



**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE  
INTERNET**

**HEARING ON THE SCOPE OF FAIR USE**

**STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE**

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. In this statement, LCA describes how all types of libraries rely on fair use in order to serve their users and meet mission; how the federal government relies on fair use in the patent examination process; and how rights-holders rely on fair use in the development of new works. LCA requests that this statement be included in the record of this hearing.

**I. Fair Use and Libraries**

Fair use is integral to the ability of libraries to achieve many facets of their missions. These include preservation of and providing access to our cultural, historical, local and scientific heritage; supporting and encouraging research, education, literacy and lifelong learning; and providing a venue for community engagement on a host of issues.

Today, researchers, students and members of the public engage in sophisticated searching and manipulation of information including ready access to data, image files and

more. Increasingly, the information available is both current and historical as many libraries and others such as Google and the Internet Archive digitize special collections that are rich in the cultural and political history of our Nation.

Each day teachers teach, students learn, researchers advance knowledge, and consumers access copyrighted information by relying on exceptions in the Copyright Act such as fair use. Fair use permits the use of copyrighted material without permission from the copyright holder under certain circumstances. For libraries and their users, the fair use doctrine is the most important limitation on the rights of the copyright owner—the most important "safety valve" of U.S. copyright law for the public.

Fair use, codified under Section 107 of the Copyright Act, allows reproduction and other uses of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship and research. The statute sets forth four factors to be considered in determining whether a use is fair, including the character of the use, the nature of the work, the amount used in proportion to the whole, and the impact on the market for the work. There is no fair use checklist, and there is no need to import from other sections of the law the detailed list of conditions, prohibitions, and exclusions such as those found in the TEACH Act, 17 U.S.C. 110(2), concerning distance education. Importantly, there is no bright line for fair use. Thus, fair use is inherently ambiguous and not easily defined but critically important in ensuring legitimate access to copyrighted works.

Library patrons routinely rely on fair use. A professor might copy a few pages from a text found in a library to share with her class. Or a student may include a quotation in a paper from a novel available via the library. In addition to a fair use by a

library patron, libraries rely upon fair use in support of a number of library activities. While the Copyright Act does contain explicit exceptions for libraries and archives in Section 108, these exceptions do not cover every circumstance under which a library might need to use a work. Section 108 specifically provides that “[n]othing in this section...in any way affects the right of fair use as provided by section 107...” Some activities where libraries may rely on fair use include the following.<sup>1</sup>

### **A. Mass Digitization**

Libraries rely on fair use to support digitization of works in their collections and to support the use of large-scale shared digital repositories for particular purposes. For example, the HathiTrust Digital Library contains millions of scanned works from over sixty partner institutions. The court decision in *Authors Guild, Inc. v. HathiTrust*<sup>2</sup> held that digitizing the works was fair use when done for the purposes of creating full-text searches, preservation, and providing access to users with disabilities. Each of these activities standing alone, the court ruled, are fair use.

### **B. Access to Orphan Works**

U.S. libraries hold large collections of orphan works, particularly in large research libraries. Some studies have concluded that up to 55 percent of books in U.S. research libraries are orphans.<sup>3</sup> A much larger percentage of the material in special collections, such as photographs and ephemera, are orphans. Orphan works can easily become lost or inaccessible to the public without the stewardship of libraries. Libraries rely on fair use to

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<sup>1</sup> These activities are discussed in greater detail in *How Flexibility Supports the Goals of the Copyright System: Fair Use and the U.S. Library Experience*, February 15, 2013, <http://www.librarycopyrightalliance.org/bm~doc/lca-flex-library-experience-15feb13.pdf>.

<sup>2</sup> *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351 (HB), 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012).

