The Origins and Future of Fair Use/Fair Dealing Week: Why Should Libraries, Museums, and Other Cultural Institutions Participate?

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Fair Use/Fair Dealing Week is a great example of successful grassroots organizing by cultural institutions, including libraries, archives, museums, and other institutions to celebrate one of the most critical of all copyright topics: fair use (and, later, fair dealing).

The Law, Briefly

The Copyright Act of 1976 grants copyright holders a bundle of exclusive rights, including the rights to reproduce, perform publicly, display publicly, and prepare derivative works of (and distribute) copies of the copyrighted work. However, despite these exclusive rights, and the length of their protection (the life of the author plus seventy years), copyright
law recognizes the essential need for “breathing space.” This space allows a user to harness some of the copyrighted work without permission “for purposes such as criticism, comment, news reporting, teaching…scholarship, or research….”

This right allows uses that “promote the Progress of Science and useful Arts” and preserves, without infringement, the values also enshrined in the First Amendment.

Fair use has been a part of copyright law for 170 years, initially coming to the United States as a common-law doctrine developed in the English courts. Fair use is now part of the U.S. Code at 17 U.S.C. § 107. The statute helps users evaluate whether a particular use qualifies as a “fair use” using a fact-specific and context-based four-factor test:

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.

As can be surmised in the preamble language to the statute, the right of fair use is a natural ally of library-related work. Libraries often provide all types of materials to patrons for uses such as “criticism, comment…teaching…scholarship, [and] research.” In the library context, this four-factor test can be used as a form of risk mitigation, examined ahead of various library-related work. For example, libraries frequently use this test to determine whether or not they can perform a certain activity or function involving copying or scanning. By reviewing the four factors, as a court might, a librarian can determine whether or not the action she is taking might risk infringement or fall squarely within the realm of fair use. Increasingly, libraries and archives themselves engage in fair uses of their own materials, from digitalization to text mining, from online collections to digital exhibitions, and more.

Fair use has provided a critical “safety valve” in copyright law as a user’s right to accommodate the range of activities noted above and more.
Without fair use, copyright could be used as a monopoly to inhibit progress. Certainly, without fair use, the quick evolution of technology today would not be possible. Fair use, as a flexible doctrine, updates copyright law, accommodating new technologies and adapting copyright to the digital era.

In recent years, US courts have focused increasingly on whether an alleged fair use is transformative. A work is transformative if, in the words of the Supreme Court, it “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” Use of a quotation from an earlier work in a critical essay to illustrate the essayist’s argument is a classic example of transformative use. Conversely, a use that supplants or substitutes for the original work is far less likely to be deemed a fair use than one that makes a new contribution.

In the last decade, there were some enormously positive developments in the realm of copyright, transformative fair use, and libraries. The US Court of Appeals for the Second Circuit upheld the ruling in Authors Guild v. HathiTrust, deciding that providing a full-text search database of scanned books is analogous to providing access to these books for people with print disabilities, which constitutes a transformative fair use. HathiTrust has paved the way for university libraries to embrace other activities, such as text and data mining, which are now at the forefront of interdisciplinary research.

A similar case, Authors Guild, Inc. v. Google, Inc., found that Google did not infringe any copyright through its Google Book Search database, which shows “snippets” or significantly small portions of works from the millions of books that were scanned at many US university libraries. US Circuit Judge Denny Chin dismissed the lawsuit and affirmed that the Google Books program meets all legal requirements for fair use. Later, this decision was affirmed by the Second Circuit Court of Appeals.

These laws and cases reveal the beneficial nature of having continual fair use programming at every institution. By investing in such efforts, patrons at each institution will be better informed and will be empowered to exercise the benefits that fair use grants, allowing for more creative use and reuse of work.
While the bulk of this chapter focuses on fair use, we also recognize that many more jurisdictions rely on fair dealing. Like fair use, fair dealing is an important limitation or exception to copyright intended to benefit users. Fair dealing is often employed in many of the same contexts as fair use, and many statutes recognize research, private study, education, parody, satire, criticism, review, quotation, and news reporting as exceptions. Both fair use and fair dealing are critical in providing limits to the monopolies provided by copyright.

