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Subcommittee On Courts, Intellectual Property And The Internet

Copyright Issues in Education and
For the Visually Impaired

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The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing artists, creators, and innovators across the spectrum of copyright disciplines, including membership organizations, associations, unions, companies and guilds, representing artists, creators and innovators, and thousands of individuals. We welcome this opportunity to submit testimony for the record of the hearing "Copyright Issues in Education and for the Visually Impaired." We do so to underscore the harm that results to authors and distributors of copyrighted works as well as to the public at large when such works are subject to unlicensed, widespread and systematic reproduction and distribution for non-transformative purposes, even in non-commercial contexts such as education.

This matter is currently at issue in the ongoing litigation between various publishers of educational materials and Georgia State University ("the Georgia State litigation"). [1] The Copyright Alliance submitted a brief as *amicus curiae* on this issue to the Eleventh Circuit. It is our belief that: (1) the courts must continue to apply

[1] *See Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *rev'd and remanded sub nom. Cambridge University Press v. Patton*, No. 12-14676 & 12-15147 (11th Cir. Oct. 17, 2014), *petitions for reh'g and reh'g en banc filed* (11th Cir. Nov. 7, 2014).

copyright law, including the fair use defense in a "media neutral" fashion to ensure a change from one reproduction and distribution method to another does not undermine the intent of the law; (2) when considering "potential market harm" from an unlicensed use, courts should consider harm to existing and developing licensing markets for the use; and (3) courts should not apply the fair use defense in an overly rigid and mechanical fashion or simplify it with bright-line rules because a failure to apply a nuanced analysis will have unintended consequences.[2] We summarize and reflect on arguments from that brief, as well as other views we have expressed in the context of the copyright review hearings here for the Subcommittee's consideration insofar as they are relevant to fair use in the educational and non-commercial context.

The Fair Use Defense is Intended to Promote, Not Hinder, Individual Creativity

The Copyright Alliance supports fair use, and is dedicated to ensuring that copyright law continues to incentivize the creation and distribution of creative works by providing robust copyright protections to authors as well as meaningful exceptions for fair use. When properly applied, fair use fosters creativity by enabling creators to use copyrighted works in ways that produce new cultural contributions that otherwise might not be possible. For example, fair use fosters creative and intellectual freedom, allowing individuals to produce transformative parodies or criticism of original works without requiring the authors of such transformative works to seek permission from the original copyright owners.[3] Fair

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[2] In the Georgia State litigation, we noted that the consequences of the district court's ruling would be particularly harmful to authors of illustrations, photographs, and individual chapters of collective works because the court's bright line rule allowing copying of up to a full chapter of a collective work could in many cases mean allowing the wholesale reproduction of an entire independently copyrightable contribution.

[3] *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) ("[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.").

use also fosters scholarly writing and research, permitting the use of short quotations of copyrighted works for purposes of comment.[4]

However, courts rightly and repeatedly have rejected attempts to use the fair use defense to permit the widespread, systematic reproduction and distribution of copyrighted works for non-transformative purposes, even where the use is for a non-profit or educational purpose.[5] The courts have emphasized that a non-profit educational use does not automatically trigger a holding of fair use, especially where the copyrighted material was used for the same purpose for which the copyright owner intended it to be used.[6]

This approach to fair use reflects the need for the defense to be balanced with the individual author's right to control whether and how her copyrighted work is reproduced and distributed. Robust copyright protections incentivize authors to create and disseminate new works, which expands the range of works available for use in educational settings. Just as importantly, robust copyright protections also provide "necessary incentives for scholarly publishers to create, invest in, and sustain the business models that make possible the dissemination of reliable, high-quality, standardized, networked, and accessible research that meets the differing expectations of readers in a wide-ranging variety of academic disciplines and fields

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[4] *See, e.g.*, *Sundeman v. Seajay Soc., Inc.*, 142 F.3d 194, 202-03 (4th Cir. 1998).