<sup>3</sup> Resource Packet on Orphan Works: Legal and Policy Issues for Research Libraries, [http://www.arl.org/bm~doc/resource\\_orphanworks\\_13sept11.pdf](http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf), September 13, 2011.

move forward with digital preservation and tailored access programs. For example, many of the works in the HathiTrust collection are orphans, and the Library of Congress relies on fair use in providing some of the American Memory collections. Fair use is especially well suited to providing access to orphan works for libraries' non-commercial purposes because fair use is equitable in nature and can accommodate problems that arise from evolving situations, such as the inability to identify a work's copyright owner.

### **C. Access to Users with Print Disabilities**

New technologies present opportunities for libraries to increase accessibility to those users who require accessible format copies of materials. Such technologies include digital and audio readers, text-to-speech functionality in web browsers, and specific-purpose screen access technologies that allow for font size and background lighting adjustments as well as make it possible for people with print disabilities to “move” within a text document using the table of contents, chapter headings, and sub-headings. The Copyright Act does include a specific exception to allow libraries to assist people with print or other disabilities, but it is relatively narrow in scope. The judge in the recent *HathiTrust* case held that Section 121 allowed creating digital versions of works to provide accessible formats to users with print disabilities, particularly for education and scholarship purposes. Importantly, though, he also noted that, if Section 121 had not applied, then the more flexible fair use provision would also cover these activities by U.S. libraries. Flexibility can, therefore, help provide access where a specific-purpose exception was not drafted with sufficient openness to anticipate and accommodate new approaches.

## **D. Code of Best Practices in Fair Use for Academic and Research Libraries**

Finally, the “[Code of Best Practices in Fair Use for Academic and Research Libraries](#)”<sup>4</sup> has enhanced the ability of librarians to rely on fair use by documenting the considered views of the library community about best practices in fair use, drawn from the actual practices and experience of the library community itself. Specifically, the Code identifies eight situations that represent the library community’s current consensus about acceptable practices for the fair use of copyrighted materials. The Code then describes a carefully derived consensus within the library community about how those rights should apply in certain recurrent situations. These include: supporting teaching and learning with access to library materials via digital technologies; using selections from collection materials to publicize a library’s activities, or to create physical and virtual exhibitions; digitizing to preserve at-risk items; creating digital collections of archival and special collections materials; reproducing material for use by disabled students, faculty, staff, and other appropriate users; maintaining the integrity of works deposited in institutional repositories; creating databases to facilitate non-consumptive research users (including search); and collecting material posted on the world wide web and making it available.

## **II. Fair Use and the U.S. Government**

The U.S. government also relies on fair use. A recently issued opinion from the general counsel of the U.S. Patent and Trademark Office (USPTO) found that copying and distribution of non-patent literature for use in providing those copies to applicants during patent examination, providing certified copies of entire patent application file histories to the members of the public, and applicants making copies of non-patent literature for submission to USPTO during the patent examination process were all

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<sup>4</sup> <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

considered fair use.<sup>5</sup> In finding that fair use applied, the general counsel noted that the use by USPTO was transformative because the purpose of its use was different from the purpose for which the articles were written and would not affect the market of the non-patent literature.<sup>6</sup>

In 1999, the Department of Commerce requested an opinion regarding government reproduction of copyrighted material following an attempt by the Copyright Clearance Center, Inc. to negotiate licenses with several federal government agencies permitting these agencies to photocopy copyrighted materials in exchange for a fee.<sup>7</sup> The opinion cautions against such licenses, noting that any agreement “should seek to limit the scope of the licensing agreement so as not to cover those photocopying practices that the agency, in good faith, concludes are not infringing.”<sup>8</sup> The opinion cites fair use as a critical component in fulfilling the constitutional rationale of the copyright system, noting that “From the ‘infancy of copyright protection,’ courts have found it necessary to provide some opportunity for fair use of copyrighted materials in order ‘to fulfill copyright’s very purpose, [t]o promote the Progress of Science and useful Arts.’”<sup>9</sup>

