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‘Transforming’ the Conversation:

Rethinking Fair Use in Academic Course Reserves

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'Transforming' the Conversation:

Rethinking Fair Use in Academic Course Reserves

Fair use for electronic course reserves in academic libraries exists in a constantly shifting environment. To make more sense of the challenges being faced by librarians in this setting, the Association of Research Libraries (ARL) put forth a “Code of Best Practices in Fair Use for Academic and Research Libraries,” in January of 2012. One of the more interesting aspects of this work is the idea of transformative use. When assessing fair use, “did the use ‘transform’ the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and values as the original?” (Association of Research Libraries, 2012) This concept of transformative use within the fair use analysis presents a number of opportunities for academic libraries as it relates to electronic course reserves.

While transformative use does have the potential to change the landscape of electronic course reserves, the current way of thinking about copyright and fair use in the context of course reserves typically does not take transformative use into account as part of the fair use analysis. In this context, academic libraries should reframe the conversation about electronic course reserves; this paper suggests a strategy for doing so. The first step in this process is to examine the ARL argument about transformative use, and how it plays into the discussion of fair use in the electronic course reserves setting. That approach needs to be considered in the broader context of fair use, especially how it relates to transformative use. Finally, the role of the course and of the faculty teaching the course must be examined. Considering all of these points

together will allow the library community to begin a reexamination of transformative use for course reserves within the fair use context.

ARL Guidelines

The concept of transformative use is discussed multiple times in the ARL's "Code of Best Practices." An important passage makes clear that transformative use describes a transformation in how, and in what context the work is being used, not in any transformation to the state of the work itself.

"In cases decided since the early 1990s, the courts have made it clear that in order for a use to be considered 'transformative,' it need not be one that modifies or literally revises copyrighted material. In fact, uses that repurpose or recontextualize copyrighted content in order to present it to a new audience for a new purpose can qualify as well." (Association of Research Libraries, 2012)

This statement is important as it establishes that the transformative act is the repurposing or recontextualization of an item, not the contribution of additional content to the original item. Transformation is an act requiring the reader of the item to use it in a different context than that originally intended by the creator.

Another relevant portion of the code for this discussion is section one, entitled, "Supporting Teaching and Learning with Access to Library Materials via Digital Technologies," which discusses fair use of academic course reserves. With relation to transformative use, the guide states that,

"For example, works intended for consumption as popular entertainment present a case for transformative repurposing when an instructor uses them (or excerpts from them) as the objects of commentary and criticism, or for the purposes of illustration. Amounts of material used for online course support should be tailored to the education purpose, though it will not infrequently be the case that access to the entire work (e.g., an illustrative song in a class on the history of

popular music) will be necessary to fulfill the instructor's pedagogical purpose.”
(Association of Research Libraries, 2012)

This excerpt reinforces the value added by the professor through analysis of the work for the greater good of the class. Crucially, items can be used in their entirety, even in an electronic state, when that use repurposes the intent of the author's creation and can be defended by the professor's pedagogical approach within the class. This does mean that certain uses would be restricted. For example, digitizing an entire textbook for the use of the class would not be acceptable, since the original intent of the textbook is to supplement learning within a classroom setting. However, a professor examining psychosocial maturity and deviance in adolescents might consider using the entirety of JD Salinger's *The Catcher in the Rye*, as it could be used as a case study to examine whether an adolescent male has reached a state of psychosocial maturity. In this, there is a foundation for arguing for fair use based on transformative use.

Rethinking Fair Use

The next aspect of this discussion concerns how fair use is viewed within the context of course reserves. Historically, fair use has assumed an “affirmative defense” approach.(Smith, 2013) *Merriam-Webster's Dictionary of Law* defines affirmative defense as ‘a defense that does not deny the truth of the allegations against the defendant but gives some other reason (as insanity, assumption of risk, or expiration of the statute of limitations) why the defendant cannot be held liable.’ (Merriam-Webster's Dicitonary of Law, 2013) Based on the definition provided, this approach as a fair use defense is troubling for a number of reasons. The most apparent of which is that conforming to this scenario places librarians and electronic reserves staff in a place of admitting wrongdoing, in any implementation.

