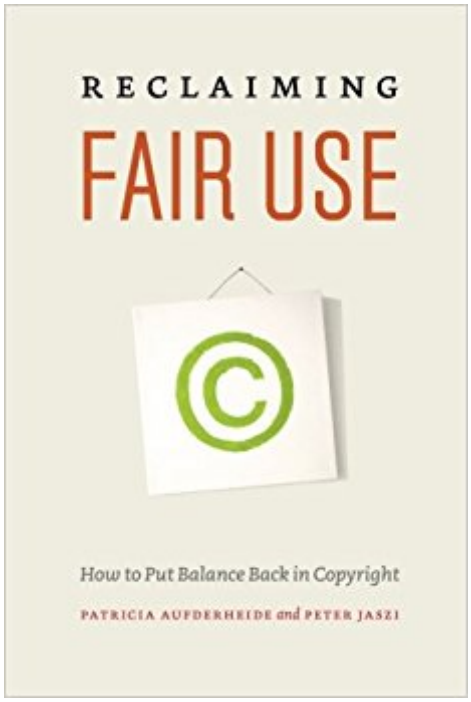
Reclaiming Fair Use: How To Put Balance Back In Copyright



Synopsis

In the increasingly complex and combative arena of copyright in the digital age, record companies sue college students over peer-to-peer music sharing, YouTube removes home movies because of a song playing in the background, and filmmakers are denied a distribution deal when some permissions â œiâ • proves undottable. Patricia Aufderheide and Peter JasziÂ chart a clear path through the confusion by urging a robust embraceÂ of a principle long-embedded in copyright law, but too often poorly understoodâ ”fair use. By challenging the widely held notion that current copyright law has become unworkable and obsolete in the era of digital technologies, Reclaiming Fair Use promises to reshape the debate in both scholarly circles and the creative community.Â Â Â Â Â Â Â Â Â Â Â This indispensable guide distills the authorsâ ™ years of experience advising documentary filmmakers, English teachers, performing arts scholars, and other creative professionals into no-nonsense advice and practical examples for content producers. Reclaiming Fair Use begins by surveying the landscape of contemporary copyright lawâ ”and the dampening effect it can have on creativityâ ”before laying out how the fair-use principle can be employed to avoid copyright violation. Finally, Aufderheide and Jaszi summarize their work with artists and professional groups to develop best practice documents for fair use and discuss fair use in an international context. Appendixes address common myths about fair use and provide a template for creating the readerâ ™s own best practices. Reclaiming Fair Use will be essential reading for anyone concerned with the law, creativity, and the ever-broadening realm of new media.

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"If you only read one book about copyright this year, read "Reclaiming Fair Use. "It is the definitive

history of the cataclysmic change in the custom and practice surrounding the fair use of materials by filmmakers and other groups."--Michael C. Donaldson, Partner, Donaldson & Callif--Michael C. Donaldson (03/22/2010)""Reclaiming Fair Use" will be an important and widely read book that scholars of copyright law will find a 'must have' for their bookshelves. It is a sound interpretation of the law and offers useful guidance to the creative community that goes beyond what some of the most ideological books about copyright tend to say."--Pamela Samuelson, University of California, Berkeley School of Law (01/21/2011)"The Supreme Court has told us that fair use is one of the 'traditional safeguards' of the First Amendment. As this book makes abundantly clear, nobody has done better work making sure that safeguard is actually effective than Aufderheide and Jaszi. The day we have a First Amendment Hall of Fame, their names should be there engraved in stone."--Lewis Hyde, Richard L. Thomas Professor of Creative Writing, Kenyon College (04/04/2011)

Patricia Aufderheide is professor in the School of Communication at American University and director of the Center for Social Media. She is the author of, most recently, Documentary: A Very Short Introduction.Peter Jaszi is professor of domestic and international copyright law at the Washington College of Law, American University, where he directs the Glushko-Samuelson Intellectual Property Law Clinic. He is the coauthor of Copyright Law.