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<sup>5</sup> Bernard Knight, USPTO General Counsel, *USPTO Position on Fair Use Copies of NPL Made in Patent Examination* (Jan. 19, 2012), [http://www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse\\_of\\_CopiesofNPLMadeinPatentExamination.pdf](http://www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse_of_CopiesofNPLMadeinPatentExamination.pdf). See also Jonathan Band, *A New Day for Website Archiving 2.0*, 8-11 (2012), available at <http://www.arl.org/storage/documents/publications/band-new-day-for-archiving-2.0-23feb12.pdf> (summarizing the general counsel’s opinion and noting that “The USPTO is the executive branch agency with greatest expertise in intellectual property law” and that this agency “conclude[d] that its photocopying and distribution of entire articles is a transformative use because the purpose of its use is different from the purpose for which the articles were written.”). Several courts have also recently held that the photocopying of articles in the course of the patent prosecution process is fair use. See, e.g., *American Institute of Physics v. Schwegman Lundberg & Woessner, P.A.* (D. Minn. 2013).

<sup>6</sup> The importance of fair use was recognized by the Department of Commerce in its recent Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy and the Office of the U.S. Trade Representative in the context of the negotiations on the Trans Pacific Partnership Agreement.

<sup>7</sup> Randolph D. Moss, Acting Assistant Attorney General, *Whether and Under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing “Fair Use” Under Section 107 of the Copyright Act of 1976*, Apr. 30, 1999, available at <http://www.justice.gov/olc/pincusfinal430.htm>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994)).

Additionally, the opinion points out that the public interest, such as that advanced through government photocopying, is considered in a fair use inquiry and while “the point is less clearly established, the fair use doctrine may be understood to contemplate permitting uses that serve ‘not only...the purpose of copyright but also...other socially recognized purposes.’”<sup>10</sup>

### **III. Fair Use and Rights-Holders**

Fair use is critical in achieving balance in the copyright system, not only for libraries and consumers of copyrighted content, but also for content producers and rights-holders. Although rights-holders of copyright often bring suit against alleged infringers of copyright when they themselves are sued for infringement, rights-holders rely on the fair use right and point to its importance in achieving the ultimate aim of the copyright system in promoting the progress of science and protecting the First Amendment.

A clear example is the recently decided case, *Bouchat v. Baltimore Ravens*, where the Fourth Circuit ruled in favor of fair use where the Baltimore Ravens’ “Flying B” logo was used in films and in exhibits in the Baltimore Ravens’ stadium.<sup>11</sup> The Fourth Circuit emphasized the importance of fair use, noting:

While copyright law rewards the owner, “[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.” *Sony Corp.*, 464 U.S. at 429 (internal quotation marks omitted). As a result, Congress has attempted over the years to balance the importance of encouraging authors and inventors by granting them control over their work with “society’s competing interest in the free flow of ideas, information and commerce.” *Id.* at 429. Absent any protection for fair use, subsequent writers and artists would be unable to build and expand upon original works frustrating the very aims of copyright policy. For creation itself is a cumulative process; those who come after will inevitably make some modest use of the good laborers of those who came before. *See Br.* for

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<sup>10</sup> *Id.*

<sup>11</sup> *Bouchat v. Baltimore Ravens*, Nos. 12-2543, 12-2548, 2013 WL 6617327 (4th Cir. Dec. 17, 2013).

Int'l Documentary Ass'n, Motion Picture Ass'n of Am., Inc. & Film Indep. As Amici Curiae (“IDA Brief”) at 9...

