Copyright and Fair Use in the New Digital Age

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Copyright and Fair Use in the New Digital Age:

Searching For Consistent Standards for Transformative Use in Online Media

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Introduction

Copyright law traditionally gives owners five exclusive rights areas including the ability to copy, adapt, distribute, publicly perform, or display an original work.\textsuperscript{1} However, copyright law has undergone its own transformation, starting in 1976 with the Copyright Act\textsuperscript{2}, to the addition of the defense of Fair Use in Section 107\textsuperscript{3}, to the Digital Millennium Copyright Act in 1998\textsuperscript{4}. Copyright owners and subsequent derivative or transformative users have undergone constant litigation in the new computer and digital age in order to determine the limits of fair use.\textsuperscript{5} Adding to the controversy is the widespread use of the Internet post-1990 and the ever-expanding technologies available thereon.\textsuperscript{6} Copyright users face more challenges despite widespread ignorance of copyright law.\textsuperscript{7} Including beliefs that copyright law wielded by the RIAA or MPAA is not subject to jury trial but is instead some modern form of “digital inquisition”\textsuperscript{8}, lawful users may be scared off from legitimate fair uses of works under copyright law because of their own ignorance of their rights and widespread misunderstandings\textsuperscript{9}. Also, arguably aggressive tactics in use by copyright holders prevent the narrowing of owners’ rights and perhaps exploit ignorance of the law by users. It is especially critical now to determine speech rights as new online speech habits are being established.\textsuperscript{10}

Copyright law faces new challenges from the growing availability of Internet applications, along with other digital technology and media, to the public at large.\textsuperscript{11} Copyright law must decide on boundaries between infringing and non-infringing uses\textsuperscript{12} when the public now has such easy access to a vast amount of media\textsuperscript{13}. This vast online media library is able to easily be recalled by users with Internet search engines to specifically and reliably search for video, images, photos, web logs (or blogs), scholarly
journals, and book text while being able to block out other search queries.\textsuperscript{14} The convenience afforded by these new technologies cannot be understated, as the benefits from instant information, specifically in the exact form desired by the user, is unquestionable.\textsuperscript{15} The most popular online search engine, Google, has commenced a project to scan whole libraries worth of books from major worldwide universities, thus possibly putting immense amount of copyrighted content online for anyone to search.\textsuperscript{16} Google also purchased popular and searchable Internet video website YouTube in October 2006, allowing even casual word searches on the engine to display video content results for the given search.\textsuperscript{17}

However, the public will certainly make all kinds of uses of this new technology. Just as peer-to-peer (P2P) file sharing software became problematic for copyright law when media, especially music in MP3 format, could be quickly and easily disseminated with the easily obtainable software\textsuperscript{18}, the amount of copyrighted material available online which is instantly searchable and usable by any Internet user presents similar questions\textsuperscript{19}. File sharers, bloggers, and even casual Internet users must recall that “no case law exists to support a broad ‘right of convenience’ that allows the copying of whole works into alternate formats or the sampling of music files from peer-to-peer services”\textsuperscript{20}, though users would be benefited greatly from the right to have archived copies of legally purchased media. Courts have held P2P services such as Napster, perhaps the most famous of the early P2P software available, liable for copyrighted content being traded using the software, as it was designed to facilitate the sharing of music libraries between users.\textsuperscript{21} Courts have wisely noted the difference between P2P services and other technologies online and not held search engines or Internet Service Providers (ISPs)
generally liable for infringing content available on their services. Courts have allowed, for example, image searches with copyrighted images to appear cached on the search engine for the user.

The next step is what the searcher and user does with this media, especially as Internet video and images become more easily searchable and usable every day. Creativity will flourish, as “rather than being typically passive consumers, users of the fair use doctrine are more likely to be active creators of new copyrighted material that builds upon the existing copyrighted creations of others.” Though of course non-fair use is still possible as well, users of online media frequently transform copyrighted content with the aid of readily-available editing software. Alternatively, users can now easily embed or post songs, videos, and images into personal web pages, social networking site web pages (such as Facebook and MySpace), and blogs, along with embedded news feeds (commonly with Really Simple Syndication/RSS technology) and other media. The user does not have to change or transform the work in any way, but oftentimes users do so creatively. Personalization and customization of the Internet have led to over 180 million unique visitors per month for social networking sites as of 2007, and also 113 million blogs as of 2008.

