

Testimony of Professor Peter Jaszi
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My name is Peter Jaszi. For the last 25 years, I have taught copyright at the Washington College of Law of American University, here in the District of Columbia. In recent years, I also have represented the Digital Future Coalition on various copyright policy issues.* Today, however, I am testifying in my personal capacity about the critical importance of the “fair use” doctrine in American copyright law.

Summary

In the two centuries following the enactment of the first Copyright Act in 1790, the United States enjoyed an unequalled and unbroken record of progress that gave us, on the one hand, educational institutions and research facilities that are preeminent in the modern world, and on the other, entertainment and information industries that dominate the global marketplace. Schools, libraries and archives benefited from the operation of our copyright system, and the public reaped the reward; likewise, expanding American publishing, motion picture, music and software businesses generated not only wealth but also less tangible forms of public good. And this was as it should be. From its inception, the copyright system has operated both as a strong force for cultural development and as a powerful engine of economic growth.

* The DFC is a coalition of more than 30 trade associations, non-governmental organizations and learned societies representing a broad cross-section of the educational, high-tech, consumer and creative communities in the United States; it was organized during the run-up to the Digital Millennium Copyright Act of 1998, and has continued to be active on current copyright policy questions.

The success of traditional U.S. copyright law was not due only to the unprecedentedly high levels of protection it has afforded to works falling within its coverage. That success also stemmed from the fact that strong protection consistently has been balanced against use privileges operating in favor of teachers, students, consumers, creators and innovators who need access to copyrighted material in order to make – or prepare to make – their own contributions to cultural and economic progress. To put the point more simply, the various limitations and exceptions on rights that traditionally have been a part of the fabric of copyright are not results of legislative or judicial inattention; rather, these apparent “gaps” in protection actually are essential features of the overall design. As the Supreme Court observed more than a decade ago, in its Feist decision, the limiting doctrines of copyright law are not ““unforeseen byproduct[s] of a statutory scheme...;”” in fulfilling its constitutional objective, copyright “assures authors the right to their original expression but encourages others to build free upon” preexisting works. And, as the Court recently has reaffirmed in Eldred v. Ashcroft, these limiting doctrines are the mechanism by which copyright law recognizes and implements the values of free expression codified in the First Amendment.

Today, more than ever, fair use matters. In the courts, the doctrine is being creatively applied to guarantee fundamental fairness and balance. In other quarters, however, fair use is under threat. But the doctrine (like the vision of balanced copyright law that it represents) deserves to be defended and supported. Some of that support can come from the Congress of the United States, but much of it must derive from the various user communities that depend on the doctrine for the opportunity to make their cultural and economic contributions to our society.

Some issues of terminology

The term “fair use” can be used in two different ways – one loose and one more precise. Often, it is employed as a shorthand to reference all the vital limitations and exceptions on the rights of copyright owners that are built into our system and have done so much to help fulfill the Constitutional objective of intellectual property: promoting the “progress” in “Science and useful Arts.” Over the years, U.S. copyright law has built up a catalogue of limitations and exceptions to copyright protection, including:

- The “idea/expression” distinction, which assures (among other things) that copyright protection does not attach to the factual contents of protected works;
- The “first sale” principle, codified in 17 U.S.C. Sec. 109(a), which assures that (as a general matter) purchasers of information products from books to musical recordings can sell or lend their copies to others;
- A variety of specific exemptions for educational, charitable and other positive public uses; and, most importantly,
- The doctrine codified in Sec. 107 of the Copyright Act, which provides – in essence – that some other unauthorized uses of copyrighted works, not specifically covered by any of the other limitations just summarized, should be permitted rather than punished because their general cultural and economic benefits outweigh the costs they might impose on copyright owners.

“Fair Use” under Sec. 107

It is to this last doctrine to which the term “fair use” refers in its more precise sense, and it is to this doctrine and its importance that my remarks today will primarily be addressed. That is because fair use (in this sense) has a special place in the array of

limitations and exceptions to copyright. Of all the doctrines noted above, it has the greatest potential to grow and change with new technological, economic and cultural circumstances. Whereas many of the statutory exceptions to copyright are static, fair use under Sec. 107 is, by its very nature, adaptable and dynamic. For this reason, it operates as a kind of keystone in the edifice of our copyright system. It absorbs pressure from different sides (i.e., from copyright owners and copyright consumers), and in so doing it allows the structure to stand. Our fair use doctrine is unique – no other country has anything quite like it. Indeed, it functions as a kind of secret weapon in support of U.S. competitiveness in the international competitive marketplace. Fair use helps account for the innovative dynamism that has made our information industries the envy of the world.