Fair use, then, is crucial to the exchange of opinions and ideas. It protects filmmakers and documentarians from the inevitable chilling effects of allowing an artist too much control over the dissemination of his or her work for historical purposes. Copyright law has the potential to constrict speech, and fair use serves as a necessary “First Amendment safeguard[ ]” against this danger. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).<sup>12</sup>

Not only did the defendants in *Bouchat* rely on fair use, but the International Documentary Association, Motion Picture Association of America, Inc., and Film Independent filed an amici brief in support of the Baltimore Ravens and the National Football League (NFL) Enterprises, advocating strongly for fair use. The brief noted that “If this Court accepts Bouchat’s expansion of *Bouchat IV* and adopts the rule he seeks, that decision would fly in the face of the controlling fair use standard articulated by the United States Supreme Court... This conflict, in turn, would significantly—and negatively—influence amici’s ability to engage in the precise type of cultural discourse copyright law intends to promote.”<sup>13</sup>

Rights holders and traditional users of copyright alike thus rely on fair use as a critical First Amendment safeguard that promotes creativity. Fair use exists as an important limitation on copyright and, as the film associations filing as amici in *Bouchat* pointed out, reliance on existing works is essential in promoting the creation of new works:

Much creative culture is iterative; new works often do not arise in a vacuum, but rather are influenced by and draw upon the creative works that came before. As the Supreme Court held in *Campbell*, highly

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<sup>12</sup> *Id.*

<sup>13</sup> Br. for the International Documentary Association, Motion Picture Association of America, Inc., and Film Independent as *Amici Curiae*, p. 2-3, *Bouchat v. Baltimore Ravens*, Nos. 12-2543, 12-2548, 2013 WL 6617327 (4th Cir. Dec. 17, 2013)

transformative works lie at the heart of fair use’s protection: they are the new expression that copyright law is meant to promote.<sup>14</sup>

*Amici* film associations provided numerous examples where creators of new content, relying on existing copyrighted works, successfully argued in favor of fair use findings. These defendants included producers of musicals, book publishers, and television networks.<sup>15</sup>

Accordingly, rights holders are also reliant on fair use in the creation of new content, including for commercial uses. Indeed, in finding in favor of fair use in *Bouchat*, the Fourth Circuit recognized that, “the NFL may not arouse sympathies in the way that a revered artist does, but the consequences of this case reach far beyond its facts. Society’s interest in ensuring the creation of transformative works incidentally utilizing copyrighted material is legitimate no matter who the defendant may be.”<sup>16</sup>

In another recent case, large publishers relied on fair use in the development of a database product they brought to market. In *White v. West Publishing Corporation*,<sup>17</sup> White alleged that West Publishing and Reed Elsevier infringed its copyrights when they

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<sup>14</sup> Br. for the International Documentary Association, Motion Picture Association of America, In., and Film Independent as *Amici Curiae*, p. 9, *Bouchat v. Baltimore Ravens*, Nos. 12-2543, 12-2548, 2013 WL 6617327 (4<sup>th</sup> Cir. Dec. 17, 2013).

<sup>15</sup> *Id.* (Applying *Campbell*, courts across the country have held that the use of copyrighted works in the context of historical, biographical, and other non-fictional works may be transformative, especially where necessary to accurately portray history. *SOFA Entm’t, Inc. v. Dodger Prods., Inc.*, No. 2:08-cv-02616, slip op. at \*8 (9th Cir. Mar. 11, 2013) (producer’s use of seven-second clip from The Ed Sullivan Show in the musical Jersey Boys to mark a historical point in the Four Seasons’ career was transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (book publisher’s use of Grateful Dead concert posters in illustrated history of the band was transformative where publisher used the posters as “as historical artifacts to document and represent the actual occurrence” of events); *Warren*, 645 F.Supp.2d at 419 (use of artist’s work in biography/retrospective chronicling his career held transformative); *Monster Commc’ns., Inc. v. Turner Broad. Sys., Inc.*, 935 F.Supp. 490, 493–94 (S.D.N.Y. 1996) (television network’s use of approximately one minute of boxing footage was transformative in biography of Muhammad Ali); *Hofheinz v. AMC Prods., Inc.*, 147 F.Supp.2d 127, 137 (E.D.N.Y. 2001) (television network’s use of film clips from monster movies in documentary about that film genre held transformative); *Hofheinz*, 146 F.Supp.2d at 446–47 (television network’s use of film clips from actor’s early motion picture appearances in feature-length biography held transformative).

