CHAPTER 3

Fear and Fair Use: Addressing the Affective Domain

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Introduction

Many laypersons have a certain amount of fear when confronted with the law. Fear of breaking the law, fear of being ignorant of the law, and perhaps the strongest motivator of them all (at least in the civil law context), fear of being sued. So, when discussing fair use with patrons of the library, whether they are faculty, students, or librarians, one must also address the elephant in the room: fear. A copyright librarian's job, quite often, is to teach others about fair use, but first, the copyright specialist must deal with the learner's visceral emotional response for the audience to have the confidence to use fair use in their daily work.

This chapter, then, is aimed at quelling the fear of those in the academy and empowering them to exercise their right to fair use. The chapter begins with a grounding of the discussion in the theory of the impact of fear on decision-making. Next, the chapter contextualizes fair use within the copyright legal landscape: is it a right, a limitation on the rights of others, an affirmative defense, or all of the above? And, is there always some risk in asserting fair use? Then, the chapter addresses instances where academics have been sued for exercising fair use and the outcomes of those cases. Finally, the chapter concludes by addressing legal safe harbors for academics exercising fair use.

Fear, Risk, and Decision-Making

It is likely unsurprising to state that when risk measures are certain or calculable, generally individuals tend to be risk-averse.[1] When presented with a situation where one option is more certain than the other, individuals tend to favor the situation that is less ambiguous.[2] The Ellsberg paradox explains this using a classic test:

> [I]f faced with a choice of drawing a ball from an urn containing 10 red and 10 black balls or an opaque urn containing 20 mixed red and black balls of unknown proportion, subjects tend to prefer the former, regardless of whether the selection of a red or a black ball would be rewarded.[3]

In other words, if an individual understands that one result is a clearer path to meeting a goal, the Ellsberg paradox demonstrates that the individual will choose the less ambiguous path, even if it is a less desirable ultimate result.[4] Similarly, "in order to mitigate risk, decision makers seek to reduce uncertainty."[5]

There is no such thing as a no-risk situation in the fair use context because courts interpret fair use as an affirmative defense and, hence, a person claiming fair use could be asked to answer a lawsuit claiming infringement,[6] even if the fair use argument is quite strong. While many principles in copyright law are infrequently challenged in courts, there are thousands of cases interpreting fair use. Because it is a flexible test, two judges hearing a factually similar case could rationally come to a different conclusion. And judges are not limited to the four factors listed in the text of the statute,[7] leading to additional concerns regarding the accuracy of fair use predictions. Hence, fair use is, at its very heart, flexible and (some would argue) ambiguous. Many librarians and library patrons, therefore, when faced with the risk of potentially being sued (no matter how low that risk may be) might be tempted to always take the easier, clearer path: to pay licensing fees to use works that may be suitable for a fair use assertion.

Hopefully, however, if the librarian or library patron is provided with the resources and information contained in this chapter, their fear will subside, they will become less risk-averse, and they will be more confident in asserting their fair use rights.

Fair Use: Is it a Right or An Affirmative Defense

While courts (and the legislature) define fair use as an affirmative defense due to its procedural posture in the court system[8]—if you are sued for copyright infringement, even if it is a fair use, you must defend the lawsuit in court to avoid a default judgment against you—many copyright educators tend to view it differently. Some view it as a limitation on the rights of authors in that users can assert fair use rights without first receiving permission from the author of the work. This interpretation seems to fit well with the terms of section 107, the fair use provision, itself as that section of the act is titled "Limitations on exclusive rights: Fair use."[9] Others argue that fair use is a right and, as such, like any other legal right, unless you use it you will lose it. It is this position that is intriguing, as it finds support both in the Copyright Act as well as in some recent case law, and yet, courts continue to apply fair use as an affirmative defense.

Kyle Courtney constructed a cogent argument that fair use is a right.[10] Courtney traces the origins of the right to the 1976 Copyright Act itself in section 108(f)(4).[11] In that section, the act provides that "nothing in [section 108] in any way affects the right of fair use as provided by section 107…."[12] This so-called savings clause, which preserves the ability of librarians to assert both their section 108 and 107 rights together, specifically refers to fair use as a "right," indicating that Congress believed it to be a right of those accessing and using copyrighted works at the time of the enactment of the Copyright Act.