How Copyright Law Affects Digital Users

Copyright law concerns itself with what these Internet users are doing with their blogs, social networking sites, and other personal web pages, and the content being placed on these sites by users. As embedding technology becomes more versatile and frequently used, and with the growth of users and customizable options for web sites and
blogs, more and more copyrighted content is bound to be uploaded to personal web sites.  Some content, even if copyrighted, will have no clear owner to ask permission or an owner that would not assert their rights even if they knew of the infringing use (an orphan work).  Other examples of Internet users posting this content will clearly represent infringing uses, for example a blogger who writes about cartoon television shows and uses actual copyrighted photos of the characters to sell his own apparel or merchandise, also with infringing images. The nature of the difference lies in whether the copyrighted content has been transformed in some way, or is a “derivative” work, that is arguably different enough from the work it is based on. Courts have struggled to define this.

However, in addition to transformative and derivative uses, there are also other possible exceptions outlined specifically within the fair use doctrine to what otherwise would be infringing use, such as for news reporting, critical commentary, or other types of scholarly or classroom use. This paper will attempt to answer what constitutes a transformative or derivative work with full knowledge of current electronic capabilities to copyright users, try to define what is a fair use by bloggers and web site users, and what is outside that realm, with a special focus on transformative uses that do not change the work but place it in a different context. Some examples of this type of transformative use include putting video or music up online, using clips in documentary films, classroom and library use, and online web pages and blogs that make use of part of a work in a new context.
Affirmative Rights of Visual Artists

Bloggers and other user-content creators should be aware they may face some affirmative duties when dealing with posting copyrighted works online.\textsuperscript{36} Even if the user is posting content that falls squarely with a fair or transformative use, affirmative duties to attribute works to the original author can arise.\textsuperscript{37} In 1990, Congress passed the Visual Artists Rights Act (VARA), partly to comply within international copyright norms after the 1989 Berne Convention.\textsuperscript{38} While America’s initial system of intellectual property protection was meant to encourage speech by rewarding it through limited copyright monopolies, our country has also recognized moral rights in authorship that underlie copyright protections elsewhere.\textsuperscript{39} The VARA granted “authors of works of visual art the moral rights of attribution and integrity.”\textsuperscript{40} This means that the author has the right to have their name attributed to the work, the right to insist their name by taken off a distorted version of their work, and the right to cease planned destruction of certain important works of ‘recognized stature’.\textsuperscript{41} Though requiring affirmative duties such as this is akin to compelled speech, few have questioned its constitutionality even though our laws try to shy away from placing affirmative tasks on the public.\textsuperscript{42} While this provision may be less important for major media companies, less well-known visual artists may want to assert their rights for the recognition and advertising that attribution to their works would provide them in increased fame and business in their industry.

The VARA may mean that embedded online media posted by users or bloggers requires attribution to the original creator, or similarly, the creator could require a disclaimer for works they do not want to be associated with. Likely few works that are transferred to an online medium would reproduce the original in such a way as to qualify
as a work of ‘recognized stature’ (as this moral right is typically invoked for statues and other three dimension artists’ constructions that are to be torn down or reworked). However, perhaps a visual artist could so greatly appreciate a use or representation of their work online that they could argue to require it remain posted indefinitely, asserting their moral rights under VARA. While some commentators have asserted the VARA must receive strict scrutiny under the First Amendment, its implications for those imbedding or using copyrighted media online without attribution should make bloggers and users err on the side of attribution. An example where attribution may be needed would be an art blog (with famous living visual artists who could assert their rights), where the blogger merely posted pictures of visual art that the blogger enjoyed without any manipulation of the pictures. Since the photos are direct representations (the blogger obviously wants to show the art pieces as they actually look since his blog is basically a gallery of the blogger’s favorites), these photos should be attributed to the artist.

Fair Use: The Factors

The four factors from Section 107 of the 1976 Copyright Act are not exhaustive of fair use, but courts use these factors to analyze whether a user has a "fair use" defense in copyright law. Fair use was originally a judge-made doctrine at common law dating back to the 19th century, and codifying it has been somewhat controversial since judges sometimes limit themselves to these factors without considering others, as allowed by the statute. The four factors to determine fair use include:

1. the purpose and character of the use, including whether such use is of a commercial in 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.47

Other defenses mentioned in section 107 protect uses for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."48