Informative, educational, practical and inspiring. This is an essential book for artists and filmmakers using source material. The authors clearly explain the rights that creatives have and often overlook. Also important for instructors and writers who need to reference other imagery in their work. Every person who creates new meaning through creative work should own this resource.

Comprehensive & thorough. A super educational read.

The book on Docs

The language is easy. This book was very useful for me as a journalist. Now I know smth more about my legal and creative rights

More than fulfilled the needs for my research...

This is a real bible for fair use right now in the USA. It is inescapable, unavoidable, indispensable. But at the same time it assumes we know our basics and I think it is necessary to start with a quotation they do not give, the section of the US Code that defines fair use (17 US Code Section 107)"Notwithstanding the provisions of sections 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 fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."This is the official section of the US Code that states the four factors to which we are going to come back over and over again.The second document they mention but do not quote is the famous and founding article by Pierre N. Leval, "Toward a Fair Use Standard" published in 1990 in the Harvard Law Review (Issue 103, pp. 1105-1136 plus 128 notes, some extensive). I will not quote it, but I would advise you to get to it.Let’s follow the fundamental ideas and emphasize what is essential from the point of view of creators and inventors and the protection of their intellectual property, particularly the moral right of that intellectual property. I want to be extremely clear on one point: most authors entrust their own intellectual property rights to some producer, publisher, or any other merchant who wants to make as much money as possible with the copyright they have bought from the creator but they do not represent the real interest of the authors and creators because they only exploit the economic dimension of them. They have imposed a long duration to that copyright (70 years after the death of the creator, more than two generations: the copyright is thus transmitted to the grandchildren, at times the great grandchildren) and no possibility, or very few possibilities to bring a contract of that type to an end in Europe, though it is slightly better in the USA where the copyright can be recuperated by the creator after a few years in some conditions. The producers of any type want a long duration not for the creators but for the copyright they own in full property (they granted authors with a long duration not to seem too greedy but that’s all they are, greedy) and that direct "for hire" copyright is protected for even more as is specified in 17 US Code, section 302c:"In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term

of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. "Can you imagine? 95 years after first publication or 120 years after creation. Mickey Mouse, is it cinematographic creation or comic strip publication? Which one will end first? It made its first cinematographic appearance in 1928. It will fall into the public domain only in 2048 as a cinematographic creation, and in 2025 as a comic strip character that appeared as such for the first time in 1930. Luckily it is this latter date that should be the good one: still 15 years to run, and you can be sure Walt Disney is going to make these years go as slow as possible. These producers have had the upper hand on the subject in the world and meet with very good listening ears in the European Community, in the US Congress and even in the World Intellectual Property Organization. The interest of the authors is to keep control over their works and what is done with them; to keep control of their moral right over their works; and to get some decent income from the circulation of their works in royalties in proportion to that circulation and at a level that should be a lot better than the miserable 5 to 10% of the sales.This being said it is important to go back to basics again as for the objective of this copyright when it was instated by Queen Anne in 1710 to the sole profit and under the sole control of the author. Let's start with the US Constitution and their definition of the powers of Congress. One of these is to instate and manage copyright and patents, that is to say intellectual property, both artistic and industrial:Article I Section 8 | Clause 8 - Patent and Copyright Clause of the Constitution. [The Congress shall have power] "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."I will not quote all the successive copyright laws (first ones in 1791). That would be fastidious and useless. The purpose of this copyright is "to promote the progress of . . . useful arts" and the means is to "secur[e] for limited times to authors . . . the exclusive rights to their respective writings . . . " This being a constitutional provision it can only be changed by an amendment to the constitution that requires a two third majority to be passed and a three fourth majority to be ratified, in other words that is practically impossible on a subject like this one. Remember the 13th amendment abolishing slavery was passed by ONE vote in Congress and ratified thanks to the State of Louisiana that stepped out of the Confederation before the end of the Civil War to rejoin the Union. An amendment to the constitution has become a miraculous enterprise today in the deeply divided political jungle in the USA. Copyright is there to stay both in its purpose and in its duration as set by Congress and the latest duration was endorsed by the Supreme Court when it ruled on it when the case against it was brought to them a few years ago.What comes up then in Leval's article and in the common law set by the jurisprudence of courts is rather simple and I am going to enumerate these elements. First

