Fair Use in Digital Environments: The Work of the Conference on Fair Use (CONFU)

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I have been asked to speak today about fair use in digital environments, and particularly about the work of the Conference on Fair Use (or CONFU) that has been meeting in Washington, DC over the past 18 months. CONFU is attempting to work out guidelines for `fair use' in educational and library settings now that digital, networked communication and publishing is becoming common, much as, twenty years ago, with photocopy and videotape technology becoming prevalent, guidelines were negotiated for fair use in educational and library settings.

Fair use is a critically important doctrine in copyright law, one of special value for scholarship and education. It allows users of copyrighted materials--teachers, students, scholars, artists--to use copyrighted materials without seeking permission from the creator or publisher and without paying copyright fees. Fair use allows scholars to draw on the work of others in advancing a new argument, reviewers to criticize, artists to parody, teachers to acquaint students with fresh insights. It is critical for the advance of knowledge and for quality education. Of course there are limitations, the most basic of which is that the use cannot significantly undercut what the creator or publisher might gain from commercial sale of the work. The doctrine of fair use was worked out in a world where print on paper has been the primary medium of communication. What can, what will it look like in a digital, networked world?

Some of the new predicaments of copyright in digital, networked environments are well illustrated in an IBM ad now showing regularly on network TV. It shows a man walking in a vineyard with a younger woman, apparently his granddaughter. They are speaking Italian. He tells her he has just finished his thesis thanks to IBM, which digitized the library at the University of Indiana, presumably a considerable distance away. The ad is meant to dazzle you with the technology: you can live in a faraway, rustic setting, and still have all the world's knowledge and culture at your fingertips.

You have to care about copyright to be annoyed by the ad, and I don't know who should be more annoyed: librarians, because the ad raises expectations that can't be fulfilled any time soon; or publishers, because of the suggestion that technology is the only barrier to digitization, not (for example) permission from copyright holders to allow materials to be put in digitized form. Certainly the University of Indiana couldn't have digitized all of its holdings even if the copyright holders had all agreed, and just as certainly the copyright holders have not all agreed. The new technology does open marvelous possibilities, but putting them to good use will require us to settle a host of intellectual property questions. And fair use is central to these.

The American Council of Learned Societies is concerned about these matters because we believe the new technology will plow up and replant the vineyard of scholarly publishing and communication, but we also believe that the settlement of intellectual property questions will be at least as decisive as developments in technology in establishing what now flourishes and what withers.

I. Fair Use in Copyright Law

The Constitution gives the federal government the power to make copyright law in order to promote the useful arts and sciences. This has been accomplished by giving creators and their designated representatives the right to profit from the expression of their ideas, but within certain limits, which allow others to make use of new ideas--to build on the work of others.

Copyright law thus involves a carefully designed set of balances. Section 106 of the copyright law gives the holder of a copyright a series of exclusive rights for a number of years: the right to reproduce a work, the right to make derivative works, the right to distribute copies, the rights to perform or display a work in public.

Other sections of the copyright law place limitations on these exclusive rights of copyright holders. Section 108, for example, addresses some limitations that pertain to libraries, section 109 establishes the doctrine of first sale, and section 110 provides exemptions for educational institutions. But beyond these, in many ways more fundamental and certainly critical to the world of scholarship and education, are the provisions of section 107 regarding 'fair use.' This section reads:

> Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> 2. the nature of the copyrighted work;
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4. the effect of the use upon the potential market for or value of the copyrighted work.

The four factors require interpretation on a case by case basis, and there have been a number of court cases that provide additional guidance. In 1976, representatives of various interested parties, including publishers and librarians worked out guidelines to help interpret these sections of the copyright law-- what was required and permitted in educational and library settings. These guidelines are in four areas: (a) classroom use of copies, (b) copying of music for educational purposes, (c) copying for interlibrary loan, and (d) off-air videotaping of broadcast programming for educational purposes.

These guidelines were developed in response to predicaments raised by certain "new technologies," especially photocopiers and VCRs. The guidelines have served us all reasonably well, but now we are faced with even newer technology: computers, networks, and digitized formats. Working out guidelines for this technology is the charge for CONFU.

II. CONFU: The Conference on Fair Use

Shortly after taking office, the Clinton administration appointed a National Information Infrastructure Task Force chaired by Secretary of Commerce Ronald H. Brown. The Task Force has largely worked through a few Working Groups, including one on Intellectual Property, chaired by Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Bruce Lehman. The Intellectual Property

Working Group prepared a draft or "green paper" on Intellectual Property and the National Information Infrastructure which it released for comment in July 1994. A final, revised "white paper" version was released in September 1995.

