
Fair Use and Media Studies in the Digital Age

By Steve Anderson

Electronic publication is often hailed as a potential remedy for much that ails academic publishing due to the obvious advantages of reduced costs for publication and distribution. But questions of economics should not be the determining factor for the revitalization of scholarly publishing. (1) Instead, electronic publication may be viewed *on its merits* as a superior platform for exploiting the full potentials of richly mediated scholarly work. However, persistent misconceptions about the viability of fair use as the basis for reproducing copyrighted media continue to hamper this movement. (2) I will argue that an informed and assertive application of principles of fair use is crucial to the long-term interests of academic publishing in the digital age. When publishers actively support an expanded view of fair use, authors are freed to incorporate primary media sources and archival materials more generously in their work, creating opportunities for intersection, expansion and interconnection with the work of others. This mode of publication also signals a potential transformation in how scholars relate to their objects of study. Instead of functioning as a lone detective who selectively extracts media samples from archives or cultural contexts, crafting a singular argument around them, a scholar may simultaneously analyze and *facilitate access* to collections of media. This type of scholarship, which may be described as “access-oriented,” is predicated on an expansive definition of fair use that has never been riper for broad application across, not just film and media studies, but the full spectrum of scholarly electronic publication.

Copyright and indeed the very concept of “intellectual property” as they are practiced in today’s academic publishing industry are designed to prevent precisely those affordances that are most powerful about networked scholarship – specifically the unfettered reproduction, dissemination, transformation and recontextualization of ideas, images and media. What I am calling for here is a rethinking of academic publishing’s attitudes toward the fundamentals of intellectual property ownership and its protection. This has implications that extend beyond parallel questions of open access. Scholarly publishers can learn from the successes and failures of old and new business models that are being experienced across the commercial music, film and publishing industries. Whereas conventional copyright is part and parcel of a fading regime of scholarly publication, an affirmative stance towards fair use offers a key to enriching the circulation of ideas, images and media, and exploding singular texts into a broader context. In order for this to happen,

publishers must take a more active role in promoting and expanding the potentials of richly mediated electronic scholarship.

But where university presses have, in decades past, been justifiably reticent to loosen their internal policies on fair use, the tide has now turned to the point where it is actively counter to their interests if they fail to do so. Ironically, this shift began with the introduction of reactionary legislation designed by the United States Congress to address the growing complexity of copyright enforcement due to the easy reproduction and distribution of digital media. The Digital Millennium Copyright Act (DMCA), which was signed into law by U.S. President Clinton in 1998, introduced the possibility of criminal prosecution for circumventing the Digital Rights Management (DRM) protections encoded into DVDs and provided increased penalties for copyright infringement via the Internet. The DMCA signaled for many the final nail in the coffin of fair use, which was widely viewed as a barely viable strategy within academic publishing. Numerous court decisions followed, including the highly publicized Napster (2001) and Grokster (2005) cases, supporting the copyright industries' campaigns against file sharing over peer-to-peer networks. Emboldened media industry lobbying organizations such as the Recording Industry Artists of America (RIAA) made headlines by pursuing a deliberately extreme agenda of high-profile prosecutions of ordinary citizens that polarized the issue of copyright enforcement into extremes of "piracy" versus the kind of hard media retail sales (CD and DVD) that dominated late 20th century home media distribution. Together with the RIAA, The Motion Picture Association of America (MPAA) launched well-funded publicity campaigns emphasizing the criminal consequences of file-sharing aimed at high school and college students, while simultaneously enlisting the help of college and university Information Technology departments in policing their network traffic for file-sharing data. Interestingly, fear of litigation on college campuses trickled upwards faster than downwards as many faculty and administrators experienced a chilling of all digital media uses (not just file-sharing), resulting in marked conservatism and undue gatekeeping in the fair use policies of many university-based electronic journals.

The consequences of these effects across U.S. higher education were widely documented in research funded by the Mellon and MacArthur Foundations. In an influential report funded by Mellon, "The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age" (2006), William Fisher and William McGeeveran of Harvard Law School's Berkman Center for Internet and Society cite the obvious potentials of electronic publication and open access:

The internet and other digitized networks remove most practical

impediments to distribution of information – the costs of paper, printing, and mailing; the need for access to a physical copy of a work; the marketing and related costs necessary to publicize the existence of content and help interested users find it. In response, passionate advocates of the open access movement have promoted the potential for distributing knowledge over these networks unencumbered by most copyright restrictions. (3)

But their report ultimately focused on the numerous impediments that many educators face when working in the digital realm. In spite of the success of projects such as MIT’s Open Courseware initiative, (4) the authors cited “resistance from the academic publishing industry to changes in its fundamental business model, which depends on enforcement of intellectual property rights” among the most disabling factors. The following year, American University’s Center for Social Media (CSM) published a MacArthur-funded white paper titled “The Cost of Copyright Confusion for Media Literacy” (2007), arguing that the combination of fear and misinformation about copyright and fair use leads not only to less effective and innovative scholarly work, but compromised thinking and communication skills throughout higher education. (5)

Direct responses to the DMCA also emerged within both the legal and technological realms. The non-profit organization Creative Commons was founded in 2001 and released its first set of tiered licenses a year later, introducing the phrase “Some rights reserved” as an alternative to the default copyright notice, “All rights reserved.” (6) Also in 2002, the non-profit Xiph.org Foundation launched Theora, an entirely free, open-source and patent-free video codec designed to compete with proprietary formats such as MPEG4. And more recently, organizations such as the Open Video Alliance (7) and Participatory Culture Foundation (8) have actively sought to build viable, free and open technologies to support copyright-free media access, creation and distribution. These efforts are remarkable due in part to the depth of infrastructural transformation that they undertake, rather than setting their sites on surface effects or risky campaigns for legislative reform.