Transformative and Derivative Uses in the Fair Use Factors

The courts have employed the transformative/derivative use dichotomy to analyze the first factor of fair use, which is the "purpose and character" of the use. This comes from an influential law review article by Judge Leval, who coined the term transformative to describe expressive uses that ordinarily would not be protected by fair use.49 Judge Leval wanted a transformative use to be found to be fair use when used "productively…in a different manner or for a different purpose than the original."50

In contrast to transformative uses, the courts have find derivative uses unprotected since they do not sufficiently change the use, while transformative uses (including parodies though usually not satires) are protected since they add value creatively and have other public benefits meriting protection.51 Derivative uses have been defined as mere "copies"52, while transformative uses must alter the original work while generally serving to comment on, criticize, or parody the original53. Transformative uses must "add something new, with a further purpose or different character, altering the first with new
expression, meaning or message" while going above and beyond "merely superseding the objects of the original creation." 54 Transformative use can also occasionally be discussed as its own factor but generally courts speak of it in terms of the first codified factor. 55

The policy behind the first factor of fair use is to provide incentives for adding new value or creativity into a copyrighted work; thus works that are sufficiently transformative or are used in a different context are protected while a simply derivative work that does not add to the copyrighted work will not be found a fair use. 56 Finding the line between transformative uses and derivative uses is tricky and unclear as "courts have not always been able to articulate clear criteria" 57, especially when a work is "copied" (not altered per se) but placed into a new context. Even though transformative use is "not absolutely necessary for a finding of fair use" 58, this paper will address what constitutes a transformative use in context, attempting to remain faithful to the definitions of these terms as given by Judge Leval 59 and the US Supreme Court in Campbell 60.

The rest of the factors are also important and merit some discussion. The nature of the work in factor two has been interpreted in terms of the "idea/expression dichotomy" as mere ideas are not copyrightable but their expression frequently is. 61 The third factor, or the "amount and substantiality" test, relates to the obvious problem that a new work might make only slight use of a copyrighted work, but could take its most vital parts such as revealing the ending to a copyrighted mystery novel, for example. 62 Thus, courts can find uses not fair if they use a vital, though minimal, part of the copyrighted work. 63 Finally, the fourth factor looks at whether the new use will cause the market to suffer significantly for the original copyrighted use. 64 As in the previous example, if the surprise ending to a mystery novel was taken and widely publicized, it could destroy the
market for the original work (since readers would not be in suspense knowing the ending of the novel), and thus would not be found to be a fair use even if a minimal use of the original work.

Fair use also generally protects classroom use, critical commentary and newsworthy uses\textsuperscript{65}, as well as parody but not satirical uses of works\textsuperscript{66}. However, controversies arise as teachers, scholars and researchers may need to make use of a substantial portion, if not the whole work, for use in the educational context\textsuperscript{67}. Generally, this presents a problem as the more of the original work taken, the more weight against a finding of fair use, though mere portions may have much less value to the educational user without the whole work.\textsuperscript{68} Many full length monographs exist solely for librarians, teachers, scholars, and researchers in order to determine what is a fair use and what is likely a copyright violation when archiving or teaching from copyrighted works.\textsuperscript{69} Bloggers and other new users of digital media must pay attention to these rules, as their uses of media potentially fall under exceptions such as news reporting or educational purposes.\textsuperscript{70}

Using the Work in a Different Context: Transformative or Derivative?

Some commentators have argued that a transformative use must constitute a "change" from or an "actual manipulation" of the original work.\textsuperscript{71} There are infinite examples of actual transformation of original works: one could lay down a different drumbeat to a music track, scramble a web video to parody the original, rewrite chapters in a book to make an opposing argument, or alter an image digitally in any way the new creator so chooses. These uses are usually considered transformative (depending on the
extent the original is altered) and merit a fair use defense because of the creative effort that was put into altering the material in a real, physical way.\textsuperscript{72} Courts do sometimes struggle with the amount of manipulation needed to make a work a transformative use\textsuperscript{73} (for example, merely cutting off the last three unimportant seconds of a ten minute video likely would not be a transformative use, despite the actual change altering the original). A complete copy, though, can still be found to be a fair use.\textsuperscript{74} Judge Leval wrote a transformative use must be "productive and employ the quoted matter in a different manner or for a different purpose from the original."\textsuperscript{75} The use of the word productive has been criticized\textsuperscript{76}, yet might be a good standard for what uses merit fair use protection as productive implies added value.

