

Educational Fair Use Project “Freedom to Teach”

The Berkman Center at Harvard University is considering a project that we hope will culminate in the widespread circulation of a Statement of Best Practices regarding fair use for teachers and scholars in higher education. This posting outlines our current thinking on the project. We post it here for discussion and feedback.

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Proposal Regarding Educational Fair Use

The development of a Statement of Best Practices will help draw to the surface and articulate a consensus in the academic community about the scope and limitations of user rights in a contemporary culture that is, on the one hand, increasingly participatory and technologically innovative and, on the other hand, increasingly marked by the expansion and tightening of traditional copyright.

It is our hope that, in the long run, a well-formulated Statement will:

- encourage educators to rely on fair use where appropriate;
- persuade gatekeepers to accept well-founded assertions of fair use in place of affirmative rights clearance or overly restrictive guidelines;
- discourage copyright owners from threatening legal action;
- in the event of lawsuits, provide defendants with a basis on which to show that their uses were both objectively reasonable and undertaken in good faith;
- and provide guidance about customary use to judges who must rule on fair use cases.

Background: the History of Fair Use

The U.S. Constitution contains two potentially conflicting provisions in regard to the circulation of knowledge. The First Amendment guarantees that “Congress shall make no law...abridging the freedom of speech, or of the press...,” while at the same time one clause in Article I allows that same Congress to give authors monopoly control of their own expression: “The Congress shall have power...to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries....” As Justice Stephen Breyer has recently written, “[w]hen working in tandem, these provisions mutually reinforce each other,” the Copyright Clause “serving as an ‘engine of free expression,’” and the Amendment “assuring that government throws up no obstacle to its dissemination.” This useful complementarity will suffer, however, whenever the “Copyright Clause bounds” expand in such a way as to “set Clause and Amendment at cross-purposes, thereby depriving the public of the speech-related benefits that the Founders...have promised.”

Simply put, the history of copyright in the United States has been the constant expansion, in both scope and duration, of the bounds of the Copyright Clause. The original American term of copyright was 14 years, once renewable; the grant applied only to “copies of maps, charts, and books,” and “the authors and proprietors of such copies” were required to apply for the privilege. Furthermore, “copies” essentially meant literal, verbatim reproductions; no one needed permission to make what are now called derivative works--translations, sequels, abridgments, and so forth.

At present copyright subsists in any work “fixed in any tangible medium of expression, now known or later developed...,” and these works include not only the obvious--novels, songs, motion pictures--but any “fixed” thing, whether formally registered with the Copyright Office or not, be it a grocery list or a child’s drawing of the sun. The term is now 75 years at a minimum, and can easily run upward of 125 years. The poems of Emily Dickinson are owned by Harvard University Press and will be until 2050, well over 175 years after they were written.

One consequence of the increasing reach of copyright has been the shrinking of that great reservoir of free expression, the public domain. In 1790, when the first copyright act was adopted, most works became public goods as soon as they appeared because few were registered with the copyright office and those that were registered entered the public domain within a few decades. Today, almost no newly created work enters the public domain; in fact, the law has made it almost impossible to create a work and not have it owned in near perpetuity.

Fair use is one of the few legal doctrines to have arisen to try to preserve the balance of free expression in the face of the great expansion of copyright's monopoly privileges. The doctrine found its first legal formulation in *Folsom v. March* (1841), a case that pitted the publisher of an eleven-volume *Writings of George Washington* against the publisher of a later two-volume *Life of Washington*. The editor of the shorter work had taken more than a third of his content from the longer one, whose publisher sued for infringement and won. Massachusetts Judge Joseph Story wrote the opinion in the case; in it he muses at length on "what may be called the metaphysics of the law," admitting what was in fact true at the time, that "a fair...abridgment of an original work is not a piracy," but then posing the otherwise-begged question: "What constitutes a fair...abridgment"? Story's response gave birth to the language of fair use:

...[W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

Story's list of factors that the law might "look to"--the nature of the selection, the value of the materials, etc.--became the point of reference by which questions of fair use were settled until 1976, whereupon one of our periodic revisions of the Copyright Act entered a formal list of fair use factors into law. Section 107 of the Act now declares that, notwithstanding the various rights granted to copyright owners,

...the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords..., 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.