Furthermore, Courtney argues, courts have recently noted that fair use is a right as well. For instance, in the 2015 *Lenz v. University Music Corp*. decision, the Court of Appeals for the Ninth Circuit, when interpreting fair use within the context of the Digital Millennium Copyright Act ("DMCA"), stated that "[f]air use is not just excused by the law, it is wholly authorized by the law."[13] The court continued by citing Eleventh Circuit precedent stating that "[a]lthough the traditional approach is to view fair use as an affirmative defense…it is better viewed as a right granted by the Copyright Act of 1976."[14] Therefore, argues Courtney, fair use is a right and has been recognized as such by courts such as the Ninth Circuit.

And yet in *Lenz*, the court was applying fair use within a specific legal context, a DMCA takedown notice. In that case, the court still acknowledged that, procedurally, depending on the nature of the case, fair use is an affirmative defense. In other words, the court made a distinction between DMCA takedown cases and other kinds of fair use cases, where fair use would remain (in the courts at least) as a procedural matter, an affirmative defense. Even in the Eleventh Circuit, where courts have been friendly to the argument that fair use is a right and not a defense stating that "fair use should be considered an affirmative *right* under the 1976 Act," courts have reluctantly applied "Supreme Court precedent," noting that "the fair use right must be procedurally asserted as an affirmative defense…."[15] It was this line of cases the Ninth Circuit relied upon to require a copyright holder to assess whether a particular use was a fair use prior to sending a DMCA takedown notice in *Lenz*. And the Supreme Court has consistently noted that fair use is an affirmative defense in 1985 in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[16] in 1994 in *Campbell v. Acuff-Rose Music, Inc.*,[17] and again in 1998 in *Eldred v. Ashcroft*.[18]

While it is comforting to copyright librarians and patrons alike to view fair use as a right, and it would make a stronger argument to combat the fear of liability and it is important to assert fair use when it is available, fair use has not been considered a right by the courts except for in the limited circumstance of DMCA takedown notices in the Ninth Circuit. And while scholars argue that the burden of proof for fair use should be lessened to a regular defense[19] or even shifted to the plaintiff,[20] and that we all have a collective right to fair use,[21] it is a disservice to library patrons to ignore that courts will procedurally follow the clear precedent of the Supreme Court. Thus, as Kyle Courtney rightfully does in his fair use instruction sessions,[22] when instructing individuals about fair use, copyright librarians should educate their patrons about the need for a fair use risk assessment, including the possibility of litigation.

Libraries, Education, and Fair Use Case-Law

Libraries are confidently ingesting more books into their digital collections and sending copies of the books to the HathiTrust Digital Library.

Libraries can feel confident providing the HathiTrust with books that are still under copyright protection so long as they will only be viewed online by researchers engaging with the text for non-consumptive purposes. Non-consumptive (or non-reading) uses include data mining, text mapping, text mining, and more. Librarians need have no fear digitizing works for ingestion by HathiTrust due to the *HathiTrust*[23] and *Google Books*[24] decisions from the Second Circuit Court of Appeals. In both of these decisions, the court stressed that using the works for the purpose of research without being able to read the entire book (in the case of *HathiTrust*, in the research term format, and in the case of *Google Books*, in the snippet view format) constitutes a fair use.[25]

As an extension of this right to fair use, some libraries are considering lending digital copies of books that are purchased by the library on a one-to-one basis with their physical holdings.[26] So long as the library has purchased the original book, the libraries assert that this is a fair use to make the entire text of the book available to one patron at a time. In other words, the library would either lend the physical book or lend the electronic version of the book at any given time, but not both. In that manner, the library considering lending copies of books that are still in-copyright would be lending out one copy of the book and would not make any excessive copies of the physical book. To the extent that a library is lending the electronic version of the book for research and educational purposes, the libraries assert that this is a fair use.[27]