There are some distinct differences between these two flavors of a similar exception, however. Fair dealing, a statutory limitation or exception, generally provides a closed-list set of activities that may be considered fair. In contrast, the fair use exception in the United States lists a number of activities that may be considered fair, but the preamble is not a closed list. Additionally, while fair use is weighed on statutory factors, fair dealing jurisdictions generally do not set forth legislative factors to determine whether a use is fair.

The Origins of Fair Use Week

The origins of Fair Use Week emerge directly from the development of the Code of Best Practices in Fair Use for Academic and Research Libraries.

In 2010, the Association for Research Libraries (ARL) and Center for Media & Social Impact (CMSI) at American University’s School of Communication launched a project to find the “best practices” of fair use emerging from libraries and archives. Using various surveys, including long-form interviews, responses were gathered from a number of diverse academic and research institutions in the United States, from large universities to rural campuses. The surveys were about the libraries’ understanding of the law and risk of utilizing fair use.

Later, after this information was processed from the surveys, librarians were invited to gather in small group discussions about fair use. Librarians gathered in five different cities between October 2010 and August 2011. In each conversation, participants were asked to discuss a series of brief hypothetical examples designed to raise questions about fair use and
its limitations and ask for the participating librarians’ own understanding of fair use.

From these meetings, a series of draft best practices started to emerge. An outside panel of distinguished copyright experts, including Prof. William W. Fisher III at Harvard University, Prof. Michael J. Madison at the University of Pittsburgh School of Law, and Kevin L. Smith, then director of scholarly communications at Duke University Libraries, also reviewed the draft document. Ultimately, however, this new *Code of Best Practices in Fair Use for Academic and Research Libraries* was developed “by and for academic and research librarians.”

In March 2013, a “Library Code of Best Practices” Capstone Event was held in Washington, DC. This served as an official celebration of the new fair use best practices.

Building on that conference, Pia Hunter, then the head of reserve, media, and microforms at the University of Illinois at Chicago (UIC), proposed a week of celebrating fair use on the conference’s *Fair Use Code Allies* listserv. At first, before the winter break, the community was unsure if it could work as a large-scale event. Successfully launching and running the new fairuseweek.org domain name that was purchased and reserved by Pia Hunter seemed a stretch. In fact, an email that went out to the listserv stating, “Please forgive my delayed notification, but at this point we’ve decided to postpone Fair Use Week for later in 2014, or if February remains optimal, 2015…”

However, Hunter’s idea for a full week of activities was taken up at Harvard Library, and several other institutions hosted single events in support of the celebration of fair use week. For example, UIC Library hosted a fair use clinic event in the lobby of the Daley Library, featuring both Sandy DeGroote and Pia Hunter. William Paterson University hosted Brandon Butler, then the practitioner-in-residence at the Glushko-Samuelson Intellectual Property Clinic at the Washington College of Law at American University, for a live fair use workshop.

Harvard Library’s Office for Scholarly Communication (OSC) under copyright advisor Kyle K. Courtney, set up a full week of activities, including daily blog posts by Krista Cox (ARL director of public policy.
initiatives), Kevin Smith (then director of copyright and scholarly communication), and Kenneth Crews (then director of the copyright advisory office at Columbia), as well as hosting the first public showing of Harvard Law Professor Terry Fisher’s new fair use lecture from his CopyrightX MOOC. On the last day of Fair Use Week, Harvard convened the first Fair Use Week Panel, featuring Andy Sellers (then at Harvard’s Berkman Center), Ann Whiteside (Harvard Graduate School of Design), Laura Quil-ter (UMass Amherst), and Ellen Duranceau (MIT).

Harvard OSC also established the “Fair Use Week Stories” Tumblr and the @FairUseWeek Twitter account. The Tumblr account showcases art, comics, writings, photos, and other works revealing the importance of fair use to communities beyond the academy. The “Fair Use Stories” Tumblr has featured posts by musicians, artists, scholars, archivists, and poets, all featuring a fair use theme. The @FairUseWeek Twitter account became the main source of social media activity on Fair Use Week events throughout the community and would play a critical role in later years’ celebration and outreach.