Further dividing the courts, however, is the problem of whether fair use can be found overall when no actual manipulation of the work is performed.\textsuperscript{77} Though more commentators are arguing that actual manipulation is necessary, there are still those on both sides of the issue.\textsuperscript{78} Questions arise: is this a "transformative" or "derivative" use? Can using copyrighted matter without actual manipulation still be "transformative"? Can using copyrighted matter without any alteration whatsoever be considered a "fair use"? Does the context matter when judging the nature of how the work is used or displayed?

The \textit{Campbell} Case

Transformative use analysis was used at the Supreme Court level for the first time after Judge Leval’s 1990 article in \textit{Campbell v. Acuff Rose Music, Inc.}\textsuperscript{79} In that case, rap group 2 Live Crew parodied the classic song “Pretty Woman” by Roy Orbison and turned into a modern hip-hop version, sampling parts of the chorus and structure of the song.\textsuperscript{80}
Justice Souter argued the central question in the case was “whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative'”.

Souter reiterated the importance to copyright of finding transformative uses fair as the aim of copyright law generally is “furthered by the creation of transformative works.” The court found the 2 Live Crew version of the song, despite being socially bawdy and degrading, a transformative use and not infringement.

The Ty Case

Judge Posner used the terminology of transformative versus substitutional copying in his Ty Inc v. Publications Int'l Ltd. (PIL) decision. Analogizing also to the economic doctrines of complementary and substitutional goods, Posner found that transformative uses such as parody must be allowed to exist with a license from the original copyright holder; otherwise parody would be copyright infringement. However, a secondary user must be allowed to use some of a work (a good example is a book review: the reviewer could not even quote one line from a book being reviewed if no use was allowed). On the other hand, substitutional copying, that is, taking too much of the copyrighted work, would naturally cut into the market for the original work (a book "review" that contained most of the book being reviewed would really be a cheaper substitute for the original work, driving the original out of market share).

In the Ty case, Posner held that summary judgment must be denied when a lower
court had held PIL's photos of Ty's copyrighted and trademarked stuff animal "beanie babies" to be derivative works and not entitled to fair use even in the context of being photos in publications with text. The case concerned several publications; some more geared toward children with pictures of the beanie babies with obviously childish and brief text. This, implied Posner, would be a closer decision as to whether these photos were entitled to a transformative use defense to gain fair use protections because the text was so lacking and the photo archive of each beanie was obviously the main draw of the publication. However, the collector's guide published by PIL, with important information relevant to adult collectors, such as the scarcity of the beanie, its market price, and other information was much more transformative. A collector's guide without the photos, reasoned Posner, would be like the musical score to a Beethoven work, as opposed to the recording of the symphony. Obviously, the vast majority of consumers would prefer the symphony over the score, and a collector's guide that was much more complete with photos for accuracy, than a collector's guide that consisted of mere text. Because of the public policy reasons against giving Ty a monopoly over photos of its toys as well as the toys themselves, Posner strongly indicated that while the photos were a derivative use, they were a compliment to the beanies overall, and were used transformatively in the context of a guide as a whole.

The Koons Case

Another case where the work in controversy was not significantly manipulated was in *Blanch v. Koons*. Jeff Koons is a famous "appropriation artist" who had been denied fair use claims previously, as his artistic endeavors involve using images already
produced in new ways. Koons was unsuccessful in Rogers v. Koons when he created a statute called a "String of Puppies" based on a photo with two people holding puppies arm to arm, as the court called his work derivative. Though it took considerable effort to turn the photo in sculpture, but the court believed Koons acted in bad faith by appropriating the picture knowing it was copyrighted. Koons's alleged bad faith and desire to profit from his art again hurt his case in United Features Syndicate v. Koons, where a Koons statute called "Wild Boy and Puppy" (where the Puppy happened to be Odie from the popular comic strip "Garfield") was found to be infringed.

Koons prevailed this time in Blanch v. Koons when he copied a photo called "Silk Sandals by Gucci" taken by fashion photographer Andrea Blanch into his painting of women's feet entitled "Niagara." The work manipulated the feet in terms of having them shown in a different position (flipped upside down), and were used in a collage with other objects as well as other women's footwear shown being worn. It was clear Koons had used Blanch's photo of that particular pair of sandals in his work since he saw it in Allure magazine and scanned it for later use. The majority found Koons's new work transformative, especially as the motivations for Blanch in her photo for Allure magazine were to portray the sensuality of a woman wearing the sandals while sitting on a man's lap in a plane's first class cabin, while Koons stated he wanted viewers of Niagara to think about their everyday encounters with objects including a series of women's footwear being worn. Koons did discard the background of Blanch's image for his work, though little other manipulation was done. The court concluded that because of the different motivations for creating the images (Blanch's for a fashion ad and Koons's for pop-art), and their different contextual displays (Blanch's for a fashion magazine and
Koons's for German art-gallery space), Koons's work was transformative.  