Thus spelled out, the fair use doctrine creates what has been called a “situational public domain,” exempting a range of expressive uses from the monopoly powers elsewhere granted to rights holders. In doing so the doctrine would seem, moreover, to privilege teaching and scholarship, these being mentioned several times in the statute.

Problems with Fair Use

The fair use statute’s implied promise of a wider range of free expression, especially for educators, has turned out to be difficult to realize in actual practice. For one thing, the language of the four factors is deliberately vague. Several concerns lie behind this lack of clarity. One is the fear that if the factors were stated more concretely they would likely block uses we might later realize ought to be considered fair. In addition, we live in an age of rapid technological change and it makes sense to leave the rules loose enough to be adapted to emerging situations.

All this said, the vagueness of the factors has produced confusion for users hoping to exercise the rights that the statute is meant to ensure. Take Factor 3, “the amount and substantiality of the portion used....” The impression might arise that the wording here means that it is illegal to copy an entire work, that one may take only a portion of the whole (10 percent, say, or 500 words of a novel, or 6 seconds of a film). Such is not the case; copying an entire work is sometimes fair. In 1984 the Supreme Court ruled that copying a complete TV show for later home viewing is fair use. Publishers themselves have agreed that an entire article or speech may often be used in a classroom setting. The statute, in fact, contains no rule as to the ‘fair’ amount. It is silent, for example, as to how many words may be taken from a book. In 1985 the Supreme Court found that reproducing 7,000 words from an out-of-print book for purposes of commentary was fair use.

Or take Factor 1 and the question of “whether [the] use is of a commercial nature”: the impression might here arise that fair use does not apply to commercial work, but that also is not the case. Often at issue in regard to the question of purpose is a distinction between “transformative” and “derivative” uses. Nowadays, most derivative uses (translations, for

example) are not considered fair--the user must seek permission--but transformative uses are. Transformative use builds on the original to forge something new, or serves some purpose other than that of the original as, for example, to enable educational or political discourse. Thus the documentary filmmaker or the parodist who uses copyrighted material for cultural critique can usually claim fair use, any commercial success of the new work notwithstanding.

Finally, take the way that the word “purpose” in Factor 1 seems to refer back to the first paragraph of the statute (the preamble), which contains a list of seemingly exempt purposes: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” Sadly, each of these is only potentially non-infringing; any particular use needs to be scrutinized in light of the four factors for they--not the preamble--are the meat of the law.

The need for such scrutiny introduces the flip side of the statute’s vagueness: to know for sure about any specific use, one needs to have a case that went to law, ideally one that went to the Supreme Court. In regard to pure educational uses, there are no such cases. Take the preamble’s mention of “multiple copies for classroom use,” for example. There have been two instances of litigation around student coursepacks; in each, the creators of the coursepacks were found to be infringing.¹ These judgments have been taken to prove that coursepacks cannot be exempt under the fair use doctrine, but that is not the case. In the cases that went to trial, the creators of the coursepack were for-profit copy shops, and the fact of their commercial purposes weighed heavily in the decision. What does this mean for “nonprofit educational purposes”? We don’t know. Suppose that a media studies professor made a coursepack of contemporary advertisements, each one annotated as to its strategies and followed by study questions; and suppose that this coursepack was produced by the college copy shop and sold to students at cost. Would this be an educational fair use? The statute seems to imply that it would, but in fact we can’t be sure; there is no applicable case law.

In sum, the first problem faced by a teacher or scholar hoping to benefit from the fair use doctrine is that the available information is at once too general and too specific. On the one hand, the enumerated factors are so vague as to offer a conscientious educator little guidance and, on the other, where clarity has arisen it has come from court cases so particular as to be of little use in making general judgments.

¹ *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 and *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381.

The Trouble with Guidelines

Over the years, users and owners have tried to add clarity to fair use by developing guidelines, rules of thumb by which both sides of potential litigation might know beforehand what is allowed and what is not. These too, however, have proven to be at least as problematic as they are helpful.

Perhaps the best known attempt in this line appears as the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions” in the historical “Notes” that accompany the fair use statute. As the 1976 revision of the copyright law was being developed, Congress asked content owners and users to meet and negotiate these guidelines. The owners were represented in part by the Association of American Publishers; the users by the American Association of University Professors. The results of their meetings are now preserved in the legislative history and it is there that we find language such as this:

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below; and,
- B. Meets the cumulative effect test as defined below; and
- C. Each copy includes a notice of copyright.

