

**Testimony of Professor Peter Jaszi
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FAIR USE NOW

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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 as a matter

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).

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 Congress⁴ 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

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.

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 statute clearly were not intended to exhaust the range of considerations that a court could take into account in making its determination. 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

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).

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.

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 conclusion¹³ 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,

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).

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 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

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).

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, 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.

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/cranoticketakedown.pdf>

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 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?

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

Peter Jaszi teaches domestic and international copyright law at American University Law School, writes about copyright history and theory, and supervises students in its Glushko-Samuelson Intellectual Property Law Clinic, which he helped to found in 2001. With Craig Joyce, Marshall Leaffer, Tyler Ochoa, and Michael Carroll, he co-authors a standard copyright textbook, Copyright Law (Lexis, 9th ed., 2013). He and Martha Woodmansee edited The Construction of Authorship, published by Duke University Press in 1994. Their new collection, Making and Unmaking Intellectual Property (edited with Mario Biagioli), was published by the University of Chicago Press in 2011. In 1994, Prof. Jaszi was a member of the Librarian of Congress' Advisory Commission on Copyright Registration and Deposit, and in 1995 he was an organizer of the Digital Future Coalition. He is a Trustee of the Copyright Society of the U.S.A., and a member of the editorial board of its journal. Since 2005, Prof. Jaszi has been working with Prof. Patricia Aufderheide of the American University's Center for Social Media on projects designed to promote the understanding of fair use by documentary filmmakers and other creators (see www.wcl.american.edu/pijip/go/fair-use). Their book, Reclaiming Fair Use, was published in 2011 by Chicago. In 2006-07, Prof. Jaszi led an interdisciplinary research team, funded by the Ford Foundation, investigation the connections between IP and the traditional arts in Indonesia; their report is at www.wcl.american.edu/pijip/go/news/professor-peter-jaszi-authors-report-on-protection-of-the-traditional-arts-in-indonesia. In 2007, Professor Jaszi received the American Library Association's L. Ray Patterson Copyright Award. In 2009 the Intellectual Property Section of the District of Columbia Bar honored him as the year's Champion of Intellectual Property, and in 2011 he was recognized with an IP3 award from Public Knowledge.