



**Association of American Publishers¹
Statement Submitted for the Hearing Record
House Judiciary Committee
Subcommittee on Courts, Intellectual Property, and 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chiefly advocated by the publishing industry and helped to clarify that no type of copyrighted work (in this instance, unpublished works) is *per se* outside the scope of the equitable fair use defense as codified by Congress.²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

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

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 “talismatic 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 Ashten 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

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.*