This particular concept of fair use has been a central and unquestioned feature of U.S. copyright law since 1841, when Joseph Story announced the doctrine in the case of Folsom v. Marsh. It was refined the courts in the century and a quarter that followed, and codified in 1976, as part of the general revision of the Copyright Act.[†] That codification, however, had some unusual features. Rather than attempting to specify the contents of

[†] **§ 107. Limitations on exclusive rights: Fair use**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

the doctrine, or to shape and regulate its future growth, the Congress merely provided a non-exhaustive list of four factors that (along with other unremunerated considerations) should be taken into account when a federal court is called upon to determine whether a particular challenged use of copyrighted material should be considered fair. When Sec. 107 was amended in 1992, to clarify that fair use applies to both unpublished and published works, its provisions retained this remarkable open texture. Thus, the dynamism of the doctrine has been preserved in the course of its codification. Today, in weighing the balance at the heart of fair use analysis, courts return again and again to two key questions:

- Did the unlicensed use “transform” the material taken from the copyrighted work by using it for a different purpose than the original, or did it just repeat the work for the same intent and value as the original?
- Was the amount and nature of material taken appropriate in light of the nature of the copyrighted work and of the use?

Among other things, both questions address whether the use will cause excessive economic harm to the copyright owner.

In this connection, there also are some misconceptions about the reach of the fair use doctrine that should be noted and corrected:

- Fair use need not be exclusively high-minded or “educational” in nature.

Although nonprofit or academic uses often have good claims to be considered “fair,” they are not the only ones. A new work can be “commercial”—even highly commercial – in intent and effect and still invoke fair use for its use of preexisting material. Most of the cases in which courts have found unlicensed

uses of copyrighted works to be fair have involved projects designed to make money, including some that actually have.

- Fair use doesn't have to be boring. A use is no less likely to qualify as a fair one because the new work in connection with which it occurs is effective in attracting and holding an audience. If a use otherwise satisfies the criteria of the law, the fact that it is entertaining or emotionally engaging should be irrelevant to the analysis.
- A failed effort to clear rights doesn't inhibit a users' ability to claim fair use. Everyone likes to avoid conflict and reduce uncertainty. Often, there will be good reasons to seek permissions in situations where they may not literally be required. When a would-be user's good faith effort to do so fails, he or she loses nothing in terms of fair use rights.

It also is important to note that fair use is not, as sometimes has been suggested, a mere negative byproduct of the economics of rights clearance in the analog information marketplace, which can be expected to wither away with the transition to digital. Rather, it is a provision of copyright law that serves an affirmative cultural and economic mission. It is likely to be more important than ever in the new information era. Nor does it detract from the importance of fair use to assert, as its detractors sometimes do, that it is not a "right" but merely an "affirmative defense." This, I would suggest, is a legal quibble rather than a serious argument. The availability of an affirmative defense in a proceeding of certain factual circumstances is tantamount to a right to engage in the privileged conduct when those circumstances actually are present. In criminal law, "self defense" is classified as a defense for purposes of courtroom procedure. However, its

recognition also functions as an affirmative authorization for some kinds of self-protective conduct the real world. The same analysis applies to fair use in copyright.

Fair use today

Although fair use has been a prominent feature of U.S. copyright since the inception of the doctrine, it truly has come into its own in the last several decades. In this period that, copyright law has become dramatically more restrictive in other respects. The last twenty years have seen extensions of copyright term, an expansion in copyright scope, a dramatic development in secondary liability for copyright infringement, and dramatic increases in civil and criminal penalties. All these developments have contributed to the importance of maintaining a legal space in which socially and economically productive uses of protected material can occur without risk of liability. The courts have responded both by reaffirming the applicability of fair use in a number of traditional contexts (such as critical quotation and educational practice), and by adapting the flexible doctrine for a range of new purposes (including copying that promotes healthy market competition).