The definitions of such terms as “brevity” and “spontaneity” follow. Brevity for prose works means, among other things, “(a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.” Spontaneity means that “the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission,” etc.

All this seems quite clear, but the very clarity obscures three serious flaws.

First of all, the Notes call the guidelines an “agreement,” but they were not that at all. They were produced by the content owners over the objections of the users. The Notes themselves say as much:

Representatives of the American Association of University Professors and of the Association of American Law Schools have written to the Committee strongly criticizing the guidelines, particularly with respect to multiple copying, as being too restrictive with respect to classroom situations at the university and graduate level.

The Notes fail to reproduce these dissenting letters.²

Second, the guidelines have no standing as law. Simply put, the legislative history of a law is not the law. Neither side in a court case may base a claim on it. In fact, in one of the coursepack cases, when content owners appealed to a prohibition on anthologies that appears in the guidelines, the court refused to allow the claim, saying simply that any anthology would have to be judged by the four factors found in the law, not by any guideline found in the Notes. (It should be added, then, that the guidelines’ definitions have no clear standing in law either; the statute never mentions “brevity” or “spontaneity,” and it is fully conceivable that an educational use may be fair even though it is neither brief nor spontaneous.)

Finally, it is not entirely clear whether the guidelines indicate minimums or maximums. This should not be the case--the Notes say directly that they “state the minimum and not the maximum standards of educational fair use”--but confusion has arisen nonetheless, primarily from an agreement on guidelines that was reached in the 1980s between New York University

² There has never been a successful negotiation between users and owners with regard to fair use. The other serious attempt at such was the Commission On Fair Use (CONFU), which met during the mid-1990’s but failed to reach an accord.

and the publishing industry. At the time the publishers had brought suit against two for-profit copy shops making coursepacks. Both settled without trial, whereupon the publishers filed suit against NYU and several of its faculty.

As did the copy shops, NYU chose to settle rather than go to court, and the settlement that they agreed upon incorporated the “Classroom Guidelines” from the legislative history. That is to say, when threatened with litigation, a major research university adopted fair use guidelines that have no basis in the law, and that were formulated by content owners over the express objections of professional organizations in higher education. Even worse, NYU agreed to drop the proviso in the Notes that called the guidelines “the minimum and not the maximum.” Faculty at NYU are now asked to follow the guidelines strictly, not as a minimal safe harbor but as a ceiling on fair use. Any uses beyond the stated limits require advance approval of the University counsel.

Similar protocols are now common nationwide. After reaching the agreement with NYU, the publishing industry sent out hundreds of letters to colleges and universities suggesting that they too adopt the guidelines or risk facing litigation. By one estimate, four out of five universities have adopted policies similar to those found at NYU.

In short, it has been the strategy of the content owners not to negotiate guidelines but to develop them on their own; to litigate and win clearly commercial cases that are close to but not the same as “nonprofit educational” fair use; and to then threaten educators with similar action in a manner such that the educators sign on to a shrunken version of fair use, one that the very same educators refused to endorse when the law was being written. In the academy at present, fair use has therefore become a little-used set of rights, weakened by confusion and fear, and this despite the statute’s clear privileging of teaching, research, and scholarship.

The Need

As this brief survey should indicate, it is rare to find practitioners in any expressive field taking full advantage of the rights laid out in the fair use doctrine. A number of recent studies have underlined that point in regard to education.

In August 2006 the Berkman Center for Internet & Society at Harvard Law School published “The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted

Material in the Digital Age." Funded by the Andrew W. Mellon Foundation and written by William W. Fisher and William McGeeveran, this "foundational white paper" begins by noting that rich sources of digital information promise to enhance the circulation of knowledge, making it easier to find, manipulate, and disseminate. The report then outlines a series of obstacles that currently stand in the way of realizing this potential; these include the law's lack of clarity, especially in regard to educational fair use, and the "undue caution" exhibited by gatekeepers "such as publishers or educational administrators." The report spells out the nature of these problems in detail, noting especially the difficulties teachers have in sharing their educational resources, the burdens imposed on the educational distribution of music, and the outdated assumptions that govern educational broadcasting. The report concludes by suggesting a number of "paths toward reform," one of which is to develop "educator-defined best practices."³

