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"Introduction: Futures of Fair Use"

Robert Spoo

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Introduction: Futures of Fair Use

Paul K. Saint-Amour, Robert Spoo, and Joseph S. Jenkins

17 USC Section 107: Limitations on Exclusive Rights: Fair Use

> [T]he 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—
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> (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 The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Does the fair use doctrine in U.S. copyright law have a future? For many legal scholars, copyleft activists, and cultural producers the answer is an emphatic No. Because Section 107 of the Copyright Act frames fair use according to four loosely worded and unweighted "factors," the practical dimensions of fair use must be determined on a case-by-case basis—often, in contentious instances, by way of expensive infringement suits. Users

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who lack the resources for such suits confront a "copyright clearance" culture that puts all discretion in the hands of the rights holder, giving even the most frivolous takedown notices and cease-and-desist letters an aura of final authority. Meanwhile, content owners are looking to neighboring regimes—contract, privacy, and trade secret law, among others—to fill whatever gaps fair use leaves in the edifice of intellectual property. Internationally, the absence or near-absence of a fair use doctrine in countries with a moral rights tradition has complicated international harmonization and has led to efforts by major international organizations to ignore or eliminate fair use. And one could argue that the most practical innovation from the copyleft—the Creative Commons flexible license—represents a retreat from fair use by those best equipped to defend it: where the user-oriented fair use doctrine mitigates copyright regardless of the creator's preference, Creative Commons lets a work's creator micro-manage the terms of its reception and reuse.

But other commentators see new signs of life in the fair use doctrine. Legal theorists have begun to echo 2002 and 2004 Canadian Supreme Court rulings that characterized fair use not as a limited defense against infringement but as a "user's right." In the United States, recent lower court decisions have, in the wake of the Supreme Court's celebrated decision in *Campbell v. Acuff-Rose Music, Inc.*,[1] affirmed new categories of potential fair use (specifically, the use of digital thumbnail images in internet search indexes and of small-scale image reprints as illustrative accompaniments of a timeline).[2] In 2004, the Brennan Center for Justice at the NYU Law School initiated a large-scale study of fair use that resulted in a major policy paper, "Will Fair Use Survive?," which concluded with six recommendations for revitalizing, clarifying, and reforming fair use.[3] Since 2004, Peter Jaszi, Patricia Aufderheide, and their colleagues at American University's Center for Social Media and Washington College of Law have been working with practice communities to generate Fair Use Best Practices statements.[4] These documents seek to reactivate a long-standing but latent element of U.S. case law that recognizes fair use as a relational rather than a positive category—as one whose baseline should be partly determined by the practice communities' living norms regarding the reasonable and appropriate use of copyrighted materials. Best Practices statements have already produced tangible results. One set of consensual norms, by a group of documentary filmmakers, persuaded several insurance companies to cover fair use

claims under their errors and omissions policies. Similar documents have changed copyright clearance policies among broadcast and cable companies.

The "Futures of Fair Use" special issue of *Law & Literature* aims to capture the energy of these debates and to consider what initiatives might come next in policy, scholarship, and practice. The word "futures" in our title does several kinds of work. It marks the fact that the statutory, precedential, and practical futures of fair use are volatile and still evolving, as are the methodologies and disciplines that will shape our study of fair use in the coming years. But just as importantly, it indexes our sense that futurity, or the question of what the future is to be, is always entailed in fair use—that fair use is one of the apertures through which the futures of fresh creation, expressive latitude, and individual and cultural property can enter and be foreglimpsed. In debating the future of fair use, that is, we are always debating which of many possible futures, and conditions of subsequent future-making, will be summoned into being by our statutes, judicial decisions, and practices. The optic of futurity opens fair use to broader questions than are typically asked of it—questions about the relationship between myths and norms, personhood and property, law and haunting, sovereignty and citizenry. Finally, the term "futures" also marks our resistance to the "recency bias" that afflicts much law and humanities scholarship. We are interested not only in the futures of fair use as seen from the vantage of the present but also in the futures past of the doctrine: its past senses of what it augured; whether these were futures that came to pass or were superseded; and whether superseded futures might, as in the case of the Fair Use Best Practices movement, be reawakened in the present.