[5] *See, e.g. Marcus v. Rowley*, 695 F.2d 1171, 1177-78 (9th Cir. 1983) (rejecting fair use defense where a teacher copied and distributed excerpts from another teacher's copyrighted booklet); *Weissmann v. Freeman*, 868 F.2d 1313, 1326 (2d Cir. 1989) (rejecting fair use defense where professor copied and distributed his assistant's scientific paper for use in a review course); *Princeton Univ. Press v. Mich. Document Serv.*, 99 F.3d 1381 (6th Cir. 1996) (rejecting fair use defense where a copyshop reproduced and sold "course packs" containing unlicensed excerpts of copyrighted works).

[6] *See Marcus*, 695 F.2d at 1175 ("This court has often articulated the principle that a finding that the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indicia of no fair use."); *cf. Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

of research."[7] Justice O'Connor understood this when she stated that copyright itself was intended to be the engine of free expression. "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create *and disseminate* ideas."[8]

I. Copyright Law And Fair Use Should Remain Rooted in Technology-Neutral Principles

The fair use doctrine is, and should remain, "technology neutral." The principle of technology neutrality recognizes that copyright law "must remain grounded in the premise that a difference in form is not the same as a difference in substance."[9] As the marketplace, including the marketplace for scholarly works, moves online, the underlying principles of copyright and fair use must remain firm. Prior to the digital revolution, Justice Stewart hinted at the importance of technological neutrality in discussing how to construe the Copyright Act, stating "[T]he ultimate aim is. . . to stimulate artistic creativity for the general public good. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."[10]

Simply put, the change from a paper medium to a digital medium does not affect the legality of an unauthorized use. Thus, where as in the Georgia State litigation, a "university-wide practice" of substituting licensed paper coursepacks for unlicensed digital coursepacks is instituted "primarily to save money," the fair use defense should not apply.

The principle of media neutrality is especially important today as new licensing mechanisms increasingly drive innovation in the digital economy. Users now have exponentially more options available, due to creative industries embracing newer licensing models, based on the availability of new technologies that offer consumers

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[7] Adam Mossoff, *How Copyright Drives Innovation in Scholarly Publishing*, GEO. MASON L. & ECON. RES. PAPER NO. 13-15, 13 (2013) (draft), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243264.
[8] *Harper & Row*, 471 U.S. at 558 (emphasis added).
[9] *Greenberg v. Nat'l Geographic Soc'y*, 533 F.3d 1244, 1257 (11th Cir. 2008).
[10] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

access on more flexible terms. If courts ignore long-established fair use principles on the basis that digital formats should somehow be treated more leniently with respect to copyright infringement than analog or paper formats which have historically been licensed for reproduction and distribution in the educational context, the diminution of protection will disincentivize creativity and harm investment in developing new, more flexible means of distribution.

II. "Potential Market Harm" Includes Harm to Current And Developing Licensing Markets

In evaluating the fair use defense, and applying the fourth factor concerning harm to the market for the copyrighted work, courts must take into account the effect on the *potential* market, should a use become widespread. [11] If other universities were to forego paying license fees for the educational materials at issue in the Georgia State litigation, the effect on the publishing ecosystem would be drastic. The Sixth Circuit understood this when it refused to uphold a fair use defense for the unlicensed distribution of paper coursepacks.[12] In that case, the record showed that the plaintiff publishers were collecting permission fees of up to $500,000 a year. The court recognized that if copy-shops across the nation were to start acting as the defendants were in that particular case, the stream of revenue from licensing would shrivel, and the potential value of those scholarly works would diminish with it.[13] Now that a multitude of new licensing models and innovative business practices exist for disseminating works in ways that benefit the public, we should be careful not to undermine the further development of such services.

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[11] 17 U.S.C. § 107(4); *Campbell*, 510 U.S. at 590 ("It requires to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original") (quoting DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4]).
[12] *See Princeton Univ. Press*, 99 F. 3d at 1386-87.
[13] *See id.* at 1387.

Incorrectly applying the fair use defense in situations like the Georgia State litigation could have that result.

