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Reflections on Copyright Law and Scholarly Publishing over Fifty Years

As with much else that has affected our niche in the publishing world over the past half century, the story of copyright law's development and impact is a mixture of good news and bad news. Advancing technology has been a boon to all publishers in controlling costs and fostering innovation, but it has also opened new avenues for piracy and other mischief at the same time. Over these fifty years I have contributed eight articles and eleven book reviews to this journal. Since half of the articles and seven of the book reviews focused on copyright, I feel it to be most appropriate for me to look back on how copyright law and its changing interpretations have sometimes advanced our interests and sometimes impeded them.

Copyright entered a new age on January 1, 1978, when the Copyright Act of 1976 went into effect. My first article for this journal was 'A Publisher's Guide to the New U.S. Copyright Law' (July 1977), which was also distributed as a booklet by the Association of American University Presses to help presses understand how they needed to rewrite their contracts and establish new procedures and business practices made necessary or advisable beginning on that date.

But following just a year later was my article 'On Fair Use and Library Photocopying' (July 1978), which sought to assess the potential threat posed by the law's sanctioning of some types and degrees of photocopying. Never before had there been any judicial recognition of the legitimacy of making multiple copies by mechanical means.

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Despite its claim not to have changed the provision of fair use as theretofore developed by the courts (going back to the first judicial use of this idea in 1839), Congress in fact explicitly mentioned the making of 'multiple copies' in section 107, covering use in educational contexts generally, and went a step further, in response to intense lobbying by the library community, in devoting a separate section 108 to cover library photocopying.[1]

What Congress had wrought with the 1976 act was harshly criticized by some, including then director of Stanford University Press, Leon Seltzer, who rendered this devastating verdict: 'It has failed to articulate a coherent rationale for copyright, it has failed to define fair use, it has introduced confusions between fair use and exempted use, and it has in the end tossed the fair use question, now thoroughly enmeshed in contradictions, back to the courts.'[2]

Congress might have avoided creating this conceptual mess had it heeded the sage advice offered by the three of us who testified at a Senate hearing on July 31, 1973. We proposed that section 107 be amended to read, in part, as follows: 'In determining whether the use of a work in any particular case is a fair use, the principal factors to be considered shall be the market value of the use of the copyrighted work and the effect of the use on the potential market of the work. Factors in making this determination shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; and (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole.'[3] In other words, to give real structure to the list of four factors to consider when determining fair use, we wanted Congress to recognize (what became) the fourth factor as preeminent and the other factors as subordinate, thereby guiding courts to place primary interpretive emphasis on the market effects, current or potential, of copying

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a work. Alas, we failed in our mission, and publishers have been paying the price ever since, with courts deciding just which of the four factors should have the most weight.

Without better guidance from Congress for how to reach judgments about fair use, courts began to engage in what Georgia Harper later declared to be justification ex post facto, viz., judges making up their minds about what most benefits the public and then citing the four factors as so much window dressing to justify those decisions.[4] The rampant conceptual confusion that ensued perturbed some judges, and one of those was Pierre Leval, who was upset that two of his decisions as a district court judge in the Second Circuit had been overturned on appeal. He therefore set out in a valiant effort to restore clarity to the law by penning a now classic article for the *Harvard Law Review* in 1990 titled 'Toward a Fair Use Standard' in which he gave voice to a theory of what came to be called 'transformative use,' a theory adopted by the US Supreme Court in its landmark 1994 decision in *Campbell v. Acuff-Rose Music* finding the 2 Live Crew parody of the song 'Pretty Woman' to be fair use because the use was 'transformative' in using the original work to create a new one in a value-added way. There followed a series of court rulings, especially in the Ninth Circuit, where in such cases as *Kelly v. Arriba Soft* (2002) and *Perfect 10 v. Google* (2007) the court's majority, bowing to the social utility of the technology emerging from Silicon Valley, declared that the creation of an index of thumbnail images to facilitate search displayed a new purpose for reproducing copyrighted photos and was therefore fair. This series of cases then fed into two Second Circuit decisions in 2014 that pitted the Authors Guild first against HathiTrust and then against Google. These signalled the ultimate victory of Leval's concept as the new watchword for judicial interpretation of fair use, thus resulting in the first factor (the

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purpose and character of the use) displacing the primacy of the fourth factor (the market impact of the use) that had continued to play a prominent role in majority decisions in the cases of *Harper & Row v. The Nation* (1985) and *American Geophysical Union et al. v. Texaco* (1995).[5]

The great irony here is that Leval himself had been the district court judge in the Texaco case whose opinion finding for infringement on the grounds of market impact was upheld on appeal when Judge Jon Newman explicitly rejected the social utility of photocopying as sufficient for justifying the copying done. Fair use as traditionally understood, he argued, required that the act of copying itself involve some measure of creativity and not amount to a form of mechanical reproduction. That very idea, it seemed, is what Leval imported into his idea of transformative use, and it was certainly used with that meaning by the Supreme Court in the parody case. Yet, when the Ninth Circuit called the use of an algorithm to produce an index of images transformative, it did so on the grounds of social utility, not on any act of new creation involved; in my view, the use of an algorithm was no more 'creative' in the traditional sense of fair use than the mechanical copying at issue in Texaco.