The issue opens with two cautionary pieces addressed, respectively, to scholars of copyright and to judges in fair use cases. Barton Beebe's essay warns against a type of predictive gesture he terms "legal futurism": a prognostication, often dire, about what future will likely follow from the failure to adopt a particular urgent reform. Such forecasts, he notes, tend not only to be wrong but to be made in argumentative bad faith, warning of a future the commentator hopes to ward off by depicting. Such intentionally self-defeating predictions, for Beebe, are dangerous for at least two reasons with respect to fair use. First, the open-ended nature of the doctrine's four factors makes prophecies about fair use particularly vulnerable to unwitting self-fulfillment. The admonitory visions of commentators may be misrecognized by courts as accurate or desirable

portraits and given a basis in case law; alarmism backfires and becomes realism. Second, fair use advocates often depict law as the last bulwark against a future dominated by technology and quantitative methodology, while at the same time undermining the authority of legal discourse by overindulging in wild augury and other extravagant argumentative moves. The present issue offers a wide array of rhetorical linkages among fair use, futurity, methodology, and reform. Among other things, "Futures of Fair Use" might be taken as a data-set for testing Beebe's claims, with some contributors notably refraining from legal futurism and others powerfully, perhaps indispensably, embracing it.

Rebecca Tushnet's essay remains firmly rooted in the legal and cultural present in calling for "epistemological humility" on the part of judges in fair use cases. The chief object of this judicial modesty is "transformativeness," which the Supreme Court decision in *Campbell v. Acuff-Rose* made a pivotal term in fair use analysis, allowing courts to find a wide range of unauthorized uses, including some commercial ones, noninfringing. However, in the course of deciding whether one work sufficiently transforms another, judges in fair use cases all too often attempt to decide on the meaning of the works in question as well. Such a tendency, says Tushnet, overemphasizes the intentionality claims of authors and the heuristic authority of the judges, ignoring the manifold, highly context-dependent ways in which audiences experience and produce meaning. (Vidders—fans who remix footage, images, and music to variously celebrate, critique, and resignify original materials—are her vivid example.) When assessing the transformativeness of a work, Tushnet urges, judges must neither expect works to appear universally, unambiguously transformative nor attempt, themselves, to impose monolithic aesthetic evaluations on works. Instead, they should acknowledge the range of interpretive responses provoked by derivative works and find these works transformative when, say, a majority of viewers thought as much.

At its heart, Tushnet's discussion mounts a critique of transformativeness since *Campbell v. Acuff-Rose*. As a criterion, transformativeness purports, she says, to find uses fair when they target some aspect of the original work, only to dismiss those same uses as preempted by the original—as adding nothing to the work they reproduce. "Transformativeness as a concept," Tushnet observes, "is at war with itself." Has the criterion of transformativeness indeed begun to crack under the strain of its own

prominence? If so, those cracks may have multiplied with the Second Circuit's decision in *Bill Graham Archives v. Dorling Kindersley Limited* (2006), which has made transformativeness an even more load-bearing category in analysis of the doctrine.[5] A fair use, the decision states, must transform a prior work's "original expressive purpose." Yet, as Tushnet and others have demonstrated, original intent or purpose, especially pertaining to creative expression, is extremely difficult to determine, often being a function of circumstances beyond an author's awareness and control.[6] What's more, the intentions of a work's author may bear little relation to how that work signifies in the world. Many creative works encourage such free flow of meaning and invite engagement, including resistant rewriting and remixing, by users critically activated by such exchanges. And yet participation of just this sort, to the extent it involves new "expression" (an easily triggered legal threshold under current copyright law[7]), may be held to be "derivative," a result potentially inconsistent with fair use.

For Peter Jaszi, in contrast, transformativeness remains a category with immense potential. "The courts," he writes in his contribution to the issue, "have done use-communities (including education) an immense favor by reimagining the law of fair use in terms of the 'transformativeness' standard." Indeed, Jaszi argues, this standard offers educators their best chance of defending and expanding educational fair use in the apparent absence of what he calls educational exceptionalism, or a robust categorical exemption for pedagogical uses. Educators, in his view, should neither seek Congressional exemptions outside of fair use, negotiate with content providers, nor acquiesce to rights holders' claims that educational use harms the market for protected materials. Instead, proponents of educational fair use must seize the initiative in showing how such materials are repurposed and recontextualized by their classroom deployments.[8] Despite his differences with Tushnet regarding the current state and stability of the transformativeness standard, Jaszi arrives at conclusions that align with hers: that users—in this case, educators—have a crucial role to play in making their transformative uses intelligible to others and that the character and parameters of transformative use are too important to leave to judges alone. The aforementioned Best Practices movement that Jaszi has helped launch takes these conclusions to heart, giving use-communities a framework within which to narrate the nature and extent of their transformative uses and to articulate norms outside of a formally juridical context.