Kevin Smith, Scholarly Communications Officer at Duke University has addressed this concept in a blog posting titled ‘On Fences and Defenses.’ He asserts that the affirmative defense approach is misplaced within copyright fair use defenses. Rather, he asserts that it is up to the publishers of such works to prove that their rights go as far as they assert they do. He summarizes this nicely when he writes,

“This perspective is also useful in thinking about the publisher arguments in the GSU lawsuit. The publisher’s reply brief in that case... asserts that those who claim fair use have ‘the burden of demonstrating the limited nature of the unauthorized use.’ Not only is there no such requirement about fair uses being ‘limited’ in the legislative or judicial definition of fair use, but this assertion potentially gets the burden of proof wrong. It is the plaintiff publishers, according to this perspective, who must show that the use in question is not fair use and therefore that they are entitled to assert any control over it.” (Smith, 2013)

This approach to fair use claims that the burden is on the plaintiff to demonstrate the extent of their rights in regard to copyright protection; as such it removes course reserves staff from a consistently defensive position. Viewing fair use as a right, instead of a defensible wrong, allows course reserves staff to begin analyzing transformative use of electronic reserves within the fair use context. Further, changing the collective mindset from mitigating a wrong, to promoting a right that course reserves staff have, allows for the proper framework in which a discussion on transformative use may take place.

The next aspect of fair use to look at is how the legal community approaches the concept of transformative use within the fair use framework. When looking at the concept of transformative use, it is important to consider the interpretive distance of the defendant’s use of the plaintiff’s work. In her article, “Everything is Transformative: Fair Use and Reader Response,” Laura Heymann writes, “If that distance is significant enough to create a distinct and separate discursive community around the second work, the defendant’s use is more likely to be

transformative (and, perhaps, fair). The focus is therefore not on the author's intent...but on the reader's reaction." (Heymann, 2008) This approach to transformative use looks at how the work is perceived, not at the original intent of the author. Heymann goes on to note that "a focus on the defendant's purpose yields a conclusion that the copyrighted work has not been 'transformed' in a physical or legal sense, while a focus on reader response may well yield the opposite conclusion." (Heymann, 2008) This can be applied to course reserves by looking at the role of the professor and the class in a very specific way. The class can represent the second discursive community when discussion of the item centers on the pedagogical approach of the professor.

Another look at transformative use within the legal framework can be taken from David Lange and Jennifer Lange Anderson's "Copyright, Fair Use and Transformative Critical Appropriation" presentation at the Duke Conference on the Public Domain. In their work they "suggest that fair use must be understood to make deliberate room for transformative appropriation of copyrighted work whenever the appropriation and transformation are necessary steps toward the realization of significant social criticism." (Lange & Lange Anderson, 2001) They build this argument largely on the case *Cambell v. Acuff Rose*. This was a landmark case asserting parody as a transformative use within the fair use analysis. When analyzing the decision of Justice Souter in this case, Lange and Lange Anderson remark that it is important "to recognize that fair use is not inevitably a reflection of the four factors, or of market analysis, or even of parody, but is driven rather by what Justice Souter called 'a strong public interest in the publication of the secondary work'...we think it fair to join others in suggesting that the door is at least ajar for other forms of transformative critical appropriations as well." (Lange & Lange Anderson, 2001) Based on the assessment of the authors in this piece, as well as the established

nature of transformative use within fair use determination, use of material in electronic course reserves is a fitting scenario to move forward with under the auspices of transformative use.