While a dissenting judge in the Ninth Circuit pointed this out, one might have expected Judge Leval to follow suit, but he did not. What happened is that Judge Denny Chin, as district court judge in the Google case in the Second Circuit, used a sleight-of-hand manoeuvre in saying that the copying done via algorithm 'allowed for' later uses genuinely creative. He thus, as I see it but Judge Leval does not, in effect abandoned what seemed to be the core meaning of transformative use. And we know that Leval has come

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to think this way himself because he wrote the appeals court decision that upheld Judge Chin's interpretation!

In my view, and the view of many in the publishing community, this re-construal of 'transformative use' has opened a Pandora's box of misuses of that concept to justify a great deal of copying that would never have been permitted under section 107 with the fourth factor as the primary one. Thus, for example, the Association of Research Libraries in its *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012) argues that since the primary market for scholarly journal articles and monographs is not undergraduate students but rather fellow scholars, it is therefore legitimate to reproduce them for classroom use without permission or payment. The same is true for novels, which are written for the general public and not for students in the classroom. The repurposing of use is alleged to be transformative in this way and hence legally fair use.[6]

Judge Leval himself, in private correspondence with me, has claimed that the fourth factor still has a role to play and that he himself would not go this far in using his concept to justify undermining secondary markets in such a massive and damaging way. Yet that is small comfort to those of us who see how, as Georgia Harper showed, different judges will reach their own conclusions on independent grounds and then just work backwards to deploy the language of section 107 to make their decisions seem like logical readings of the four factors.

Alas, Judge Leval appears to have forgotten how Judge Newman disallowed social utility to override harm to the market; it is difficult to believe that Newman would have given social utility such a commanding role to play as did the Ninth Circuit, whose rhetoric evidently carried Judge Leval down a path that it seems he otherwise may never

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have been tempted to pursue on his own, given the powerful appeal of the idea of transformative use as he originally conceived it in his 1990 article. So, rather than the conceptual clarity Leval had hoped to bring to copyright law, we now remain mired in even more confusion. If only Congress had listened to the Association of American University Presses in 1973, we might not be in the mess we are still in today!

Sanford G. Thatcher

Notes

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[1] Whether section 107 (fair use factors) can be cited to extend the justification for copying by libraries beyond what section 108 specifically allows has been a subject of controversy ever since.

[2] Leon E. Seltzer, *Exemptions and Fair Use in Copyright: The Exclusive Rights Tensions in the 1976 Copyright Act* (Cambridge, MA: Harvard University Press, 1978), 16–17.

[3] Testimony of the Association of American University Presses, Copyright Law Revision, Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 93rd Congress, 1st Session, Pursuant to S. Res. 56 on S. 1361, July 31, 1973: 142. My colleagues in giving testimony were AAUP Executive Director John B. Putnam and AAUP President Arthur J. Rosenthal, then director of Harvard University Press. I was social science editor at Princeton University Press at the time and a member of the AAUP Copyright Committee, which I had joined in 1972 (and remained on until 2015).

[4] Georgia Harper, 'Google This!,' 2006. This electronic source is no longer available online.

[5] I had a front-row seat for the *Harper & Row v. The Nation* battle as a member of both the Freedom to Read Committee (which, ironically, was meeting in the offices of Harper & Row at the time) and the Copyright Committee of the Association of American Publishers. These committees had conflicting interests in backing the First Amendment arguments of *The Nation* and the copyright arguments of Harper & Row. During the unfolding of the Texaco case I served on the board of directors of the Association for Copyright Enforcement (1988–1994), which was set up to manage the case on behalf of the publishing industry. The fourth factor did play the major role, however, in *Cambridge University Press et al. v. Georgia State University*, which is still on appeal.

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6 As a result of what the library community considers to have been decisions favouring its interests in cases where transformative use has played the principal role, its associations have ceased to be cooperative in trying to amend the law—for instance, by abandoning efforts to rewrite section 108, since these associations feel that they can get all they need from reliance on fair use in section 107 as it has been interpreted by circuit courts. The process of further revising copyright law is another victim of this re-construal of transformative use, which once looked so promising to publishers but now seems to have morphed into public enemy number one. As I said at the outset, the past fifty years of copyright law has been a good news / bad news story.

Stephen Broomer
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