<sup>16</sup> *Bouchat v. Baltimore Ravens*, Nos. 12-2543, 12-2548, 2013 WL 6617327 at \*10 (4th Cir. Dec. 17, 2013).

<sup>17</sup> No. 12-CV-1340 (S.D.N.Y. Feb. 8, 2013).

acquired copies of White’s briefs through the court’s Public Access to Court Electronic Records (PACER) system, captured metadata, and placed them in a searchable database. Asserting fair use, the publishers filed a motion for summary judgment, which the court granted.

Although Reed Elsevier and other publishing companies have often brought infringement suits where they opposed defendants’ claims of fair use, as a defendant in *White v. West Publishing*, Reed Elsevier acknowledged the critical role that fair use plays in the copyright ecosystem. In its memorandum in support of its motion for summary judgment, Reed Elsevier noted that

“Fair use” exists as a necessary tool to further the goals of copyright law. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts.’” (quoting U.S. Const., Art. 1. §8, cl. 8)).<sup>18</sup>

Reed Elsevier further argued that while its database relies on the use of works created by others, “By offering a vast, searchable library of enhanced versions of publicly filed legal documents, Lexis has created a public benefit that disseminates information, encourages the development of individual knowledge and legal skills, and assists in the creation of new works.”<sup>19</sup>

The memorandum filed by Reed Elsevier argued that each of the four fair use factors tilts in favor of a finding of fair use, in particular the transformative nature of its use in the Lexis database.<sup>20</sup> In addition to addressing each of the four fair use factors individually, Reed Elsevier notes that its product provides a public benefit and that such

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<sup>18</sup> Memorandum of Law in Support of Defendant Reed Elsevier Inc.’s Motion for Summary Judgment, *White v. West Publishing Corp.* No. 12-CV-1340 (S.D.N.Y. Feb. 8, 2013), at 9.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 9-16.

“benefits provided by Lexis thus outweigh any hypothetical harm to the Plaintiff and favor a finding of fair use.”<sup>21</sup> The memorandum points to the fact that Lexis “provides the opportunity to learn about new areas of law, analyze successful and unsuccessful legal arguments, and research specific jurisdictional formats and related issues,” and also points to the “well-established right of public access to judicial records.”<sup>22</sup>

Rights-holders depend on fair use when creating new content: new films,<sup>23</sup> new databases,<sup>24</sup> new musicals,<sup>25</sup> new works of visual art.<sup>26</sup> As Sandra Alstairs, the President of the Copyright Alliance, stated, “Fair use is a core part of copyright law. It is a doctrine all artists and creators depend on daily.”<sup>27</sup>

## **Conclusion**

Everyone relies on fair use: libraries, students, teachers, government agencies, patent applicants, artists, and media companies. Fair use, in addition to reflecting in the copyright law the First Amendment-based principle of free speech, provides the basis for our most important day-to-day activities in scholarship, education, and learning. Fair use is a robust and evolving doctrine as interpreted by the courts. The Library Copyright Alliance believes that section 107 of the Copyright Act requires no change given how it is successfully employed by so many diverse constituencies.

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<sup>21</sup> *Id.* at 21.

<sup>22</sup> *Id.*

<sup>23</sup> *Faulkner Literary Rights v. Sony Pictures Classics*, (N.D. Miss. July 18, 2013).

<sup>24</sup> *Authors Guild v. Google* (S.D.N.Y. 2013).

<sup>25</sup> *SOFA Entertainment v. Dodger Productions*, 709 F.3d 1273 (9th Cir. 2013).

<sup>26</sup> *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>27</sup> Sandra Alstairs, Happy Fair Use Day, May 4, 2012, <http://www.copyrightalliance.org/2012/05/happy-fair-use-day-.UuVBYmQo7bh>.