Transformative Teaching: Educational Fair Use After Georgia State

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Goals:

- Life after Guidelines/ Coursepack Cases?
- Tell two histories - fair use for education vs. fair use for everything else
- Finding the transformative in education
Road map

- The Georgia State case
- Educational fair use and the Guidelines/Coursepack era
- Transformative Use and the Scholarly/Judicial Consensus
- Transformative teaching: the future of educational fair use?
Georgia State

• Cambridge UP, Oxford UP, SAGE - funded by CCC and AAP—never forget!

• Course sites (Blackboard, e.g.) AND library reserves - no distinction.

• Chapters/excerpts from scholarly books.

• Assumed all non-transformative; faulty vision of transformativeness

• Trial, appeal, remand.
The outcome of the case is overwhelming victory for GSU—all but 4 uses are found fair, publishers ordered to pay ~$3-4mil in attorneys’ fees and costs! But is the reasoning useful for other universities and libraries? Is there any alternative?
The 11th Cir. upshot:

• Education is a favored purpose under the first factor, even when the use is non-transformative, BUT

• The “risk of market harm” to academic publishers from non-transformative uses is substantial, so the 4th factor must also be weighed heavily

• (The 2nd factor doesn’t matter; the 3rd is a colored heavily by the 1st and 4th).
How to break the tie??
The core conflict in all fair use cases is the user’s laudatory purpose vs. the copyright holder’s market prerogative.
Education is important, but if schools have to pay for electricity, librarians’ salaries, and lunches, why shouldn’t they pay for [e-reserves]?
Four Factors Don’t Help

• Weighing and interpreting them without some external guidance or overarching normative theory of fair use is impossible

• Often they may seem to be in equipoise, or tension, and you need to find a way to resolve conflicting claims of priority

• For someone who needs to apply the doctrine, important information (re macro- and micro-economics, e.g.) may be difficult/impossible to get
Principled answers grounded in the logic/purpose of copyright:

1. Market failure: Because the market that copyright is supposed to create doesn’t function in the right way for some educational uses.

2. Transformative use: Because some educational uses serve the purposes of copyright by using the work for a new purpose, without “merely superseding” the original purpose of the materials used.
The Guidelines/Coursepack Era
The ’76 Classroom Guidelines

- Negotiated by education groups and publishers w/blessing from Congress
- Incorporated in legislative history
- Perfect implementation of market failure theory
The Coursepack Cases


- Culmination of a careful campaign of lawsuits to enforce the Guidelines

- Give some (though not dispositive) weight to the Guidelines

- Defer to market prerogatives of publishers

- Commercial copy shop mediators muddy the waters
The upshot: Most copy shops, commercial or no, pay permissions for printed coursepacks.
Transformative Use and the Scholarly/Judicial Consensus
Market failure fails

• Sony endorses market failure theory, fair use suffers for a decade+; scholars say it’s incoherent, courts apply haphazardly


• 1994: Campbell v. Acuff-Rose: Transformative uses are “at the heart” of the fair use doctrine.
I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely “supersede the objects” of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.
Transformative Use

news reporting, *579 and the like, see § 107. The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely “supersed[e] the objects” of the original creation, works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, see, e.g., *Sony, supra,* at 478–480, 104 S.Ct., at 807–808 (BLACKMUN, J., dissenting), and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.
Scholarship

• Neil Weinstock Netanel, Making Sense of Fair Use, 15 Lewis & Clark L. Rev. 1–46 (2011)


• Matthew Sag, Predicting Fair Use, 73 Ohio St. LJ 47–91 (2012)

• Michael J. Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm and Mary L. Rev. 1525 (2004)
Scholars show:

• Transformative use has eclipsed market failure in the courts, dramatically

• Transformative uses win overwhelmingly; non-transformative uses lose

• Transformative use almost completely trumps market arguments

• Amount question is viewed through lens of purpose
The Netanel/Jaszi Two-Step Test

• Is your use transformative?

• If so, did you use a portion qualitatively and quantitatively appropriate to your transformative purpose?
Consequences:

- Search engine and other technology cases
- Parodies
- Best practices
What about educational (esp. teaching) uses?
Varieties of transformative teaching
Two Overarching Considerations

• Appropriate amount - per Netanel, caselaw

• Tailored access - per Google Books, Best Practices
Two Kinds

- Orthogonal: use for completely different purpose
- Productive: use for similar discursive purpose, but with criticism and commentary to create new information, ideas, understandings, aesthetics
Orthogonal Teaching

- Current events as problems or illustrations - e.g. window boxing The Wire
- Teaching history from primary materials - e.g. Marinetti and the Futurists
- Using expressive works to teach modes of analysis - grist for the crit mill
- Teaching with archival materials
- Teaching with examples of good and bad practice
- Teaching creative tools with raw material from the field - film soundtrack for Editing 101
Productive Teaching

• Incorporating 3rd party material into lecture slides
• Teaching theme, genre, and style with exemplars
  • Assigned reading
• Galleries and playlists
Again, key question is: Why is your purpose new/productive, and is the amount appropriate?
Advantages of this Approach

• Media neutral - applies to films, sound recordings, images, etc.

• Grounded in dominant paradigm—courts want a transformative use story

• All relevant facts are easily at hand (no need to know revenue, availability of a license, etc.)

• Educators can apply this logic on their own

• Always trumps market concerns
See also: Best Practices
Postscript
Now comes the GSU case, on remand.
Relative Weight of the Factors

Factor One: 25%
Factor Two: 5%
Factor Three: 30%
Factor Four: 40%
Sorting the GSU data

3.25%  8.3%  12.45%

mil 1.6%

Percentage of Total Pages Copied

⇒ Enfringement

⇒ FairUse
Sorting the GISU data

Number of Pages Copied

min: 11

37 pp.

102 pp.

Sorting the GSV data

Are licenses for online use readily available?
Sorting the GSV data

$34.04 \quad $159.34 \quad $189.92 \quad $467.31

Lost Licensing Revenue
Sorting the GSV data

Number of Chapters Copied

≤ | √ | 2 |

4 7
Where ≥ 2 chapters taken, were they entire chapters, or portions?

Portions: 4  Whole = 9 uses
Sorting the GSV data

License for electronic NOT Available

License Revenue < $5k

$15k $21k $21k $75k

Total

License Revenue

(for works where portion used was ≥ 2 whole chapters)
Total License Revenue

(for works where portion used was ≥ 2 whole chapters)
So, for Judge Evans:

- When licenses for electronic use are readily available, AND,
- the amount used is 2 complete chapters or more, AND,
- the revenue generated by licensing is more than $5,000

then the market harm to the publisher outweighs the educational purpose. Otherwise, education trumps.
BUT

• The appellate court expressly barred the use of bright line rules—these lines are implicit in the decision, hiding behind qualitative language about whether the publishers’ incentive to publish is unduly harmed.

• The N.D. GA is just one district court—other courts are free to reach other conclusions and apply other heuristics, case-by-case.

• The 11th Cir. opinion has virtually zero to say about what fair use is, though it did say a few useful things about what it isn’t.
A way forward?

• Non-transformative uses (educational use of works made to be used in education) - keep it modest, less than 2 chapters, preferably no license available, or else avoid titles that appear to be successful on the licensing market?

• Transformative uses: full speed ahead!
Thanks!

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