A second research inquiry into educational fair use resulted in the September 2007 publication by the Media Education Lab at Temple University and its collaborators of "The Cost of Copyright Confusion for Media Literacy." Based on in-depth interviews with 63 practitioners, this study found that media literacy educators regularly meet both with conflicting information about their rights and with institutional policies that are needlessly complex and restrictive. They cope with the consequent confusion and frustration through a combination of studied ignorance, clandestine transgression, and hyper-compliance. The pedagogical cost of these strategies are many: the quality of the curriculum materials is impaired; the work that is created, either by students or teachers, has limited circulation; teachers fail to take advantage of new digital platforms; and students learn copyright misconceptions. The authors of this study recommend that the media education community not only educate itself about the clear rights that copyright law grants them but, as in the Berkman study, that they develop their own code of best practices.

The Best Practices Model

Given that the law is vague, the owners litigious, and current guidelines extralegal and restrictive, what is to be done? How can fair use be reclaimed as an effective part of the social bargain that copyright law is meant to embody?

³ Fisher & McGeeveran also suggest that the best practices model might well be applied to the issues of licensing negotiations and the deployment of DRM systems. It might be useful, too, in dealing with the complexities of the DMCA. These worthy projects lie beyond the scope of this proposal.

The studies just cited point to one answer: a movement has arisen to reclaim the fullness of the doctrine by developing statements of best practices expressive of the norms of particular communities. In this approach, users look not so much to the statute and the case law as to what their own disciplines can articulate as normative.

The first and most successful example of this model is the “Documentary Filmmakers’ Statement of Best Practices in Fair Use.” Published in 2005, the statement was authored by five professional filmmakers’ associations and based on research conducted by the Center for Social Media and the Program on Intellectual Property and the Public Interest, both at American University in Washington, D. C. The statement outlines a short list of typical situations faced by documentarians (as when, for example, in the process of filming something else, the filmmaker captures copyrighted media content--a poster on a wall, incidental music playing on a radio, etc.); the statement then articulates principles by which a filmmaker might reasonably decide whether the use is fair or not.

The documentarians’ statement produced immediate and remarkable results as soon as it was published. Documentarians have seen:

- * the saving of millions of dollars in unnecessary licensing costs (\$400,000 in one film alone, “Wanderlust”);
- * the release of films that could never have been seen publicly, or possibly even finished (“Hip Hop: Beyond Beats and Rhymes,” “This Film Is Not Yet Rated,” “The Trials of Darryl Hunt”);
- * the adoption of the Statement into the business practice of many public television stations and cable companies;
- * and the acceptance of the Statement by all four of U.S. insurance companies for errors-and-omissions insurance of fair use claims.

There has also been one significant follow-on project. As noted above, the Media Education Lab at Temple University, joined by the Center for Social Media and others, is developing a best practices statement for teachers of media literacy. Funded by the MacArthur Foundation, this project finished its first phase last September. It is worth noting, also, that the College Art Association is in the process of generating a fair use statement based on the focus group research that led to the 2005 publication of *Will Fair Use Survive?* by the Brennan Center

for Justice at NYU, and that the Society for Cinema and Media Studies has recently drafted a statement of fair use and best practices for film and media scholars.

Specifics of the Proposal

Following the model developed at Washington University we propose a focused project to develop a statement of best practices in fair use for teachers and scholars in higher education.⁴

We feel that the initial project would do well not to try to cover all academic disciplines; to produce a well-founded statement specific to one portion of the academy will give the project greater feasibility and will pave the way for others to follow.

We propose, then, to focus on modern languages with an emphasis on departments of English. The key professional organization representing this cohort is the Modern Language Association, and we hope to collaborate closely with the MLA from the beginning of the project such that it may, at the end, sign on as author or endorser of the statement. In addition, we intend to keep three other professional organizations informed about the project in hopes that they, too, will be signatories to the final document. These are the National Council of Teachers of English, the Conference on College Composition and Communication, and the Association for Literary Scholars and Critics.

Given this focus, the process of developing a statement of best practices can be broken down into the following steps.