This holding is remarkable because of the limited nature of the actual manipulation by Koons, since he used the same photo in his collage. However, the court found the difference in meaning and message of the works more persuasive and allowed this to be a transformative use.  

Koons went on to win the case, and the image in his painting was held to be a fair use despite little manipulation other than reorienting the image.  

The court found the message, meaning and context so different as to declare Koons's use transformative.  

The Bill Graham Archives Case

In Bill Graham Archives v. Dorling Kindersley, the defendant publishers had created a 480-page coffee-table book with over 2000 images, chronologically telling the story of the band the "Grateful Dead." Dorling Kindersley had originally asked permission for several copyrighted posters from Bill Graham that it used in the book along a timeline of the Grateful Dead's history, and had displayed these concert promotional posters in greatly reduced size so the viewer could see the evolution of the band's career, including the poster art advertising its appearances. These images were copied without being altered or significant manipulated (other than to be greatly reduced in size to fit along the book's timeline), so the original work was displayed in its entirety. The lower court found this use transformative because "the works are displayed to commemorate historic events, arranged in a creative fashion, and displayed in a significantly reduced form" and the second circuit court agreed.  

This use was different in meaning and context as, originally, each of BGA's
images fulfilled the dual purposes of artistic expression and promotion.\textsuperscript{112} The posters were apparently widely distributed to generate public interest in The Grateful Dead and to convey information to a large number of people about the band’s forthcoming concerts.\textsuperscript{113} In contrast, Dorling Kindersley used each of BGA’s images as “historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on the Illustrated Trip’s timeline”.\textsuperscript{114}

The court seems to be slightly stretching its contrast of the motivations for these uses and the overall doctrine of transformative use here, as these images are being used as concert posters promoting the Grateful Dead in either case. The main difference is the purpose of the use, as the original work was to inform the public and Dorling Kindersley’s use is to make a more complete guide with as much historical accuracy and first hand evidence and artifacts associated with the Grateful Dead as possible.\textsuperscript{115} The context is somewhat different as the posters did not originally appear in an art book, though viewers and concert-goers likely recognized that the posters had some nostalgic or historical value even when they were first new. Dorling Kindersley happened to capitalize off of that nostalgia, years later in its coffee-table book. The court was likely correct to find a transformative, and thus a fair, use in this case but it seems to stretch the boundaries of the transformative use doctrine.

Good arguments can be made that these posters were not in significantly different meaning or context, and this case could have been decided differently.\textsuperscript{116} Since the court seemed to find fair use because the rationale of the publisher was different than the rationale of the original creator for producing the posters (and that the rationales could be seen as similar rather than distinguished by the court: in both contexts the posters
promote the band in a broad sense), the decision’s reasoning could be seen as weak. However, the court does mention that Dorling Kindersley is allowed some freedom as it is trying to preserve the historic record of the Grateful Dead, which could be seen as similar to a news reporting or educational use though this book was made for profit. Displaying the concert posters in this way can be considered criticism, scholarship or research, as Dorling Kindersley was merely trying to provide an accurate historical record for information and artifacts of the Grateful Dead and their appearances, and used the works in conjunction with a chronological text scheme to report this.

Transformative Use for the Lay User in the New Digital Age

The Internet has allowed unprecedented use of copyrighted works, accessible instantly. Viewers and users can browse web pages, or scan items from a printed copy to a digital one, for computer use. The speed at which the total volume of web pages on the Internet has grown as astounded many, while the number of user based sites including fan sites, web blogs (generally used as personal diaries with statistics on the user, or for amateur news commentary, or simply for the satisfaction of having a home for oneself online, or RSS news feeds), peer-to-peer (P2P) networking, and embedded media such as music and video onto web sites has grown even more markedly. With hundreds of millions of personal web pages and blogs, with many having the "unauthorized use of copyrighted text, images, and sounds such as scripts, video image captures and audio sampling," not to mention streaming video, these user created web sites do have the potential to attract enough visitors for advertising revenue for the creator or owner of the webpage.
The amount of user friendliness has increased greatly on the web with the explosion of pre-made blog sites, build-your-own-webpage sites, and other templates, allowing Internet users unaware of how to use computer programming languages or unwilling to pay for their own domain name to post their own personal web page. As a sizable percentage of blogs feature copyrighted music, images and video embedded into the user's web page, the amount of customization also increases leading to more and more uses of copyrighted materials. Few blogs are commercial, but some do sell advertising and the market is growing rapidly. Online advertising was a $9.4 billion market as of the end of 2004, and is expected to be around $19 billion by 2010, though search engine revenue (customized advertising links generated from the user's search queries) should overtake "standard display advertising" by then.