The benefits of a balance mediated by fair use

It may be useful to provide some general illustrations of how the balance that is assured in our copyright law by the operation of fair use has served the twin goals of cultural and economic progress. It is common to note the self-evident proposition that the non-profit educational and library sector depends on limiting doctrines for many essential functions. Although schools and libraries are among the largest purchasers of copyrighted materials in the United States, their most typical and beneficial activities --

from classroom teaching to scholarly research -- would not be possible without the built-in fairness safeguard that fair use provides.

It is less frequently noted that such major information industries as motion pictures and computer software came into being not despite the fact that filmmakers and programmers were free to copy important elements of their predecessors' work, but because of it. They have continued to prosper under these conditions; likewise, fair use also is critical to a wide range of practices within the book publishing and music industries. It would not be going too far to say that the creativity and innovation that copyright exists to promote are fueled as much by this strategic "gap" in the law as they are by its strong protections. Individual creative artists understand this point well from direct personal experience, even though large copyright-owning media companies sometimes lose sight of it. Although the entertainment industries are legitimately concerned about "piracy" of copyright works, it is important not to confuse the activities they rightly condemn with the ordinary, lawful exercise of the various use privileges, including fair use, that are conferred by the Copyright Act itself.

Equally important, fair use operates to the direct and immediate benefit of ultimate information consumers. It is because of fair use (and other limiting doctrines) that we all can make a broad range of personal uses of the content of information products we purchase, without fear of legal liability. Because of fair use, students can copy texts or images from published sources to enhance a term paper or homework assignment and music fans can combine selections from their personal record collections to make "mixes" for a family member's birthday or anniversary celebration, all without any concern that by doing so they will violate traditional copyright principles. Nor is this

all. Ultimately, it is the freedom to read, listen and view information products assured by fair use that enables many consumers of copyrighted content to become producers -- to move from absorbing and repeating the words, images and notes of others to making their own creative contributions to the general store of cultural resources.

Some examples: fair use in filmmaking and film teaching

For the last 18 months, my colleague Professor Pat Aufderheide (of the American University School of Communication) and I have been directing a project designed to investigate the ways in which documentary filmmakers interact with copyright law in the United States. Early on, we discovered how extensively and pervasively producer-directors in this increasingly popular medium must rely on the fair use doctrine if they are to fulfill their mission. Documentarians need fair use in order to quote limited amounts from copyrighted works (TV programs, literary texts, musical recordings, and other films). In turn, they need the right to quote to make critical comments about contemporary media, in order to illustrate the social and cultural phenomena they address in their films, to depict truthfully the often media-saturated environments in which their human subjects are found, and (sometimes) to illustrate important historical events through archival footage.[‡] When filmmakers' ability to employ fair use is frustrated (as is too often the case), their work suffers and their audiences are the ultimate losers.

Another example of the importance of fair use comes from the educational context – specifically, the domain of media education. In our time, teaching media literacy is more important than ever, and various kinds of film and television studies courses are increasingly popular in institutions of higher and even secondary education. Effective teaching in this field, however, involves the use of visual illustrations to

[‡] The “Untold Stories” project is described at www.centerforsocialmedia.org/rock/index.htm

demonstrate an instructor's points about the content and style of audiovisual works under consideration. The most effective teaching often occurs in the classroom where a lesson juxtaposes numerous short clips from various media sources for purposes of visual comparison and contrast. In short, one can no more teach media studies course effectively without media clips than a literature course without selections from literary texts. Effective media studies teachers take advantage of fair use in order to assemble "clip reels" of examples to accompany their lectures and classroom discussions. When they are unable to do so, their students pay a price in terms of forgone learning opportunities.