The Second Year of Fair Use Week and Beyond

Building on the success of Fair Use Week celebrated at Harvard and other institutions, in 2015, ARL worked to promote and expand the celebration
in a coordinated manner. Hunter transferred the fairuseweek.org domain name to ARL in support of this effort. In addition to establishing the website, ARL created branding materials, including logos, for use by participants.

Beyond the branding, ARL also recruited participation, encouraging not only libraries and research institutions to celebrate but also non-profit organizations and trade blogs focused on users’ rights to participate. In 2015, Fair Use Week expanded in terms of participating institutions and in scope, becoming Fair Use/Fair Dealing Week. By including the copyright doctrine of fair dealing in the celebration, institutions, and organizations from Canada as well as the multitude of fair dealing jurisdictions could also participate. Although there are important distinctions between fair use and fair dealing, these copyright doctrines share the characteristic of being an important and flexible right for users, safeguarding against excessive copyright protection. As explained on the Fair Use/Fair Dealing Week website,

Fair use and fair dealing are essential limitations and exceptions to copyright, allowing the use of copyrighted materials without permission from the copyright holder under certain circumstances. Fair use and fair dealing are flexible doctrines, allowing copyright to adapt to new technologies. These doctrines facilitate balance in copyright law, promoting further progress and accommodating freedom of speech and expression.

While fair use and fair dealing is employed on a daily basis by students, faculty, librarians, journalists, and all users of copyrighted material, Fair Use/Fair Dealing Week is a time to promote and discuss the opportunities presented, celebrate successful stories and explain the doctrine.23

Every year since its inception, participating organizations have used the week to celebrate, educate, inform, and promote the important doctrines of fair use and fair dealing. Each participant decides on the
Figure 4.3. “The Origin of Fair Use” comic by Kyle K. Courtney, Jackie Roche, and Sarah W. Searle
level of participation, from social media engagement (e.g., tweets and blog posts), to the creation of resources (e.g., infographics and comic books) and multimedia content (e.g., podcasts and webcasts), to live engagement (e.g., panel discussions or lectures). Thus, even after the celebration ends, librarians, educators, and advocates can continue to promote the doctrines of fair use and fair dealing, relying on the resources created during past celebrations. For example, an infographic on Fair Use Myths & Facts, later adapted for the Canadian context in the creation of a Fair Dealing Myths and Facts, explains these doctrines and addresses criticisms. Similarly, sharing an easily understandable and relatable explanation of the history of fair use can be accomplished through distribution of the comic book, The Origin of U.S. Fair Use.

In 2015, the sixty-four participating institutions included universities, libraries, library associations, and a number of non-governmental organizations, such as the Electronic Frontier Foundation, Creative Commons, New Media Rights, Public Knowledge, and the R Street Institute. Since then, the celebration has grown each year, and in the 2018 celebration of Fair Use/Fair Dealing Week, the most recent year, participation grew to 153 organizations and included numerous individuals. Over the past five years, while the greatest concentration of participation has occurred in Canada and the United States, celebrations have also taken place globally, including Australia, Colombia, Greece, Israel, Kenya, Korea, the Netherlands, New Zealand, Pakistan, Tanzania, Uganda, and the United Kingdom.

Over the years, Fair Use/Fair Dealing Week has taken on an advocacy-based role for certain institutions. It is no surprise that fair use and fair dealing are often under threat from rights holders, lobbyists, and other organizations who have a fiscal interest in uses that can be licensed and commercialized for profit. This advocacy can take many forms, from promoting clauses used in library contracts that preserve rights, such as fair use, to supporting international adoption of fair use in other countries. As Fair Use/Fair Dealing Week continues to grow and expand, governments should take note of the importance of these essential doctrines and ensure the robust application of fair use and fair dealing are not curtailed.
Chapter 4

Why All Institutions Should Celebrate Fair Use Week

Fair use and fair dealing play a critical role in ensuring balance in the copyright system, allowing for criticism and comment, research and learning, the creation of new knowledge and culture, and promoting innovation. Fair use, while often thought of in terms as a user’s right, is depended upon by rights holders and users alike. Even though everyone who interacts with a copyrighted work relies on fair use on a daily basis, particularly in the digital world, there have been some attacks on this critical doctrine. Celebrating fair use annually, therefore, provides an opportunity to educate and remind the community about the role that fair use, like other limitations and exceptions, plays in a functioning copyright system. By allowing not only use, but reuse, fair use serves as the basis for new knowledge and creation.