what Leval calls the "statutory factors.""1. Factor one - The Purpose and Character of the Secondary Use." It is clear that the Secondary use has to have a different purpose from that of the primary use. If a piece of entertaining music is used to be mashed up into another piece of entertaining music, it is obvious the purpose and even character are the same. Aufderheide and Jaszi specify this point as follows:". . . a wide range of reasons for people to repurpose copyrighted material: satire and parody, commentary both negative and positive, as a trigger to discussion, as illustration or example, incidental use, diaries, preservation, and pastiche/collage - or as many now called it, remix." (page 119)The fundamental word in that approach is "repurpose." And we are talking common law here: the repurposing element will have to be assessed by a court if need be. It is not defined by the law itself in any detail. That’s what a common law judicial system is: the code law only defines a general frame tnat has to be in conformity with the constitutional law which is basic. And then it is the jurisprudence of courts, hence common law, that defines all the fine print of the interpretation of this code law. The Supreme Court is the final stop and can only deal with the constitutionality of a legal provision in the US Code, what’s more the federal constitutionality of such and of any state law in any State Code, and of any court decision. But remember the Supreme Court has to be asked to rule on a case that has run all levels in the judiciary system, and the Supreme Court will first decide if they want to rule on the case. They are not obliged to rule on any case presented to them."2. Factor Two - The Nature of the Copyrighted Work." This factor is difficult to understand. It concerns the genre with a strict opposition between documentary or factual reportage on one hand and fictional works on the other hand. In fact these two are the extremes of a continuous shift from one to the other and then the court considering a case that comes to them will have to assess the position between these two extremes, hence the degrees of factuality and fictional creativity. We also have to consider that what is protected is the form of the work itself not the ideas, hence the words themselves in a poem or a novel and not the ideas. Things become more complicated when we are dealing with visual or auditory arts or media. It is easy to see that the word "the" is not protected at all and if "to be or not to be" would be protected if these words were modern, the individual words themselves could not be and phrases like "be or be not" in the context "be or be not! See how I care!" could not even be thought as being protected. But the note "C" played by a trumpet is a lot more complex. The note itself is not protected, but the sound of the trumpet produced by a trumpet player who has his own style and his own trumpet is going to be protected. And you have the same thing, though even more complex with images. We come here to the concept of plagiarism which is extremely difficult to pinpoint and identify. How many identical notes can be considered as plagiarism? One particular performance of these notes is protected

against sampling and yet what is fair use if someone did sample them and used them? Then we go back to the first factor."3. Factor Three - Amount and Substantiality." The amount can be extensive but it has to be the exact necessary amount to reach the purpose of the secondary use: in other words you must not quote for the pleasure of quoting but to make your point and nothing but your point. Too short might not hit the target but too much would be over killing and then you will step out of fair use."4. Factor Four - Effect on the Market." This factor is also difficult to evaluate. Essentially it would not be fair use if the secondary use completely dried out the primary commercial use and hence income of the copyright holder. But there are other elements to be taken into account. A secondary use can even enable the primary use to get a new or renewed life. This has to do too with the image of the author of the primary use, hence with moral right. We all know that an author can disclaim his own paternity of an adaptation of a work of his and win, even a lot, in damages. We all know the case of "The Lawnmower Man" by Stephen King who denied his paternity of the film on the basis that the film was far too far away from his original short story.Aufderheide and Jaszi add four more elements to be taken into account. The first one is just the recording and emphasis on the RE-purposing of the secondary use. And this new purpose has to be different from the original one, clearly different. Then they insist on the appropriateness of the amount of copyrighted material used in the derived work. The third one is a reference to a concept that is rather fuzzy: "Was it reasonable within the field or discipline it was made in? . . . What normally acceptable practice is." (page 25) That means there is no universal rule, but there are many practices that change from one field to another: it is not the same in graphic arts and in music, and it cannot be the same. It is not the same in archiving and in musical creation, in teaching and in satirical drama. Only the professionals of each field are able to define what is "normal" in their domain. And even so. If you want to show the rhyming and rhythmic patterns of a poem, you have to quote the whole poem. If on the other hand you want to show the special use of one metaphor in that same poem, you will probably not have to quote the whole poem but only the relevant elements. The last element they add is "good faith and this is immediately asserted as requiring full attribution and credit to the works and authors quoted in the secondary use. This is, without the authors of the book ever calling it by its own name, the moral right of any author, composer or artist of any sort.The book then gives a procedure to establish a code of best practices in a given field. It has to come from the users and creators of this field, not necessarily the copyright holders when these are the producers. It is easy in some domains, but it is still very difficult in the fictional audio-visual field and in music. A consensus has to be found among creators and users and then this code of best practices of fair use in one particular domain after strict examination of it by lawyers and organizations engaged in that kind of legal action and