Libraries may feel a bit less confident about their ability to place materials on e-reserve without first paying licensing fees and asserting fair use due to the ongoing litigation involving Georgia State University. Georgia State University has been involved in this litigation for over ten years and the case is still pending.[28] The case, which involves library physical reserves and e-reserves of copies of library books, was instituted by Cambridge University Press and Oxford University Press, with funding from the Copyright Clearance Center, in an attempt to curtail the widespread practice of fair use copying for course readings. It is important to note that this case began because Georgia State University had a problematic policy for creating course reserve materials whereby up to 20 percent of copyrighted works could be copied under fair use.[29] This is important because most universities do not create such a high risk of being sued by

(1) not having a problematic fair use policy, and (2) maintaining e-reserve materials for courses behind protective paywalls. In any event, the district court in that case has consistently held that the majority of the instances of alleged infringement are fair use.[30] However, the Eleventh Circuit Court of Appeals reversed and remanded the case to the district court, citing issues with the weighing of the fair use factors and noting that the district court gave short shrift to the impact on the marketplace for the copied books.[31] Nevertheless, on remand, the district court continued to favor the university and even ordered the publishers to pay for the attorney's fees incurred by the university in defending the litigation in excess of three million dollars.[32] This result, of course, was appealed to the Eleventh Circuit Court of Appeals once again with yet another remand to the lower court—this time ordering the court to reinstate its findings that factor four of the fair use test "for the 31 excerpts for which digital permissions were available"[33] favored infringement and insisting that the lower court eschew any "mathematical" approach to calculating fair use.[34] At the time of the printing of this book the decision at the lower court was still pending.

Legal Safe Harbors

The biggest way to fight fear is in realizing that the likelihood of another case against a university library for e-reserves similar to the one launched against Georgia State University is rare and that the legal safeguards against such a case are high. In other words, it is not worth the publishers' time and money to file these kinds of lawsuits often. Regardless, there are legal protections granted to librarians, educators, and educational institutions that should quell much of the fear of being sued for good faith fair use determinations, including Section 504 of the Copyright Act and Sovereign Immunity (for the institution itself).

The first line of defense for individual librarians or educators who fear liability for fair use determinations is included in the remedies section of the Copyright Act itself. Section 504(c)(2) provides that

> the court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his

> or her use of the copyrighted work was a fair use under section 107, if the infringer was:
>
> (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords.…[35]

There are a few things to note about this provision. First, the provision protects librarians, archivists, employees, or agents working on behalf of the employee of a non-profit library, archive, or educational institution. Second, the protected librarian, archivist, employee, or agent made the fair use determinations as a part of his or her job. Third, the employee or agent of the employee had reasonable grounds to believe that his or her fair use determination was fair use. Fourth, this provision only applies to the reproduction or copying of works, not to a public display or public performance of the work. Fifth, if all of the above applies, the employee or agent of the employee is shielded from statutory damages, which can be significant. In that instance, the potential liability from infringement would be limited to "the actual damages suffered by him as a result of the infringement" as well as profits "that are attributable to the infringement and are not taken into account in computing the actual damages."[36]

If the library is part of a public institution, the doctrine of sovereign immunity may provide a defense for the library as well. "The Eleventh Amendment stipulates that a state or state agency may not be sued in a federal court for dollar damages."[37] However, even if sovereign immunity applies, the university still may face equitable relief such as an injunction when an appropriate state officer is named in the lawsuit and an ongoing violation of the law is alleged.[38] Interestingly, though, one district court has found that a professor at a public university can assert sovereign immunity (as opposed to a higher ranking administrator) and that "the fair use doctrine is unsettled enough" as to prevent a lawsuit. (One of the prerequisites to establishing sovereign immunity is that the statutory right allegedly violated as "clearly established" at the time of the alleged violation.)[39] So, there is some precedent for professors to assert the defense of sovereign immunity in copyright cases to completely avoid liability.