Major media companies and other content creators face difficulties in knowing what to do about fan sites and other pages with embedded media. Some companies have take the response of developing their own "official" fan web sites to honor the TV show, actor, movie, musician or group which they own the rights to, while discouraging the broader online community from making individual web sites regarding the popular media or using the copyrighted images, audio or video. Major media companies have sent out “cease and desist” letters to some fan site creators, though individual users are unlikely to be deterred. However, owners are "understandably reluctant to sue those persons who are clearly their best customers" as the web sites created by fans and bloggers represent those who are likely more than just casual fans of the media if the user took the time to construct something online about the media.

Though some treatises believe this use of media on personal web sites
infringing\textsuperscript{128}, these users and secondary creators have new legal arguments on their side as a result of the recent decisions discussed above. With codified fair use already possessing the express excused uses of critical commentary, news reporting, and classroom use, many bloggers and web page builders will try to claim their site has a journalistic purpose, or at least contains a public benefit through the dissemination of knowledge, even if it be a lone user's unpopular opinion.\textsuperscript{129} However, most of these users do not bother to alter or manipulate media they use on their web pages, since they either do not possess the technical skills or software to professional edit images and video. Likely, unless creating a parody or fusing works together for experiment, most users do not want to change music, images or video they embed as they want to disseminate them as they are to the online community. The law prefers transformative uses however, as users are to be rewarded for adding their own creative power to an already existing work.\textsuperscript{130}

Case law from above should aid our analysis. The recent decisions in favor of "appropriation art"\textsuperscript{131}, compiling photos into a collector's guide\textsuperscript{132}, and using thumbnail versions of posters in a new context\textsuperscript{133} can greatly aid new digital users. Bloggers and web page builders most always put their work into a new context. It may still be a site devoted to disseminate information for true fans of the particular popular work, but the individual creator always places their own perspective and context for the work. Even a popular fan site competing with the "official" fan site created by the copyright owner still places the work in a different context as it likely focuses on different aspects of the original work. Otherwise, the individual user may not have bothered to compete with the official site. If it is enough of a contextual difference in the \textit{Bill Graham v. Dorling}
*Kindersley* case for the judge to find contrasts between the original concert posters promoting the band and the coffee-table book using the same posters in its timeline of the historical record of the group\textsuperscript{134}, it could be understood that individual content users make their own historical record, artistic choices, and add their own flavor and style to any new work using the copyrighted original.

News reporting services which include many blogs can also find a safe harbor here.\textsuperscript{135} Blogs are generally created to be a user's own personal diary. The user comments and criticizes, lays out his or her own likes and dislikes, and offers personal information and events so friends can view their page. Often, blogs comment on newsworthy events, and are also created to be devoted to particular niche topics of newsworthiness or academia.

Frequently, blogs will have embedded content as the user will, for example, want to show picture or video of a particularly funny scene from the TV show they saw, or will have music playing in the background\textsuperscript{136}, or a favorite YouTube video to share with visitors to their site\textsuperscript{137}. Users should be careful though. Creating a parody of the work, or critical commentary or news reporting will be covered, and the context to find those exceptions applicable seems to have broadened. However, a song playing for any visitor to the site, or a background picture that does not necessarily relate to the rest of the page's content, or an out of context video or other image could be found to be an infringing use. While again media companies are not prone to sue their biggest fans, bloggers and others may face copyright liability if they upload media that does not relate to the news reporting or commentary purposes of their site.

Courts should not engage in determining how “journalistic” a particular blog is
for public policy reasons, though some blogs clearly have public benefit while others
would be ignored by all but closer personal friends of the user. Finally, while physically
alteration or manipulation of the original work may no longer be required, courts looking
to context to decide transformative uses will likely come out with many varying
decisions, and secondary users should be wary of the purpose of their use.