Phase I: Research into current practice

The first step in the process is to conduct research identifying the most significant problems in the field related to issues of copyright, as defined by practitioners. What do teachers and scholars know about copyright and fair use? Where did they learn what they know? Where do they feel blocked or frustrated by the copyright clearance process? What uses are they not

⁴ "Fair use" in this proposal stands for both "fair use" and "educational use." Section 107 of the Copyright Act outlines fair use exemptions; subsequent sections augment those for educators: in Sections 110 through 118 are found the classroom use exception; the Technology, Education and Copyright Harmonization (TEACH) Act; the libraries and archives exceptions; and exceptions for the benefit of public broadcasting.

enjoying that the law would in fact allow? What are the costs, to pedagogy and to scholarship, of fear, misunderstanding, and confusion?

Phase I seeks to answer questions such as these. We will use a qualitative method, based on 50 to 75 long-form interviews designed to elicit both practices and attitudes. Understanding the community's preexisting perceptions of copyright and how these perceptions have influenced the development of curricula and scholarship is the essential platform for later work.

Phase I will conclude with a publication that will describe current problems that educators face and abstract from these a short list of typical situations in which greater clarity concerning fair use will best enable teaching and scholarship. The completed report will be reproduced and released with a press packet, housed on the ----- website, and circulated back to the field at conferences and other appropriate meetings. This work will help us expand visibility for the project at a national level and help inform work in Phase II.

Phase II: Development and approval of a statement of best practices

Once we have a clear sense of where confusions about fair use lie we will work with the collaborating professional organizations to create a Statement of Best Practices in Fair Use. We will begin by holding small-group meetings with teachers and scholars through their organizations. We expect to hold perhaps 8 such meetings, in different locations appropriate to the organizations and their meetings. These meetings will be held with the organizations' rank and file, but selected for experience in the field. We will use scenarios drawn from the research to trigger conversations in which the participants can propose to each other appropriate standards, try them out, and discuss them. The goal is to host conversations among people who can represent the middle ground of teachers and scholars, those who have enough experience to know what the issues are, enough investment in the practice to care about the circulation of knowledge, and enough at stake to want to find solutions within today's law rather than putting themselves or others at risk. It is these people's judgments that will properly inform a document designed for the broader academic community.

Once our meetings have been completed, we will create a draft consensus document. An advisory team of legal scholars and practicing lawyers who are familiar with fair use will provide

expert advice to ensure that the evolving document provides not only best practices as educators understand them but ones that lawyers can support. Once vetted, the document will be presented to the organizations for their boards' approval.

In this context it is worth pausing to note that documentary filmmakers made an ideal initial community for a discussion of fair use because most practitioners are both owners and users. Filmmakers need to be rewarded for the work they have made, and thus have a stake in copyright; at the same time they do not want to see permission costs unnecessarily escalate when fair use can be legitimately claimed. The majority of academics may not be as well positioned to occupy both sides when it comes to the contending claims of users and owners, but some are (especially those who have written textbooks), and in either case the process in this phase of the project will include asking participants to consider both sides of any use issue. The emphasis on a balanced view internal to the academic community does not mean, however, that the process of developing best practices is a negotiation between adversaries whose interests diverge. An academic Statement of Best Practices should represent the consensus among teachers and scholars of what is fair and reasonable based on their own values in regard to the progress of knowledge.

Phase Three: Outreach, publication and education

The outreach portion of this project should be at least as full as the research and development portions. A Statement is of no use unless practitioners know about it, own it, trust it, and use it. The practitioners in this case are not only teachers and scholars but, in addition, the gatekeepers with whom they work. The people who run copy shops, librarians, university counsels, permission departments at publishing houses, editors of academic journals, internet service providers, and more--all of these must be made aware of the Statement and, where appropriate, urged to publicly assent to the norms it expresses.

Thus, once the authoring organizations have approved the Statement, we will organize a series of events--press conferences, receptions, panels at professional conferences, and other showcase gatherings to launch the Statement. We will publish the Statement as a pamphlet and post it as well on our website as part of a media-rich set of resources for educators.

We will also create and publish at least one scholarly article, targeted to a journal such as the *PMLA* and two to three shorter pieces aimed at professional audiences through such publications as *Education Week* and the *Chronicle of Higher Education*.