Conclusion

Copyright literacy, and especially fair use literacy, is key to helping library patrons and educators to feel more comfortable making daily fair use determinations. It is natural to fear the unknown and to also become risk averse in the face of potential legal liability. And yet, there are some safeguards to liability as reviewed above. Namely, the fact that librarians and educators working in nonprofit educational institutions, libraries, or archives and acting within the scope of employment making a fair use determination are shielded from large damages. Additionally, sovereign immunity may also lead to either no damages or a limitation on the judgment to purely equitable relief, such as injunctions. Finally, the Supreme Court has made it clear that the recovery for attorney's fees shall go to the prevailing party, including the alleged infringer in a copyright case if the court rules that the defending party prevailed[40] in asserting fair use.

Thus, while there may be no such thing as no risk when asserting fair use, there are plenty of situations where the risk is quite low. Savvy librarians, educators, and library patrons can take comfort that their daily good-faith assertions of fair use will likely go unchallenged in court. And if they are challenged, there are some well-established safeguards to liability. Go forth and assert fair use in good faith without fear.

Endnotes

1. Catherine A. Hartley and Elizabeth A. Phelps, "Anxiety and Decision-Making," *Biological Psychiatry*, 72, no. 2 (2012): 115.
2. Hartley and Phelps, "Anxiety and Decision-Making," 115.
3. Ibid. (citing Daniel Ellsberg, "Risk, Ambiguity, and the Savage Axiums," *Qualitative J. of Economics*, 75 (1961): 643–69).
4. Ibid.
5. Kieren Jamieson and Paul Hyland, "Good Intuition or Fear and Uncertainty: The Effects of Bias on Information Systems Selection Decisions," *Informing Science*, vol. 9 (2006): 54.
6. Haochen Sun, "Fair Use as a Collective User Right," *North Carolina Law Review* (2011): 137.
7. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
8. Sun, "Fair Use," 137.
9. 17 U.S.C. § 107 (2012).
10. Kyle K. Courtney, *Fair Use is a Right, Haters to the Left: A Primer for Libraries and Other Cultural Institutions*, abstract available at SSRN, https://ssrn.com/abstract=3152153.

11. 17 U.S. § 108(f)(4) (2012).
12. Ibid.
13. 815 F.3d 1145, 1151 (9th Cir. 2016).
14. Ibid., 1152.
15. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 n.3 (11th Cir. 2001).
16. 471 U.S. 539, 561 (1985).
17. 510 U.S. at 590.
18. 537 U.S. 186, 219-20 (2003).
19. Lydia Pallas Loren, "Fair Use: An Affirmative Defense?," *Washington Law Review*, no. 90 (2015): 712.
20. Ned Snow, "Proving Fair Use: Burden of Proof as Burden of Speech," *Cardozo Law Review*, no. 31 (2010): 1822.
21. Sun, "Fair Use," 201.
22. Kyle Courtney, "Copyright First Responders, Fair Use Training Session," University of Illinois Library, April 25–26, 2017.
23. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).
24. Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).
25. Ibid., 229; Authors Guild, Inc. v. HathiTrust, 97.
26. Michelle M. Wu, "Piece-by-Piece Review of Digitize-and-Lend Projects Through the Lens of Copyright and Fair Use," *Legal Reference Services Quarterly*, 36:2 (2017): 67, doi: 10.1080/0270319X.2017.1359059.
27. Wu, "Piece-by-Piece Review."
28. The lawsuit was first filed in April of 2008. Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190, 1201 (N.D. Georgia 2012).
29. Cambridge Univ. Press, 1219.
30. Ibid., 1364.
31. Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014).
32. Cambridge Univ. Press v. Becker, 2016 U.S. Dist. LEXIS 118793, at *294 (N.D. Georgia March 31, 2016).
33. Cambridge Univ. Press v. Albert, 906 F.3d 1290, 1299 (11th Cir. 2018).
34. Ibid., 1300.
35. 107 U.S.C. § 504(c)(2) (2012).
36. 107 U.S.C. § 504(b) (2012).
37. Kenneth D. Crews, *Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions* (Chicago: ALA Editions, 2012): 106.
38. Ex Parte Young, 209 U.S. 123 (1908).
39. TC Reiner v. Thomas Canale, No. 16-11728, 2018 WL 1324739 (E.D. Mich. Mar. 15, 2018).
40. Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994).

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