While fair use should be celebrated broadly, libraries have a particularly strong role to play in participating in Fair Use/Fair Dealing Week. As institutions that rely on fair use to fulfill their core missions and the role they play in providing access to knowledge, libraries are uniquely positioned to both advocate for the value of fair use and educate individuals on the doctrine.

In terms of advocating for fair use, libraries can use Fair Use Week as the perfect time to highlight particular collections made available through fair use. For example, in a blog post on the Fair Use Week website, Greg Cram showcased New York Public Library’s (NYPL) 1939 New York World’s Fair collection, which includes numerous records, documents, photographs, and other ephemera that were digitized and made available:

At the conclusion of the Fair, the corporation responsible for the Fair dissolved and donated a large amount of material to The New York Public Library. The corporation donated over 2,500 boxes of records and documents, as well as 12,000 promotional photographs. These records document not only the operations of the Fair, but also present a comprehensive view of all aspects of the planning, design, execution, maintenance, and dismantling of the Fair. The photographs in particular offer a unique view of life at the time, illustrating the Fair as only visual images can do.
We then turned to conducting a thorough, good-faith search for rights holders. When the records of the Fair did not help, we searched for rights holders utilizing other methods, including searches on Google, the Copyright Office records, and other relevant sources. This search was time-consuming and, ultimately, fruitless.

Having found no copyright owner after our good-faith and reasonable search, we undertook a fair use analysis. Our analysis was informed by the development of voluntary community-driven efforts to create best practices for identifying rights holder(s), taking into account the nature of the particular material at issue, including the Society of American Archivists’ 2009 statement of best practices, as well as general guidance such as the “Code of Best Practices in Fair Use for Academic and Research Libraries,” developed by the Association of Research Libraries. We were also informed by various academic viewpoints, including Jennifer Urban’s article on fair use and orphan works.

Guided by our fair use analysis, we determined to move forward with digitization of portions of the collection after balancing the educational benefit of the undertaking against the risk that a rights holder might subsequently surface. Although the potential for $1.8 billion in statutory damages in the worst-case scenario was daunting, we not only digitized and posted the selections of the collection online, we also created a free iPad application to feature the digitized content. The application was named one of Apple’s “Top Education Apps” of 2011.

Libraries might choose to highlight any number of projects, from the ways libraries support education using digital platforms to the creation of databases to facilitate search or other uses. Also, the preservation of particular collections of websites or other digital works subject to risk certainly is a major component of library-facing fair uses. And, as always, libraries excel at traditional fair use support, such as a student’s reuse of existing works in the creation of new knowledge in the form of disserta-
tions, remixes, or mashups. These are just a few examples of the ways that libraries support the fair use activities of their host institutions and users at large.

An interesting narrative or storytelling using movies, film, music, and art is often a successful pedagogical strategy. Fair use story pedagogy is no different. Fair use success stories are an important element of learning, including the history of copyright, demonstrating the value the doctrine provides in expanding research, knowledge, and new creation.

An essential for any modern cultural institution is a full understanding of the law regarding the relationship between materials and copyright, particularly the fair use doctrine. Having a reliable point of contact for fair use is a critical component of any successful twenty-first-century cultural institution. To that end, the American Library Association, the Society of American Archivists, the College Art Association, American Association of Law Libraries, and other organizations list copyright and fair use as critical competencies in their respective fields.

Libraries, for example, not only depend on fair use to provide access to patrons but they can also help users employ fair use on their own, for example, when questions arise on the use of materials in a collection. The most common fair use question is whether using copyrighted materials in research, scholarship, and other creative endeavors is permissible.