Best Practices in Fair Use

The American University’s Center for Social Media\textsuperscript{138} has identified practical
problems with copyright law, fair use, and lay users’ knowledge of the limits of fair and
transformative uses, and compiled a handbook with “best practices” guidelines for fair
use\textsuperscript{139}. These guidelines do not have force of law but were produced in tandem with
copyright law experts who can advise on the proper boundaries between fair use and
appropriation, especially for small-budget users such as documentary filmmakers,
bloggers, music samplers, and other users of new technology.\textsuperscript{140} The best practices
statement is designed to not impede on copyright owners’ rights but also allow secondary
users to exert their rights to use what can reasonably be fair.\textsuperscript{141} This is because some
users can be intimidated out of certain fair uses because the user would rather forgo the
use than risk litigation without much of a budget to defend their use.

The editors of the statement identified four important areas where a blogger,
documentary filmmaker, or other public commentator may want to use media and would
need to be advised as to whether their use was fair.\textsuperscript{142} These include “employing the
copyrighted material as the object of social, political or cultural critique”\textsuperscript{143}; “quoting
works of popular culture to illustrate an argument or point”\textsuperscript{144}; “capturing copyrighted
media content in the process of filming something else” (i.e. incidental use)\textsuperscript{145}; and “using copyrighted material in a historical sequence”\textsuperscript{146}. All of these uses present their own challenges and fair use boundaries, but general guidelines for each can be very helpful for users.

To begin with the first use, all reviewers need to employ copyrighted material for critique.\textsuperscript{147} This is a fair use, as long as the amount so quoted is not so “extensive or pervasive” that the audience is satisfied by the quoted matter and does not further need to see the rest of the work.\textsuperscript{148} This standard is subjective since it depends on individual members of the audience but seems to be fair to the content owner. Importantly, the content owner generally invites reviewers of their work for the advertising it provides, but does not want the review to substitute for the original work.

The second identified use of employing quoted works to illustrate a point is a bit more complex, but generally has some of the same controversies as the first issue.\textsuperscript{149} Again, the issue is that the quoted material should not be longer than necessary to illustrate the point, and the user should not take advantage of the original work merely because of the extra effort needed to make their own substitute work.\textsuperscript{150} Employing quoted works should likely consist of briefly using multiple works, so no one work is highlighted, to prove that the user needed the compendium of works to illustrate their point.\textsuperscript{151} Proper attribution will assist the user in their good faith arguments that the use was fair and necessary.\textsuperscript{152}

The third identified use, or incidental capture, is a common problem for video (such as when advertisements are caught in the background, or even audio (such as when copyrighted music is playing while someone is talking).\textsuperscript{153} Because secondary users
should not be forced to “falsify reality,” fair use should cover incidental use.\textsuperscript{154} To further their fair use argument, the user should ensure that the content with incidental capture is necessary, the incidental capture material is not the focus of the use, and that music is not substituted for an otherwise overlaid track.\textsuperscript{155}

Lastly, using copyrighted material in a timeline or “historical sequence” can be vital to the argument of the user when showing the progress of some issue over time.\textsuperscript{156} Again, properly attributing the copyrighted material used and using only as much as necessary should be required for the user to claim fair use, though the user should also try to license the material if possible.\textsuperscript{157} The copyrighted content should not be the focus or main point of the use or “predominantly or disproportionately rely on any single source” to claim fair use.\textsuperscript{158} The argument for this type of use should be strengthened by the \textit{Bill Graham Archives} holding discussed earlier, as fair use was found for unlicensed material placed along a historical timeline.\textsuperscript{159}

Lay users should obviously be aware that the best practices statement was primarily intended for documentary filmmakers\textsuperscript{160}, though controversies discussed in the handbook are relevant to many secondary users of copyright including bloggers and other online journalists or those interested in social commentary. Those not posting video footage will not encounter some of the problems, but as the Internet allows for more bandwidth, video use will be ever-increasing. Also, strategies to maintain fair uses of whatever media, including text, are similar to that of video. A summary of best practices for fair use for any media should include: proper attribution of the copyrighted work, using only the amount necessary, not highlighting or using the copyrighted works centrally, the nonexistence of suitable substitutes (though not to the extent of “falsifying
reality”), and not exploiting the copyrighted material or satiating the audience’s desire for that material by overuse. 161

1 Schwartz, Eric J. and Matt Williams, Joking Aside: Recent Copyright Infringement Cases Reexamine the Distinction Between Satire and Parody in Determining Fair Use. 30 Los Angeles Lawyer 33 (2007).