In this process, we will develop relationships with key gatekeepers. While the Statement of Best Practices will represent a consensus document among educators, we will benefit from learning about the gatekeepers' perceptions and gaining support from sympathetic voices in educational publishing and distribution. To that end, we will also hold a round of quiet meetings with gatekeepers to discuss their perceptions of the Statement.

Finally, we expect to develop a strong relationship with at least one of the authoring organizations in order to invest them with the task of continuing to educate educators and their gatekeepers about the Statement's philosophy and utility.

Follow-on Tasks

It is our hope that at least two more steps will be taken once this project is completed. First, although our plan begins with modern languages, it shouldn't stop there. If we do our work well it should be relatively easy to build out from it into the other academic disciplines at low marginal cost. A likely method would be to interview a much smaller cohort of practitioners in the other disciplines with an eye toward finding where their fair use problems are either congruent or incongruent with those in modern languages. Where the concerns overlap we could then assume a replication of practice; where new concerns emerge, we could again convene discipline-specific practitioners to develop normative statements.

Second, a defense fund needs to be established to support potential defendants who have adhered to the Statement but nonetheless face litigation. The Copyright Act's provision on damages in Section 504 states that a court may not award statutory damages "in any case where an infringer believed and had reasonable grounds for believing" that the use was fair use under Section 107. A clear community-based statement of best practices promises to provide such "reasonable grounds," and thus reduce the threat of litigation. That said, we believe that as this movement builds, a court challenge is inevitable.

One of the successes of the Documentary Filmmakers' Statement project has been the awakening of interest in defending fair use. The ACLU has been exploring the possibility of

taking on a fair use case, and Stanford University's Fair Use Project has already done just that, winning a settlement with the estate of James Joyce on behalf of scholar Carol Loeb Shloss. These are encouraging signs, but they still fall short of what is needed, a well-endowed defense fund for educational fair use.

Conclusion

Fair use is a key part of the social bargain at the heart of copyright law. The rights that this doctrine gives to the scholars, teachers, and creative artists in higher education only come to life, however, when they are understood, claimed, and used. Fair use has too long suffered from both the ambiguities of its expression and the threats of rights holders. The development of a well-grounded Statements of Best Practice promises to bring clarity and agency to an area where confusion and caution are now the rule. The very process of developing and disseminating such a statement promises to educate not just the users but owners and gatekeepers as well. The Supreme Court having acknowledged a link between custom and fair use, it also promises, in the event of litigation, to enhance the standing of the legal claims that users make.

At the time the Constitution was framed, the term “science” meant “knowledge” generally, from the simplest to the highest forms of learning.

*As alphabets in ivory employ,
Hour after hour, the yet unletter'd boy,
Sorting and puzzling with a deal of glee
Those seeds of science call'd his A B C.*

-- William Cowper (1781)

The Constitution grants Congress the power to give authors ownership of their works; it does this not merely to create intellectual property, but more broadly “to promote the progress of science and useful arts.” In 1790, when the Congress first acted upon this granted power, the law they wrote was called not merely a “copyright Act” but more broadly “an Act for the encouragement of learning.” A successful effort to reclaim fair use rights in higher education will help us return to these foundational principals. It promises as well to restore the balance without which

copyright ceases to be a useful tool in the mission of all institutions of higher learning--the creation, dissemination, and preservation of knowledge.

Selected Sources

Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522

Breyer, Stephen. *Eldred v. Ashcroft*, 537 U.S. 186 (2003), Breyer, J., dissenting

Copyright Act of 1790. 1 Statutes At Large, 124.

“The Cost of Copyright Confusion for Media Literacy.” centerforsocialmedia.org/medialiteracy

Crews, Kenneth D. "The Law of Fair Use and the Illusion of Fair-Use Guidelines." *Ohio State Law Journal* 62 (2001): 599-702.

“Documentary Filmmakers’ Statement of Best Practices in Fair Use.” centerforsocialmedia.org/fairuse

McGeeveran, William and Fisher, William W., "The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age" (August 2006). Berkman Center Research Publication No. 2006-09 Available at SSRN: <http://ssrn.com/abstract=923465>

Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381.

“Will Fair Use Survive?” (New York: Brennan Center for Justice, 2005).
www.fepproject.org/policyreports/fairuseflyer.html

William W. Fisher, III, “The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States.” <http://cyber.law.harvard.edu/property99/history.html>