The views expressed by the authors of these articles were recently reinforced by Minnesota Magistrate Judge Jeffrey J. Keyes in a Report and Recommendation submitted in the case of *American Institute of Physics, John Wiley & Sons, Inc., and Wiley Periodicals, Inc. v. the law firm Schwegman, Lundberg & Woessner*. In his report, Judge Keyes acknowledges that the label of transformative use is generally applied when the original piece has been altered in some material way. However, Judge Keyes writes that the “reproduction of an original without any change can still qualify as a fair use when the use’s purpose and character differs from the object of the original, such as photocopying for use in a classroom.” (Report and Recommendation for *American Institute of Physics, John Wiley & Sons, Inc., and Wiley Periodicals, Inc., v. Schwgman Lundberg & Woessner P.A., and John Doe Nos. 1-10, v. The United States Patent and Trademark Office*, 2013) This passage reaffirms that, at least in this instance, the thinking of the practicing legal community is in line with legal scholars and the ARL on the nature of transformative use within the fair use context.

The Role of the Class

The final point for discussion here is the role of the class and of the professor in the analysis of transformative use. It is understandable from an outside perspective to view a professor constructing a course around the works that will be used in the class. This is understandable, yet very incorrect. Rather, the approach of a professor in constructing a class is a much deeper activity that relies heavily on the pedagogical approach of the professor to the subject at hand. The professor is not attempting to justify the message being put for in the works

that they assign to read in the class, but are rather using these works to reinforce the overall ideas and concepts that the professor has chosen to focus the class around.

Dean Braa and Peter Callero discuss the concept of how the material of a class is used to engage students and create a community that will use the material in a broadly beneficial manner in their article, “Critical Pedagogy and Classroom Praxis.” While the article focuses on the sociology classroom, the discussion is relevant to other disciplines. Braa and Callero write that, “Any serious application of critical pedagogy must at some level take steps to facilitate greater dialogue, critique, counter hegemony, and praxis.” (Braa & Callero, 2006) When considering the four concepts of dialogue, critique, counter hegemony, and praxis, a professor must consider how the material used in the class will aid in how the students engage with the class, and in what they take away from it.

An example of how this approach applies to transformative use within the context of being a work used in a class is the previously introduced, *The Catcher in the Rye*. Within a course on psychosocial maturity, the give and take of discussion on the concept of psychosocial maturity between students and faculty in the class can be used to turn a critical eye to the character of Holden Caulfield. The class can critically examine the character to apply the theoretical concepts as were discussed in class, including the concept of counter hegemony, meaning the way in which the work critique or counter traditional hegemonic power within the context of psychosocial maturity. Finally, these actions provide praxis by providing the opportunity to apply the theoretical concepts discussed in a concrete manner. This example highlights how a pedagogical approach in a class can give direction and purpose to the material used in the class. It further reinforces the previously discussed approaches of both the library community and legal scholars to the concept of transformative use in the fair use analysis.

When examined this way, it is possible to consider the class as its own distinct work that utilizes pieces of culture (articles, books, movies, audio, etc.) for the purpose of reinforcing the pedagogical approach of the professor to the subject at hand. When viewing a course within this context, the critical appropriation aspect of transformative use discussed in the previous section gains a new relevance. There are few settings in which social criticism and discussion can thrive like in the academic classroom setting. Few other settings make such a strong case for transformative appropriation of copyrighted material than does the non-profit setting of an academic classroom.

Conclusion

The recommendation in the ARL's "Code of Best Practices in Fair Use for Academic and Research Libraries," that applying transformative use assessments in fair use could allow academic course reserves to utilize a much higher percentage of copyrighted works, up to the entire work, is difficult to imagine based on previous views of fair use. By reexamining specific aspects, including fair use, legal limitations of transformative use, and the role of the class and professor in this process, we can begin to understand the circumstances and situations that would allow for a greater use of materials in electronic course reserves. Approaching fair use as a right, instead of as an affirmative defense allows us to appropriately examine the concept of transformative use. Understanding that transformative use has a legal precedence in the response of the recipient, as opposed to the degree of physical change the copyrighted material undergoes, allows us to examine the role of the class in this scenario. Viewing the class as its own work, whereby the copyrighted works are transformed to support the pedagogical approach of the professor, allows us to see certain situations in which the use of entire works are justified under

fair use. By reframing the conversation of electronic course reserves, transformative use, and fair use in this manner, the library community may begin to engage in dialogue consistent with the recommendations of the ARL in their “Code of Best Practices.”

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