*, SCHOOL LIBRARY JOURNAL, January 01, 2002, at 41.

¹² See Scott Carlson, *Legal Battle Brews Over Availability of Texts on Online Reserve at U. of California Library*, Chron. of Higher Educ., April 22, 2005 at 36.

¹³ See *Id.*

The publishers believe that this practice more closely resembles commercial “course packs,” which courts have found to not be a fair use.¹⁴ The school believes that they are within the bounds of fair use and that any suit by publishers would be futile and a public-relations disaster.¹⁵ Still, many libraries are cautious and allow fear of litigation to determine their policies.¹⁶

C. Fair Use is Broken

For fair use to fulfill its function in allocating expressive freedoms, it cannot remain a stealth doctrine for the majority of users of copyrighted works. Instead, users require a means to obtain greater ex ante assurance about the scope of their rights. One existing method to acquire such certainty is an action seeking a declaratory judgment of fair use. But this route is available only when a copyright owner has made a sufficiently specific and credible threat of litigation, which usually occurs only after a user has made an investment in use of the copyrighted work and is preparing to distribute it publicly.

A search for post-1976 Act cases in which a user of a copyrighted work sought a declaratory judgment of fair use yielded only twelve cases. Of those, the courts reached the merits in seven cases, issuing declaratory judgments in only three. The other five cases were dismissed on jurisdictional grounds.¹⁷

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In sum, in theory fair use plays an essential role in brokering expressive freedoms among first-generation authors and their successors, but in practice, fair use is broken. The high costs associated with interpreting standards and the financial risks associated with relying on fair use greatly limit the degree to which those who produce works for public consumption are willing to rely on fair use.

¹⁴ See *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991) (deciding that creating course packs of copyrighted material and selling them to students not a fair use).

¹⁵ See *Id.*

¹⁶ See *Id.* (quoting Jonathan Franklin, fair use scholar and associate law librarian at Univ. of Wash.)

¹⁷ See, e.g., *Texas v. West Publishing*, 681 F. Supp. 1228 (W.D. Tex 1988) *aff'd*, 882 F.2d 171 (5th Cir. 1989) (finding that no case or controversy existed because West had not threatened suit); *Ad Hoc Committee for Investigation and Exposé of Multiculturalism v. Madhubuti*, No. 93 C 1354, 1993 WL 75103 (finding no case or controversy because defendant never responded to letters from plaintiff); *Diagnostic Unit Inmate Council v. Films Inc.*, 88 F.3d 651 (8th Cir. 1996) (finding no case or controversy because the involuntarily joined plaintiff, Arkansas Department of Corrections, refused to take a position in the matter).

III. FIXING FAIR USE: A PROPOSAL

What is needed to fix fair use is an institutional straddle that preserves the flexibility and context-sensitivity of the legal standard while providing sufficient *ex ante* certainty to encourage creators and users to exercise their fair use rights. As I argue in a separate paper, binding, non-precedential, administrative advisory opinions (hereinafter “advisory opinion”) serve such a straddling function. Currently in the law, the advisory opinion is used to provide such certainty in the federal regulation of income taxation, securities, and health care. In operation, the advisory opinion provides regulatory guidance in particular situations without creating a thick body of binding precedent that ossifies the regulatory system.

To insert the advisory opinion function into copyright law, I encourage Congress to amend the Copyright Act to create a Fair Use Board in the U.S. Copyright Office analogous to the recently-created Copyright Royalty Board.¹⁸ Fair Use Judges would have the authority and obligation to consider petitions for a fair use ruling on a contemplated or actual use of a copyrighted work. The copyright owner would receive notice of the petition and have the opportunity to acquiesce in, or oppose, it.

If the Fair Use Judge determines that such a use is or would be a fair use, the petitioner and the petitioner’s heirs or assigns, would be immune from liability for copyright infringement for such use. Such a ruling would not affect the copyright owner’s rights and remedies with respect to any other parties or any other uses of the copyrighted work by the petitioner. If the Judge rules that such use is not, or would not be, a fair use, the petitioner retains all other defenses to copyright infringement.