3 17 U.S.C. § 107


5 David A. Rice, Sega and Beyond: A Beacon For Fair Use Analysis . . . At Least As Far As It Goes, 19 U. Dayton L. Rev. 1131 (1994).


7 See Raghu Seshadri, Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap, 2007 UCLA J.L. & Tech. 3 (2007) and The Good, The Bad, and The Confusing: User-Generated Video Creators on Copyright, Issued April 3, 2007, by the American University Center for Social Media, p. 7 (showing that no interviewee as a video creator could correctly define fair use in copyright law though many thought the doctrine applied to them).

8 Documentary: Good Copy Bad Copy (2007).


10 Ibid, 2.


14 See www.google.com.

http://books.google.com/bkshp?hl=en&tab=wp

http://www.google.com/press/pressrel/google_youtube.html


Schwarz and Williams, 33.


Ibid.

http://video.google.com/?hl=en&tab=iv

Schwartz and Williams, 34.


http://www.profy.com/2007/02/06/record-embed-share-comment-video/


www.blogherald.com/2008/02/11/how-many-blogs-are-there-is-someone-still-counting/


http://www.keytlaw.com/Copyrights/dmca.htm

http://www.copyright.gov/orphan/


Ibid.


Ibid.

http://www.ivanhoffman.com/vara.html


Ibid.

Schwartz, Eric J. and Matt Williams, Joking Aside: Recent Copyright Infringement Cases Reexamine the Distinction Between Satire and Parody in Determining Fair Use. 30 Los Angeles Lawyer 33, 35 (2007).


http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-a.html

Campbell, 510 US at 579.


http://www.copyright.gov/fls/fl102.html

Campbell, 510 US at 579.


510 US 569.


http://www.lib.umn.edu/copyright/fairuse.phtml


http://www.lib.umn.edu/copyright/fairuse.phtml


http://www.lib.umn.edu/copyright/fairuse.phtml


Judge Leval, despite his 1990 article Toward a Fair Use Standard arguing otherwise, now thinks that recent cases such as Arribasoft (where thumbnail photos on a search engine were held transformative) were correctly decided, meaning that actual manipulation of works is not necessary to hold them transformative. Source: Robert Kasunic, April 17, 2008.


Ibid.

510 US at 579.

Ibid.

510 US 569.

292 F.3d 512 (2002).

Ibid.

292 F.3d at 517.

Ibid.

292 F.3d 512 (2002).

292 F.3d at 519.

Ibid.

Ibid.

292 F.3d at 521.

Ibid.

Ibid.


Ibid.

Ibid.


467 F.3d 244 (2006).

Ibid.

Ibid.

467 F.3d at 252.

467 F.3d at 261.

467 F.3d at 252.

Ibid.

467 F.3d at 260.

Ibid.


Ibid.

448 F.3d at 609.

Ibid.

Ibid.

Ibid.

448 F.3d 605.

Matt Williams, Recent Second Circuit Opinions Indicate that Google’s Library Search Project is Not Transformative, 25 Cardozo Arts & Ent LJ 303, (2007).

448 F.3d at 609.

Ibid.

G. Peter Albert, Copyright Law in Cyberspace, BNA Books (1999), 288.

Eric Goldman, Co-Blogging Law, Santa Clara Univ. Legal Studies Research Paper No. 06-04


http://www.jupitermedia.com/corporate/releases/05.08.15-newjupresearch2.html

Albert, 289.

Albert.


Albert, 288.

Albert.


467 F.3d 244 (2006).

292 F.3d 512 (2002).

448 F.3d 605 (2d circuit 2006).

448 F.3d 605 (2d circuit 2006).


www.youtube.com

http://www.centerforsocialmedia.org/about/

Documentary Filmmakers' Statement of Best Practices in Fair Use. Issued November 18, 2005, by the American University Center for Social Media.

Ibid.

Ibid, 1.

Ibid, 4-6.

Ibid, 4.

Ibid, 4.

Ibid, 5.

Ibid, 6.
Ibid, 4.

Ibid, 4.

Ibid, 4.

Ibid, 4-5.

Ibid, 4-5.

Ibid, 4.

Ibid, 5.

Ibid, 5.

Ibid, 5.

Ibid, 5.

Ibid, 6.

Ibid, 6.

448 F.3d 605 (2d circuit 2006).

Documentary Filmmakers’ Statement of Best Practices in Fair Use.

Ibid.