The Copyright Alliance does not take the position that legislative changes to fair use are necessarily required. However, in assessing how copyright is working in the educational context, Congress should keep in mind the considerable investments that go into producing the scholarly materials used by universities across the country. The creative efforts of authors of such works are self evident. Additionally, publishers also support and invest in ensuring works can reach their intended audiences. For instance, in 2009, almost 1.5 million articles in just the scientific, technical, and medical fields were published by over 2,000 different publishers.[14] Publishers such as Reed Elsevier and John Wiley & Sons have invested hundreds of millions of dollars in order to shift to digital publication of journals, as well as make accessible in digital formats articles previously published in print format.[15] It is therefore important to ensure that, even in an educational context, the fair use defense is not applied too broadly so as to allow schools simply to avoid obtaining a readily-available license. This is especially true in cases like the Georgia State litigation where the University could have access to over 1.3 million works for an annual cost of only $3.75 per student.[16]

Even if a license is not readily available for a given work in a given context, courts should not presume that there is no market value for the work in that form. Nor should courts require that on demand, multi-format licenses be available for every possible use. To do so would be particularly harmful to independent creators and small businesses who do not have the financial and technical resources to offer their works in every conceivable format or may have valid reasons for not making a

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[14] *See* Mossoff, *supra* note 7, at 17.
[15] *See id*. at 19.
[16] *Copyright Issues in Education and for the Visually Impaired*: *Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Allan Adler, General Counsel and VP of Gov't Affairs, Association of American Publishers).

work available at a given time or on a particular platform.[17] Copyright law has never required an author to provide access to works in the format best preferred by the requesting institution.[18]

III. Fair Use Cannot Be Defined by Bright-Line Rules and Presumptions

The fair use doctrine must be applied on a case-by-case basis, and facts must be analyzed in an appropriately nuanced fashion to achieve the balance the law envisions. Favoring bright-line rules and mechanical formulas over a nuanced approach will have significant unintended consequences.

For instance, in the Georgia State litigation, the lower court devised arbitrary bright-line formulas that failed to address the fact that each contribution to a collective work holds its own copyright "distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution."[19] Applying the court's suggested bright-line rules would have allowed copying of up to a full chapter of a collective work.[20] This could in many cases mean allowing the wholesale reproduction of an entire independently copyrightable contribution. Such a result would have a damaging effect on individual authors who make illustrations, photographs, and similar pictorial or graphic contributions available for use in a

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[17] For instance, artists may choose to withhold a work from a given platform or release works on different platforms in different timeframes, not because the works have no value or demand on a yet-to-be-authorized platform, but because the terms of use for a given platform may be inappropriate for the work at a given time, or because an exclusive release on a particular platform has been negotiated in order to finance the creation of the work, or to ensure the most successful marketing and distribution for the work.

[18] *See, e.g. Pac. and S. Co. v. Duncan*, 744 F.2d 1490, (11th Cir. 1984) ("Copyrights protect owners who immediately market a work no more stringently than owners who delay before entering the market."); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001) ("Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.").

[19] 17 U.S.C. § 201(c) (2011).

[20] *See Cambridge*, 863 F. Supp. 2d at 1234.

collective work. Such a bright-line rule undervalues the contributions of independent authors whose works constitute a separable whole.

Contributions to collective works often enrich our cultural, human, and scientific understanding in ways that cannot be defined formulaically. For example, a broad variety of scholarly books depend largely on visual works to convey information, including medical textbooks, field guides, surveys of art history, and books used in web design, architecture, animation, and motion picture production courses. Without images, those works would be of little purpose to their users. Applying the district court's bright-line rule, an institution could appropriate wholesale any photographs or images contained within an excerpt of a scholarly or educational book, notwithstanding that the photograph or image might be highly expressive and central to the work.

Individual authors whose works are appropriated through application of a bright-line rule such as the ones at issue in the Georgia State litigation may be discouraged from contributing their work to a larger scholarly work. This would ultimately harm the institutions seeking to access such works. The Supreme Court recognized the risk of unintended consequences inherent in setting bright-line rules when it stated that the fair use analysis cannot be "simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[21]

Conclusion

Fair use in educational settings, when appropriately scoped, serves the long-standing goals of copyright. However, as new modes of distribution and new business models for licensing works develop, courts and Congress should take care that the law (including the scope of any exceptions and limitations) continues to appropriately incentivize the creation and dissemination of works by authors and publishers, which in turn ultimately benefits the public at large.

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[21] *Campbell*, 510 U.S. at 577.