¹⁸ See 17 U.S.C. § 801(b). Under the Act, the Copyright Royalty Judges will conduct proceedings to “make determinations and adjustments of reasonable terms and rates of royalty payments as provided in [Copyright Act] sections 112(e), 114, 115, 116, 118, 119 and 1004,” “to make determinations concerning the adjustment of the copyright royalty rates under [Copyright Act] section 111,” to authorize distributions under sections 111, 119, and 1007 of the Act, and “[t]o determine the status of a digital audio recording device or a digital audio interface device under sections 1002 and 1003, as provided in section 1010.” *Id.*

Under the Reform Act, three permanent Copyright Royalty Judges are to be appointed by the Librarian of Congress to encourage settlements and, when necessary, resolve statutory license disputes. “The expectation is that the Copyright Royalty Judges, appointed to staggered, six-year terms, will provide greater decisional stability, yielding the advantages of the former Copyright Royalty Tribunal, but with greater efficiency and expertise.” 37 C.F.R. ch. III §; 70 Fed. Reg. 30901 (May 31, 2005).

In either case, the Judge's determination would be administratively reviewable by the Register of Copyrights.¹⁹ The Register's decisions would be reviewable by the U.S. Court of Appeals for the District of Columbia Circuit. The standard of review would be *de novo*.

A. Administrative Adjudication

[Potential fair users, want fast and cheap fair-use determinations. This proposal seeks to balance this desire with the need to respect the copyright owner's interests and to create realistic administrative timetables.]

1. The Fair Use Board

[My views on the specifics of the proposal are very preliminary, and I welcome suggestions.]

a. Selection and Composition

[Judges would have to be lawyers with demonstrated experience in copyright law. Terms would be fixed, probably at 10 years, and would be renewable. It is foreseeable that the pool would likely be predisposed to favor large copyright holders and that anything less than a lifetime appointment creates revolving-door incentives to favor such interests as well. These are acceptable risks in my view, given the shriveled state that fair use is in.]

b. Procedures

[The petitioner would be obliged to serve a copy of the petition on the copyright owner, who would have an adequate opportunity to participate in the proceeding. The amount of the filing fee will be important to limit the strain on the limited administrative resources that the proposal could garner. The filing fee might be set rather high, say at \$500, with some in forma pauperis or waiver rules. The copyright owner would have 10 days to give notice of intent to participate, and another 20 days to file such response. Of course, absence of copyright owner does not result in default judgment. The Fair Use Judge is obliged to make an independent fair use assessment. The Fair Use Judge would have a deadline, perhaps 45 days after the petition and any response from the copyright

¹⁹ Cf. The Register "may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under this title that underlies or is contained in a final determination of the Copyright Royalty Judges." 17 U.S.C. § 802(f)(1)(D).

owner has been filed, to issue a brief, written decision. The Register would have 10 days to decide whether to review the decision. If she declines to review, the Fair Use Judge's decision becomes final agency action. If the Register grants review, she will have 30 days in which to issue a decision.]

c. Administrative Record

[The petitioner submits with the petition a copy of the copyright owner's work and either a copy of a derivative work claimed to be a fair use or a detailed description of the proposed fair use. There would be no live hearings or live testimony. Analogous to proceedings under the UDRP, the record will all be "written," understanding that multimedia works would be submitted in their original form. Sworn testimony would be in affidavit form, including expert testimony on the effect on the copyright owner's market under factor four.]

2. The Constitutional Status of the Board

The proposal may draw a constitutional challenge. Article II of the constitution gives the President the power to execute the law. The Librarian of Congress is appointed by the President with the advice and consent of the Senate,²⁰ but the Library itself is not an executive agency. Instead, the Copyright Office is part of the Library of Congress,²¹ the Register of Copyrights is appointed by the Librarian of Congress, and is under the Librarian's supervision.²² The Library of Congress is organized under Title Two of the United States Code, which governs Congress.²³ The Supreme Court has indicated that Congress has only the power to legislate, with certain explicit exceptions, and legislation requires bicameralism and presentment.²⁴ Similarly, the Court has held that the power to execute the laws could not be exercised by either Congress or an officer under its control.²⁵

²⁰ 2 U.S.C.A. §136.

