Fair Use Without Fear in the Academy

Brandon Butler
Peter Jaszi
American University Washington College of Law
Feb. 18, 2014
OVERVIEW

• Copyright and Fair Use
• The Best Practices Approach
• Litigation and Legislation
THE PURPOSE OF COPYRIGHT
ONE PURPOSE:

TO PROMOTE THE CREATION OF CULTURE
• Rewarding creators with limited monopoly

• Encouraging new makers to use existing culture
BIGGEST BALANCING FEATURE:

FAIR USE
legal, unauthorized use of copyrighted material—under some circumstances
“FOUR FACTORS”

• Reason for the use
• Kind of work used
• Amount used
• Effect on the market
GOOD NEWS...

• Judges love balancing features

• Supreme Court: fair use protects free speech

• Fair use judicial interpretation shifts greatly since 1990
JUDGES ASK:

• Is your use “transformative”? (i.e., use for new purpose, context, audience, insight)

• Did you use the appropriate amount to satisfy the transformative use?
“TRANSFORM?”

• E.g., use of works for scholarly study
• Use of works for teaching
• Use for exhibits
• Etc.
Custom and practice of individual creative communities…

...especially when well-documented
BEST PRACTICES CODES
COMMUNITIES
INTERPRET FAIR USE:

Communications Scholars
Poets and Poetry Scholars
Dance collections
OpenCourseWare
Academic and Research Libraries
All Codes Are Online at:

www.cmsimpact.org/fair-use/best-practices
DOCUMENTARY CODE
RESULTS:

TV programmers air films

New kinds of films

All insurers of errors and omissions insurance now accept fair use claims

Lawyers use the Statement to build their practices
BEST PRACTICES, NOT GUIDELINES

Principles, not rules
Limitations, not bans
Reasoning, not rote

TRY THIS AT HOME
NEW INPUT FOR RISK MANAGEMENT

Put legal risks into perspective, “mission risk”

Consider views of librarians

Grounding for solidarity
REFERENCE FOR FRONT LINE STAFF

Replacement for Classroom Guidelines

Guidance for smaller projects

Addresses common scenarios
SOURCE OF RHETORIC AND ARGUMENTS

- Front matter
- Intro paragraphs for each principle
- Supporting materials online
Courts Weigh In

GSU: Course reserves

Different rationale, but largely congruent

Authors Guild v. HathiTrust, Google Books

Mass digitization for preservation, accessibility, non-consumptive use is fair

Ratifies Principles 3, 5, and 7
What’s Next?

• Cases on appeal

• Legislation/Agency Action
Is Video Different?

- Fair use is media neutral
- OpenCourseWare and Library Code approaches
- The UCLA Case as Fair Use Sketch
MOOCs as a Fair Use Testing Ground

- OpenCourseWare as proto-MOOC
- Music sampling as cautionary tale
- Assert your rights clearly, and early
RECLAIMING FAIR USE

How to Put Balance Back in Copyright

PATRICIA AUFDERHEIDE and PETER JASZI
Please feel free to share this presentation in its entirety. For excerpting, kindly employ the principles of fair use.
CONTACT INFO

Brandon Butler
bbutler@wcl.american.edu
@bc_butler

Peter Jaszi
pjasz@wcl.american.edu