reflection has to be publicized and progressively promoted to a general consensus with the producers as copyright holders. The main argument with them is that they can become fair users in their own productive work in some clear cut situations, which will enable them to simplify their managerial work and even reduce their costs provided they allow other producers and professionals in their field to do the same with their own productions. It is give and receive, it is loss on one side and gain on the other side, and in the end they have to become convinced that the simplification of their work is worth some loss especially since it will also correspond to some economies that might even be of scale.Can this procedure which is typically American be transported into Europe? My answer is yes but with a tremendous amount of difficulty because of the strictly different methods used in Europe which is essentially a legal system based on legal codes hence on code law and on parliamentary acts. Right now a reform of authors' rights legislation is being discussed in Brussels and Strasbourg but their aim is not to bring everyone in every field to a consensual agreement on what fair use could be, but to set up an ever growing lists of exemptions (that's the word used in American legal language on the subject, and not exceptions) that are for many of them unrealistic. We may understand that hearing-impaired people may have access to some visual description of what they can't hear, but to provide all handicapped people with the same privilege is in fact making it free for everyone because it is no longer ethical.In the same way the false debate around what Europeans call "transformative works" in which they include mash-ups and that they define as a work in which the original fragments are no longer recognizable by the wide public (without asking the question whether this wide public knows or is able to identify the works from which these fragments are taken), hence inciting the secondary use "creators" to forget attributing or crediting their "works" to the original artists, hence to negate the moral rights of these original artists, this false debate is trying to make us believe that the inventor of mashed potato can be credited with the invention of the potato itself. In other words for them Parmentier is the one who invented the potato in the world if not universe, of course my dear Dr. Watson. It is then purely the negation of any fair use and its replacement by some kind of long list of exemptions that then become full exceptions since it is not fields of practices where authors' rights are suspended under very concrete and clear conditions, but fields of activities where authors' rights are purely and simply gotten rid of, fields in which there exists no protection any more, and consequently no incentive to create any more. It thus becomes a dangerous situation against creativity itself.My conclusion is clear. Copyright was invented "to promote the progress . . . of useful arts" by providing the authors with an incentive in the form of a possible commercial income. But if that copyright is negated or limited in some fields in the name of enabling a wider public to have access (meaning unpaid for access) to more works

then the incentive to creators will be dropped and creators will have to move to other parts of the world or to other practices that will lock up their works in some air-proof profitable closets with extremely limited access. The best works will then remain unknown for long periods of time of the public, general, wide or whatever. Europeans are producing today with their legal limited mind a generation of creating similar to Arthur Rimbaud whose main poetical work ("A Season in Hell") remained unknown for a full century and was rediscovered by pure accident and luck. And all that is only motivated by political considerations.This book is thus very important for Northern America but fair use is systematically perverted into a completely different perspective and for a completely different project by some anti-copyright and anti-authors' rights lobby in Europe. But that is not the only field where Europe is misguided since they want to make open-access publication compulsory for any piece of research that has benefitted from "some" public money without any specification of the amount nor of the nature of that public money. A primary school teacher who is living thanks to the public money paid by the state for his teaching and who writes in the middle of the night some articles on the genitive in the Sanskrit Vedas could not do it if he did not have his public salary. So his research is benefitting from public money and would have to be published under open access, hence without any incoming financial proceeds for the researcher who not even considered as a researcher deserving some "salary" for his work, and anyone could quote it without any obligation in return, financial or moral. Europe is standing on its head, its feet up in the air "pedaling in the sauerkraut" as the French would say, though some don't want to appear anti-German so they "pedal in the mashed potato" of our friend Parmentier. That will produce mashed sauerkraut and sooner or later mash-up sauerkraut. Bon appÃ©tit!Dr Jacques COULARDEAU