Peter Decherney's essay takes up the question of fair use norms in another sense: as extralegal conventions that circulate as myth, rumor, and received wisdom within particular use-communities. Decherney's approach differs markedly from the "order without law" model advanced by Robert Ellickson and others. Whereas that model tends to find greater efficiency in extralegal conventions than in legal systems, Decherney observes that fair use rules-of-thumb tend toward inefficiency—that they "more often enshrine labyrinthine rules, impose unscalable levies on the reuse of work, or preclude fair use entirely." In a sense, copyright owners intuit this tendency whenever they refrain from pursuing infringement claims against users. Whereas an infringement suit might establish a legal precedent that disadvantages the rights holder, the absence of legal action usefully maintains the certainty vacuum around fair use. By remaining silent, copyright owners let typically risk-averse use-communities fill that vacuum with confusion, distortion, and bogus guidelines more restrictive than the law would likely be. By tracing the shifting norms within the experimental film community from the 1960s to the 1980s, Decherney initiates a new methodology for fair use scholarship, one that sets law and economics to the side and focuses instead on the informal, often oral modes by which fair use lore arises, spreads, mutates, and petrifies. As he memorably puts it, such an approach sees fair use as "a narrative system, closer to folklore than to jurisprudence."

Joseph Jenkins's contribution engages a different historical moment and vocabulary, scrolling back to Henry VIII's 1538 Proclamation of nationwide book licensing to establish copyright's prehistory in the partnership between a privately administered censorship logic and the ideological strategies of a sovereign figure. By providing a brief history of subsequent partnerships along these lines, a designation he willfully repurposes here, Jenkins argues that copyright regimes yoked to the self-preserving energies of sovereignty tend to permit only those works whose transformativeness is modest enough not to threaten or destabilize incumbent regimes. As long as it is in sovereignty's thrall, in other words, copyright shapes a human mass that is only mildly, incrementally creative. What such legal regimes constrain is the sort of radical creation that might undermine existing cultural logics and the sovereign forms with which they are entwined. But whereas sovereignty shuns radical creation, Jenkins continues, the republic depends, for its survival, on nurturing radically creative and destructive *virtù* in its citizens.[9] The survival here in question is not that of

a particular form of sovereignty (e.g., the United States as "global hegemon," "Christian nation," "true to the Founders' vision," etc.) but rather of the republican dynamic itself: the process of resistant, creative, truly transformative engagement with emergent sovereign forms and cultural logics. In present-day copyright maximalism—an unholy alliance of private censorship, rights-holder lobbying, and legislative giveaways—Jenkins finds yet another public-private partnership bent on sustaining particular forms of sovereignty and relegating transformativeness to the margins rather than on cultivating citizen *virtù* in all its vital turbulence.[10]

In this issue's most explicitly literary meditation on fair use, Robert Spoo reads Henry James's tale "The Real Right Thing" as a parable about another kind of sovereignty: that of the dead over the living. As he begins to research a commissioned life-study, James's biographer-protagonist feels his subject—the deceased author Ashton Doyne—first bestow and then retract his blessing through a series of ghostly visitations. Convinced by these hauntings that Doyne wishes his story left untold, the biographer finally scuttles the project. But where the end of "The Real Right Thing" manifests James's well-documented wish to shield the dead from the prying eyes of scholars and biographers, Spoo finds the tale's conclusion haunted by its middle, a portrait of the intimate exchanges fair use—particularly the fair use of unpublished materials—might permit between the living and the dead. What interferes with these exchanges, for Spoo, is not simply the right to privacy but its entanglement, since its inception, with copyright. Thanks to this entanglement, copyright is no longer merely an incentive to fresh creation; it is also a means of adjudicating the privacy of authors, both living and deceased, and of their heirs and assignees. But as Spoo observes, we already have robust privacy torts without needing to press copyright into service as an auxiliary privacy regime. To heed the second-order haunting in James's tale would be to disentangle these regimes: to render unto privacy what is privacy's and unto copyright what is copyright's. The specter of privacy and moral rights must be exorcized from copyright, that is, before the full benefits of fair use can be realized. Until that happens, the fair use of unpublished works in particular will remain a stunted area in law and publishing practice in the United States, despite Congress's having lifted the per se rule against such use twenty years ago.

Whereas Spoo would subtract considerations of the rights holder's personal privacy from copyright, Paul Saint-Amour invites us to consider

the user's personhood interests in a protected work with which she has intensively interacted. Saint-Amour invokes Margaret Jane Radin's distinction between "fungible" property, which can be perfectly replaced by an equivalent object, and "personal" property, which is so much a part of its owner's self-production and self-recognition that its replacement cannot fully remedy the pain of its loss. This distinction, according to Radin, has long been a silent normative criterion in court decisions, particularly those that upheld the tenants' rights revolution of the 1970s. Saint-Amour proposes a tenants' rights provision in intellectual property law: a new, fifth factor in fair use. Such a provision would acknowledge that the user of a protected work might enter, through prolonged interaction, into a personal rather than merely fungible relation to that work, a relation that could attenuate the rights holder's sovereignty over the work's copyright. By considering the user's personal property relationship to the work, this proposed fifth factor would recognize that a work's creator and heirs do not have a monopoly on personal property claims upon it. And by allowing that a user's personhood can be entangled with a work through intensive and protracted engagement, it would recognize that certain kinds of use transform not only the work but the user as well. There may be another energy here as well, one that remembers what was dissident about the tenants' rights revolution. We are partly constituted as subjects by our desire for the protected works with which global media inundates us. Under the current copyright system, we pay once to consume these works and, too often, a second time to express interactively with them a self formed to desire them. How, Saint-Amour asks, can we be required to pay twice for the only dwelling in which we are allowed to live?