There is an inherent tension in this environment, however: institutions want to provide whatever their community may desire but they also must balance the law against the user’s needs. Fortunately, copyright and fair use do not always restrict certain uses. In many cases, a solid understanding of copyright can help ease fears, provide legal alternatives to a particular request, or help educate the community at large. Libraries have an opportunity—and responsibility—to empower their communities by providing truthful fair use resources for their users. In this way, libraries can serve a cooperative, risk-mitigating role within the institution.

Again, in addition to promoting the robust, well-reasoned use of fair use, libraries and cultural institutions can also play a role in promoting the responsible reliance on fair use. Dispelling myths surrounding fair use (such as the myth that all educational uses are fair or that reliance on a
certain percentage (‘‘thirty seconds is fair!’’) of the work is always fair) can lead to greater risk mitigation for the library or institution.

Fair Use/Fair Dealing Week also presents an opportunity to highlight important but related laws that normally would not be emphasized in day-to-day instruction or reading. For example, in the second annual Fair Use Week, a number of libraries highlighted the ‘‘library innocent infringer’’ section of the copyright law. If a library is found guilty of infringing a copyrighted work, there is a potential chance that there will be no statutory damages for such infringement. Congress offers libraries one last chance to avoid penalty in section 504(c)(2). This section states that if the infringer is a library or archive, or the employee of a library or archive, then the court can lower or eliminate damages altogether if the infringer ‘‘believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under § 107.’’ To help support this in practice, a library should try to retain any documentation used to determine that the alleged use was a fair use. Spreading knowledge of this section, and others highlighted during Fair Use/Fair Dealing Week, can also aid the ‘‘total’’ analysis for risk mitigation of various fair use library activities.

From the Fifth Anniversary to the Future

The Fifth Anniversary of Fair Use/Fair Dealing Week was celebrated in February 2018. Building off the best story-telling pedagogy fair use can offer, the Harvard Library Office for Scholarly Communication’s poster for the 5th Anniversary Fair Use Week Symposium, ‘‘Tried and True: Fair Use Tales for the Telling’’
Scholarly Communication hosted the conference titled “Tried and True: Fair Use Tales for the Telling.” Thanks to the generous support of the Knight Foundation, this celebration was a one-day program featuring a vibrant community of artists, poets, filmmakers, archivists, lawyers, librarians, scholars, and other leading fair use experts. As with any Fair Use Week, there were stories, demonstrations, art exhibits, and lively discussions about the most powerful and flexible provision in copyright law.

That Fair Use/Fair Dealing Week launched from libraries is indicative of the special role these cultural institutions play as the guardians of that right. To quote the statute, “the fair use of a copyrighted work…for purposes such as criticism, comment, news reporting, teaching, scholarship, or research,” is not an infringement of copyright. Many library actions fall within these types of uses. Libraries are often the only entities that provide access to copyrighted works before the copyright expires. This enables libraries, their patrons, and other users to exercise their rights under fair use limitations to creators’ right. Libraries also store, exhibit, and share copyrighted material as part of their fundamental mission.

And, finally, Fair Use/Fair Dealing Week is the representation of our most important mission: sharing knowledge across all disciplines with both patrons and peers. This is the true driving motivation behind the success of Fair Use/Fair Dealing Week. And, hopefully, with continued support from institutions and individuals around the world, Fair Use/Fair Dealing Week will continue to be celebrated for years to come.

Endnotes
6. Ibid.
7. Campbell, 510 U.S. at 579.
8. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 105 (2d Cir. 2014).
10. Authors Guild, Inc. v. Google Inc. at 293.
11. Ibid., 804 F.3d 202 (2d Cir. 2015).
18. Pia Hunter, email message to authors, December 13, 2013.
20. All five years of Harvard’s “Fair Use Week” expert blog posts and videos are available at https://blogs.harvard.edu/copyrightosc/.
22. Fair Use Week Twitter at https://twitter.com/fairuseweek.
28. See, for example, the various comments regarding fair use in *The Scope of Fair Use:*
Chapter 4


Bibliography


U.S. Const. art. I, § 8, cl. 8.