The *White Paper* discusses intellectual property issues that arise with new information technology, and makes a number of legislative recommendations. These proposals have now been introduced in both Houses of Congress.

On fair use and the other related library and education limitations on the exclusive rights of copyright holders, the *White Paper* made no recommendations. Instead it created the Conference on Fair Use "to determine whether educational or library guidelines of a similar nature [to those developed in 1976] might prove attainable in the NII context." The Working Group added, "should the participants in the Conference on Fair Use fail to agree on appropriate guidelines, the Working Group may conclude that the importance of such guidelines may necessitate regulatory or legislative action in that area." [*White Paper*, p 83, 84]

Several dozen organizations participate in the work of CONFU. It is difficult to give a precise number because new participants continue to arrive and some have drifted away, but perhaps 50 or 60 organizations have been steadily involved. Many are organizations that represent publishers and other copyright holders. Users of copyrighted materials are principally represented by library organizations.

ACLS is a middle player in the conference, and there are very few others similarly situated. On the one hand we represent 56 learned societies, all of which publish journals and other copyrighted works. On the other hand we represent 300,000-400,000 scholars who belong to these scholarly societies and who are voracious users of copyrighted materials. ACLS's fundamental interest is in the health of the system of scholarly publication and communication, and in the appropriate availability of scholarship to students and teachers.

III. Dominating Worries and Background Hopes

There is another ad most of you have seen recently on television which bears mention here. A teenage girl is ripping pages out of a book and inserting them one by one into a fax machine. A man, apparently her father, wanders by. She tells him she is faxing a book on maturity to her boyfriend on the west coast. "Can't he buy the book?" the father asks. But he is clearly not disposed to intervene. Again we are meant to be dazzled by the technology, but in this ad AT&T is plainly showing someone violating the copyright law. No one would argue that faxing a whole new book (even if this were for a legitimate educational purpose) could be construed as fair use. You have to care about copyright to be appalled. One can only wonder what exchange about this ad has passed between AT&T and the American Association of Publishers.

I mention the ad because, when you do care about copyright, the ad provokes basic worry on the part of publishers. Publishers worry that networks and digital technology open the door to users transmitting millions of illegal, perfect copies across the globe with just a few key strokes. On this worry, fair use is an open door to renegade behavior that will undercut the financial viability of publishers. Librarians have a very basic worry as well. Librarians worry that the new technology will be used to create a world which is strictly pay-per-view. There will no longer be any fair use, nor any sharing of materials among users or institutions. Though seldom expressed in bald form, these two very large worries dominate CONFU, one from each side. Their scale and breadth have tended to be corrosive of practical solutions for particular problems.

There also are some seldom-expressed hopes that participants bring with them into the discussions. Publishers hope that the new technology will bring new efficiencies, possibilities for publishing on demand, relief from the need to hold inventory, and new possibilities for deriving additional income from previously-published materials. Librarians hope that the technology will allow them to work out new strategies for sharing materials and provide a foundation for cooperative collection development. These hopes are rarely expressed for fear of sparking the corresponding worry from the other side.

Something else slowing progress is shared awareness that the technology continues to evolve very quickly. No one wants to enter into an agreement which will be rendered unfavorable to them by a quick shift in what the technology makes possible.

IV. Possible Guidelines

The conference began with a long list of topics suggested by participants. Brief issue papers were written on most topics and then scenarios for discussion on a smaller number of issues. The conference is now working in a number of small groups on draft guidelines on five topics. It would be difficult to give an accurate sense of where each group is at the moment, but let me identify the areas in which they are working and the questions they are trying to answer:

1. **Image archives.** Art historians and others regularly use slides and other images in teaching and scholarship. With the new technology they can capture and transmit identical copies of these images in digital form. What is fair use of such materials? To what extent can educational institutions digitize existing slide libraries, whose images come from many sources? What use can be made of images in scholarly or educational publications, print or online?

2. **Multimedia.** Increasingly faculty are developing multimedia presentations using text, sound, and images from many sources, some of them copyrighted. Students are learning how to use multimedia as well and exploring the limits of what is possible. What is legitimate in making and using multimedia materials? How can these materials be used once prepared?

    These are both areas without analogue in the 1976 guidelines. Oddly (or perhaps not) this may have made progress somewhat easier. Two other areas are ones which can be seen as having analogues in the earlier guidelines which may be drawn on for the digital future.

3. **Electronic reserves.** Most colleges and universities have reserve systems in their libraries, and, within limits, libraries have photocopied copies of some articles for these systems. With the new technology, should librarians be allowed to digitize materials and make it available on a campus network? To what extent and within what limits?