²¹ See 17 U.S.C.A. §701.

²² 17 U.S.C.A. §701(a).

²³ See 2 U.S.C.A., Chapter 5, Library of Congress.

²⁴ See *Id.* at 954-955 (quoting U.S. CONST. art. I, § 2, cl. 5 (House power to initiate impeachment); U.S. CONST. art. I, § 3, cl. 6 (Senate power to conduct impeachment trials); U.S. CONST. art. II, § 2, cl. 2 (Senate power to approve presidential appointments, and to ratify treaties)).

²⁵ See *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating the portion of the Gramm-Rudman-Hollings Act which delegated supervisory duties to the Comptroller General, a congressional officer).

However, the Copyright Office already carries out certain functions that appear to be executions of the law, particularly, under the DMCA, which gives the Librarian of Congress the power to exempt certain classes of works and users from the anti-circumvention provision.²⁶ Although the risk of a separation of powers violation in that provision has been noted, the constitutionality of the provision has not been challenged.²⁷ This proposal proceeds on the assumption that the courts will continue to treat the Copyright Office as a *de facto* executive agency. Were the courts to rule that this proposal violates separation of powers, I propose in the alternative to locate the Fair Use Board in the U.S. Patent and Trademark Office, in the Department of Commerce.

B. Judicial Review

[Judicial review would be available to petitioner, the copyright owner, or the Copyright Office in the D.C. Circuit. Although normally the court gives an expert agency deference in its interpretation of law, because fair use stands in the shoes of the First Amendment, and because the record is identical to that considered below, the standard must be de novo. Cf. Bose Corp. v. Consumers Union Of U.S., Inc., 466 U.S. 485 (1984) (independent review when issue is mixed question of fact and law regarding availability of First Amendment privilege).]

IV. DEFENDING THE PROPOSAL

[Skeptics may resist this proposal on three grounds: fairness, efficiency, and jurisprudential integrity. Interestingly, the proposal is likely to draw offsetting complaints on each of these grounds from some institutional copyright owners and from proponents of more vigorous user's rights. I consider these in turn.]

A. Fairness

[Some copyright owners are likely to complain that instituting such a procedure unfairly burdens their rights. Have to monitor fair uses and spend much more time and energy contesting these.

User's rights advocates may argue that presence of such a procedure actually prejudices the exercise of fair use rights because it makes it more difficult to defend relying on fair use without having sought an advisory opinion first.

²⁶ See 17 U.S.C.A. §1201(a)(1)(D).

²⁷ See Cohen, *supra* note XX, at 238.

Responses. Copyright owners have to remember that this proposal creates only a new procedure but does nothing to affect the scope of the substantive rights the law grants. Moreover, the burden is overstated. The Copyright Office will make independent judgments. Also, petitions will give copyright owner useful data about how the work is being used and valued.

Users' rights advocates have a point, but given the dismal state of fair use reliance, the net effect should be a greater exercise of fair use rights. To the extent that there are infringing uses thought to be fair that will be deemed unfair, that just helps put the law back into balance.]

B. Efficiency

[Some are likely to complain that the costs of the system would not be worth the price. It is true that this process will not solve the problems of creative folks who need quick determinations. However, over time, some patient creators are likely to find the process worth the wait, and an administrative, and perhaps, judicial fair use jurisprudence will emerge from the process. This will have positive spillovers to others seeking fair use clarifications.]

C. Jurisprudence

[Some will be concerned about the substance of the decisions that the Board will render. Some critics believe that the Copyright Office has become a captured agency and that either the Board will also become captured and give fair use a very cramped reading, or the Register of Copyrights will do so on appeal. This is a real risk, but de novo judicial review would serve as a corrective. More importantly, the process would supply courts with useful information about the growth in aggressive tactics pursued by some copyright owners. With this information, courts will a better understanding of the interests at stake in fair use disputes.]