Copyright has hit the headlines this year for the problems of digitisation. The book by Aufderheide and Jaszi addreses these problems, and more, in a concise and readable way, although it has to be said that it is a book by americans for the US market. In the UK, the equivalent concept is "fair dealing". The idea that one can copy parts of a copyright text or image without consulting the copyright holder is a very old one, because how else can one criticize or comment on a work without doing so? Indeed, by quoting a text in a review, say, it is giving publicity to a book and so maybe helping its sales, which must be good for the copyright owners, usually the author and the publisher. Digitisation has brought the concept into focus owing to the ease of copying and broadcasting that work to the whole world over the internet. That has not only raised the old problem of wholesale piracy but also how far fair use can go within the confines of the law. One particular problem arose from the large scale scanning of books by Google, which made them available on its website. For

old books where the author is long dead (Dickens, Shakespeare etc), there is no problem, but since copyright is a long lasting right (70 years after the death of the author), there is a problem for more recent in-copyright works. This is why there is a major unresolved dispute between authors and Google. But yet the same company uses the doctrine of fair use in its search pages. For example, thumbnails of images are an essential part of the image search, to which no author objects at all. Without fair use, we would have no image search at all. But there is mounting evidence that copyright is being abused by major copyright holders, or indeed, some non-copyright holders. For example, many libraries hold extensive old photographs which are either not in copyright at all (being created before the copyright act established the right) or the copyright has expired. But since they may hold unique examples, they insist potential users to sign a license which means they can claim a fee for use of that image. Although that issue is not discussed in this book, it covers most of the controversial issues, some of which remain unresolved pending further legislation. It is essential reading for all those authors who worry about digitisation, as well as the public who want to know the fair limits of their rights in copying.

Reclaiming Fair Use is an extremely valuable scholarly work in the field of copyright law. It allows documentary filmmakers, educators and others to develop their own balanced, legal, common sense guidelines for fair use of copyright works. Filled with many examples of legal case studies and "best practices" guidelines for many fields, it deserves a place alongside the excellent books written on the subject by Michael Donaldson.

Use Diet and Supplements to Put an End to Headaches (Basic Health Publications User's Guide) Ventriloquism: How to Put on an Act, Use the Power of Suggestion, Write a Clever Accompanying Pattern and Make Your Own Dummy Off Balance: Getting Beyond the Work-Life Balance Myth to Personal and Professional Satisfaction Off Balance: Getting Beyond the Work-Life Balance Myth to Personal and Professional Satisfact ion Cash Balance Combos: A Practical Guide for Understanding and Operating Cash Balance/Defined Contribution Plan Combination Arrangements Resistant Starch: The Resistant Starch Bible: Resistant Starch - Gut Health, Fiber, Gut Balance (Gut Balance, Glycemic, Natural Antibiotics, Dietary Fiber, SIBO, Soluble FIber, Healthy Gut Book 1) CHAKRAS: Chakras For Beginners - How to Awaken And Balance Chakras, Radiate Positive Energy And Heal Yourself (Chakra Meditation, Balance Chakras, Mudras, Chakras Yoga) Your Flight is Out-of-Balance, Captain!: The Role of Effective Communication in Today's Aircraft Weight & Balance Planning Balance Your Hormones, Balance Your Life: Achieving Optimal Health and Wellness through Ayurveda, Chinese Medicine, and Western Science Fighting Back the Right: Reclaiming America from the Attack on Reason