4. **Interlibrary loan/document delivery.** For decades libraries have shared materials with one another when users cannot find what they are looking for in their home library. The coming of the photocopier made interlibrary loan easier: libraries could share copies of articles, not the original bound journal. Can they do this now by scanning, digitizing, and sending via the Internet? Again, within what limits?

5. **Distance learning.** The last area is distance learning, the most important topic of all, in my view. It is the one where the stakes are highest for educational institutions, and all of the other guidelines topics connect with it. Many states, particularly those in the West, have invested heavily in distance learning capabilities. What copyrighted materials can be transmitted over these closed but far-flung networks without paying copyright license fees? Can we do the same things

in a virtual classroom that we can within the confines of a single room on a university campus?

V. Current Legislative Proposals

The work of the CONFU will continue into the fall, it now appears. Though a good effort is being made, it is not at all clear that we will emerge with drafts in any of these areas that are acceptable to a sufficiently large spectrum of the participants to serve effectively as guidelines.

In September, legislation was introduced in both houses of Congress to amend copyright law (H.R. 2441, the NII Copyright Protection Act). The House has already held hearings; the Senate will in the next few months.

Ostensibly the proposed legislation is silent on issues of fair use. Instead, it introduces proposals made in the NII Task Force's *White Paper*. It proposes that a right of "transmission" be added to the section 106 list of exclusive rights of copyright holders. It has a provision on how digital technology may be used by libraries in preservation of materials. It has a provision on copyright protection and management systems, including language which would hold network providers liable for materials transmitted over their networks. And there is a provision which would allow reproduction of works for the visually impaired.

Many of these topics are worth a discussion of their own. Some supporters of the legislation have described it as making only small adjustments, but the implications are much more significant. Here I only want to note that I do not believe--and many others do not believe--that the legislation has no implications for fair use.

The central issue here is the proposed transmission right. Adding this to the rights of copyright holders without a clearly stated understanding of what would constitute fair use in digital environments could rip apart the carefully constructed balances of copyright law. When and under what conditions could users, under a claim of fair use, transmit copyrighted materials, or make use of transmitted materials? We would not know. And for the health of education and scholarship it is very important that we do know.

My own view is that it would be most unwise to pass this legislation (or any) without provisions about fair use in it. I believe this especially with the work of the CONFU uncertain to reach any conclusion and certain to reach no conclusion until the fall.

VI. Two Difficult Basic Issues

I want to close by highlighting two issues which increasingly seem important to me and which crosscut all of the issues on which we are preparing guidelines.

(1) One is an issue I'll call the problem of creating a `digital commons.' How can we all know what's been published--what's available?

In a print world, we have many opportunities for `browsing.' I don't think `browsing' in this sense is something we can translate directly into the digital future. But it is important that we find a way to allow all scholars, students, teachers, and other users to know what is available and also to know something about it. They may well have to spend money to make use of the work (or someone else may have to spend money on their behalf), but they will be able in principle to know of the totality of what's available.

Several publishers have argued that the marketplace, the needs of successful competition, will press all publishers to make known information about what is available. The market will solve the problem, they think. I'm not persuaded. At least in the scholarly world, I think it would be useful to have some norms, some standards of good behavior by publishers, about what could be seen for free regarding what's been published.

(2) Let me call the second issue `entertainment and scholarship.' Can one set of rules or guidelines work for both of these realms? Increasingly, the world of publishing is dominated by conglomerates whose interests include books, movies, software, CDs: every possible format for every possible kind of audience. The largest stakes for these companies have to do with entertainment, not education and scholarship.

I believe we need some way to provide for the special needs and concerns of education and scholarship. This isn't a matter of tilting in favor of users over publishers. It is rather a matter of finding a balance between the interests of users and publishers that is appropriate for this particular realm. Guidelines, such as those that the CONFU is working on, would be one way of accomplishing this.

Not to have guidelines--or some other way of respecting the special qualities and needs of education and scholarship--is to say that entertainment and scholarship will be governed by precisely the same regime--and that regime would essentially be the logic of the marketplace. I can only think this would be harmful to education and scholarship. For example, will the marketplace provide for the long-term preservation of all that is published? I doubt it. Preservation is a critical concern for scholars, and something that has largely been accomplished in the past by libraries. Digital technology creates new opportunities but also new predicaments for preservation of the human record. We must be sure that we are doing at least as well in the digital future as we have in the print on paper present and past.

Perhaps this is just another way of asking why we have worked as hard as we have in seeing that the CONFU process comes to successful conclusion.

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