The internal critique of fair use

One potential threat to the survival of fair use as a useful tool for consumers and creators comes from an unexpected source – progressive commentators on copyright who argue that the doctrine simply does not go far enough, or fails to provide a level of clarity that would permit users to proceed with reasonable certainty. This argument overlooks, of course, the advantages (already noted) associated with a dynamic, flexible fair use doctrine. Unfortunately, however, this potentially self-fulfilling message has achieved considerable currency. Among the filmmakers with whom I have been working in recent months, for example, some individuals are reluctant to invoke fair use because either they themselves, or the "gatekeepers" (distributors, broadcasters, etc.) on whom they rely for access to audiences, cannot understand or will not place trust the doctrine. This is so, incidentally, despite the fact that in almost every court case where a documentary filmmaker has relied on fair use, the court has accepted this defense to a claim of infringement, thus shielding the defendant from liability.

Even though it sometimes may be overstated, this friendly critique of fair use has a real foundation. Because of its situational nature, the applications of fair use to particular sets of circumstances are sometimes difficult to predict. The solution to this dilemma lies not with the Congress or the courts, but with disciplinary communities (filmmakers, historians, musicians, teachers, etc.) who rely on fair use. Each such community has the opportunity to articulate their shared understanding of what constitutes a reasonable level of unlicensed quotation from copyrighted works in particular contexts. Were they to do so in a balanced manner, after a full process of consultation, their conclusions would have great persuasive force. In this connection, I am pleased to say that this coming Friday, November 18, a group of national organizations representing independent documentary filmmakers will announce a “Statement of Best Practices on Fair Use of Copyrighted Materials.”[§]

The external threat to fair use

In the last decade, one of copyright owners’ most significant responses to the uncertainty of the new communications environment has been to develop digital rights management (“DRM”) tools (sometimes referred to as “technological protection measures” or “TPMs”) to control access and use of texts, images and sounds in electronic formats, with the aim of preventing “piracy” and enabling new, and newly secure, forms of electronic information commerce on a “pay-per-use” model. Inevitably, however, the risk that such DRM’s may be hacked has loomed large in the concerns of copyright owners. From this concern has grown domestic

[§] The organizations are the Association of Independent Video and Filmmakers, Independent Feature Project, International Documentary Association, National Alliance for Media Arts and Culture, and Women in Film and Video (Washington, D.C., chapter). I will supply the Subcommittee with copies of the Statement upon its release.

and international political pressure for the creation of a new species of intellectual property protection: the so-called anti-circumvention provisions that are the centerpiece of the 1998 “Digital Millennium Copyright Act” (DMCA) in the United State, and of similar legislation elsewhere in the world. This new family of legal norms is not a development of copyright law, although it is superimposed on copyright; rather, it is a kind of “paracopyright” that provides for new rights, new remedies and – crucially – a new and exclusive set of exceptions. Thus, copyright’s traditional limiting doctrines, including fair use, do not apply as such in this new and evolving legal space.

The U.S. legislation makes relatively few concessions to the access interests of follow-on creators and innovators. This problem already is acute in fields (such as encryption research) where essential information is incorporated into copyright works that are made available only in digital formats. It will become increasingly significant in other fields (including scholarship, criticism and education) as literary texts and (especially) audiovisual works migrate to exclusive digital formats.^{**} Thus, for example, the ability of media teachers to assemble clip reels of short excerpts from commercially available copy-protected DVD’s – a clear instance of fair use under copyright law – is threatened by the paracopyright regime of 17 U.S.C. Sec. 1201. The narrow specific exceptions provided in the DMCA do not apply to this instance,^{††} nor is it clear that the special rulemaking procedure for devising a limited

^{**} The problem is exacerbated by the fact that, by design, anti-circumvention laws are insensitive to the distinction between the protected and unprotected elements of copyright works.

^{††} In particular, the “savings” language of Sec. 1201 (c), as it is generally interpreted, does not give a film teacher the authorization to engage in circumvention for purposes of fair use. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

range of additional exceptions, specified in Sec. 1201(a)(1), could be successfully invoked by media teachers.

Unlike the problem of uncertainty in fair use referred to in the preceding section of my testimony, the threat to fair use posed by anti-circumvention laws will require Congressional intervention if it is to be dispelled. H.R. 1201, the “Digital Media Consumers Rights Act of 2005,” as introduced by Representatives Boucher, Doolittle and Boucher last March, is an example of legislation that would be well calculated to fulfill that important goal.

Thank you for your attention to my views on this important doctrine, its place in U.S. copyright law, and the challenges that it currently faces.