We would like to thank each of our contributors, whose insightful writings, past and present, have inspired this volume and informed these introductory remarks. We would also like to express our thanks to the editors of *Law & Literature* for encouraging us to undertake this special issue.

1. 510 U.S. 569 (1994).
2. See, respectively, *Kelly v. Arriba Soft Corporation*, 280 F.3d 934 (9th Cir. 2002) *withdrawn*, re-filed at 336 F.3d 811(9th Cir. 2003); and *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).
3. Marjorie Heins & Tricia Beckles, *Will Fair Use Survive? Free Expression in the Age of Copyright Control* (New York: Brennan Center for Justice at NYU School of Law, 2005), at http://brennan.3cdn.net/5e7962b4cf0020e496_4am6br5vo.pdf (accessed December 2012).

4. For an engaging and accessible account of the Best Practices movement (including practical advice and template codes), see Patricia Aufderheide & Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (Chicago: University of Chicago Press, 2011).
5. 448 F.3d 605 (2006).
6. Much of Jeff Koons's art may be interpreted as gesturing toward this essentially psychoanalytic insight: what a photographer, whose photo Koons's art appropriates, may consider his *own* "original expressive purpose" is shown by Koons, through his display of the photo among a panoply of commodity images, to be nothing more than the photographer's adherence—often unconscious—to implicit "laws" (the laws of desire in the cultural moment that produced the photograph, mediated substantially by the logic of the commodity). In other words, Koons's art can be read to suggest that the "original expressive purpose" of a given photograph is neither unitary nor fully knowable. Koons's work has played an important role in recent fair use jurisprudence—see Tushnet's and Jaszi's comments on it in this issue.
7. *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).
8. In Jaszi's hopeful portrait, educators model a kind of critical thinking that positively transforms both the object of study and the student. An alternative or supplementary portrait may be worth considering as well, one that notes additional impediments to transformative pedagogy. Many teachers today, disciplined through fear of their students' standardized-test performances, substantially limit their teaching to assigning and explaining predigested teaching materials sold to school systems by for-profit interests. These teachers then administer exams that test their students' ability to select, among prefabricated choices, those notions "originally intended" by the teaching materials to be seen as correct and important for students to know. The student is thereby assimilated into preexisting cultural logics (including preexisting employment hierarchies) rather than being transformed through the practice of critical thinking and writing. Such logics risk tragically reducing, in the students they educate, the very quality required by law for fair use of copyrighted materials: the propensity to transform a work critically and creatively. The viciousness of this cycle suggests that advocacy for copyright law reform, including reform of fair use, cannot be separated from the critique of more broadly ossifying logics. It should be recalled that today's overwhelming commodity logics have much in common with what is referred to, in classical republican theories, as corruptive subjection to private interests. It should also be recalled that the writers of the U.S. Constitution and its Intellectual Property Clause had great respect for these theories.
9. The republican cultivation of radically creative and destructive *virtù* animates the saying, "Prepare continually for war to avoid wasting the citizenry's *virtù*, its potentiality, in actual war."
10. Lawrence Lessig argues, in *Code: and Other Laws of Cyberspace, Version 2.0* (New York: Basic Books, 2006), that computer code can regulate human behavior, often to a greater degree than state-enforced law. It can do this by placing human psyches in software architectures that offer limited selection menus for decisions. But Lessig nonetheless exhorts a state-enforced legal structure: one designed to change the course of technology. He proposes that we first decide what kind of citizenry we would like to see constituted by our laws and then accordingly regulate technology. But such interplays may be a bit more complicated. They exhibit a kind of circular quality: technology and the traumas it brings (including traumatic ecstasies) will themselves constitute, in large part, the mass's desires to pursue a certain mold of citizenry or personhood. The ideal citizenry desired by the masses, engaged with current and foreseeable media ecosystems, will likely differ widely from that of classical republican polities. (Even modernity, prior to any *post-*, can be read as resistant to classical republicanism; see J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Moment* [Princeton NJ: Princeton University Press, 1975].) Or should we just poll a certain elite? Disconcerting questions here arise.