Further evidence of progress on the front lines of fair use may be seen in the continuing production and dissemination of Codes of Best Practices in Fair Use from the CSM. Under the direction of Pat Aufderheide (9) and with legal guidance from Peter Jaszi, Director of the Glushko-Samuelson Intellectual Property Law Clinic at American University, the center has published seven Best Practices guides to date, articulating fair use principles within communities associated with Documentary Filmmaking, Online Video, Media Literacy Education, Open CourseWare, Dance,

Poetry and Research Libraries, while additional organizations such as the Visual Resources Association have produced their own guides explicitly modeled after those produced by the CSM. (10) In addition, the legal advocacy organization, the Electronic Frontier Foundation (EFF) has expressed its willingness to defend in court members of these communities who adhere to the CSM's Codes of Best Practices, lending a degree of concrete protection to the principles and standards articulated in the guides. In the judicial arena, an affirmative lawsuit filed by the EFF against Universal Music Group resulted in a court ruling that it was illegal for takedown notices to be issued without taking the possibility of fair use into consideration (11) and the three-year battle between YouTube and Viacom ended in June 2011 with a summary judgment supporting the fundamental protection for online service providers against litigation from copyright owners. (12)

More recently, in July 2010, the U.S. Copyright Office announced an expanded set of exemptions to the DMCA prohibition against the circumvention of the anti-copying measures (a.k.a. Digital Rights Management or DRM) encoded into commercial DVDs, broadening the protection to include fields outside Media Studies, non-commercial video production and even student work. The level, consistency and extent of these public shifts in favor of fair use would have been nearly inconceivable just a decade ago. As recently as five years ago, Law Professor Lawrence Lessig was widely quoted on the subject of fair use as saying "Fair use is the right to hire a lawyer." (13) But other legal scholars specializing in copyright law have long held the opposite opinion. Jaszi has argued that "we live in a Golden Age of fair use" in which "a fair use renaissance has emerged." (14) More recently, Lessig himself has shifted his rhetoric about fair use to be openly supportive, no doubt motivated in part by the fact that recent court decisions have been weighing heavily and consistently in favor of fair use, particularly for educators and those whose rights have been curtailed by the aggressive tactics of the copyright industries. (15) This type of momentum should not be squandered by those constituencies that have the most to gain from broadened applications of fair use, including scholars who work with media and the presses and journals who publish them.

Unlike a majority of commercial presses that exist precariously under the umbrella of larger media conglomerates that include film, television or other forms of electronic entertainment, university presses and online journals have the luxury of relative autonomy and commercial inconsequentiality. (16) Put bluntly, academic presses are highly unlikely to be targeted for infringement by copyright holders. The fair use doctrine specifically sites educational uses ("the fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research, is not an infringement of copyright"

(17)) as having privileged status in the appropriation and reuse of copyrighted materials. Yet, many authors' agreements continue to place responsibility for obtaining permissions with the authors themselves, leading fearful and under-informed scholars to self-censor their use of media, even when it is crucial to their argument. To be safe, under such conditions, many contributors would surely opt for a path of lesser complication and resistance, choosing the centuries-old practice of ekphrasis over simply embedding a playable media file in their work.

But what kinds of scholarship become possible if the medium specificity of an electronic journal becomes an explicit part of its editorial mandate? It is all-too rare for an electronic journal to announce, as does the [Vectors](#) journal that I co-edit with Tara McPherson at the University of Southern California, that the goal of the journal is to "publish only works that *need*, for whatever reason, to exist in multimedia." As stated in the Editorial introduction to the journal,

Vectors features submissions and specially-commissioned works comprised of moving- and still-images; voice, music, and sound; computational and interactive structures; social software; and much more. *Vectors* doesn't seek to replace text; instead, we encourage a fusion of old and new media in order to foster ways of knowing and seeing that expand the rigid, text-based paradigms of traditional scholarship. (18)

In keeping with its emphasis on access-oriented, richly mediated scholarship, *Vectors* has taken a proactive stance with regard to fair use and the possibility of multiple scholarly treatments of any given media set. But we also recognize that *Vectors* is a statistical anomaly, a limit case operating at the edges of the academy, at the intersection of design, scholarship and next-generation electronic publication. *Vectors* offers a proof-of-concept that demonstrates the potentials of resource-intensive, interactive, multi-modal scholarship, but we are under no illusions that it represents a model for a majority of electronic scholarly publishing in the near future. (19)

A development with more immediate implications for mainstream scholarly publishing is the shift within print-oriented presses to sanction, or even encourage, the development of a web presence to accompany conventional book publications. These online companions vary widely in scope and intent, ranging from richly illustrated supplements that allow authors to include a great many more images (or audio/video clips) than a printed text might accommodate, to a fully-realized extension of a work's primary argument into the digital realm. While the value of the former seems relatively straightforward, I would argue for the increasing

importance, even need, for the latter. One such example may be seen in Anne Friedberg's [digital companion](#) to her book, *The Virtual Window*. The book, published by MIT Press, represented over a decade of the author's research and ruminations on the evolution of visual culture as seen through the metaphor of the window ranging "from Alberti to Microsoft." Shortly after the book's publication, Friedberg launched an interactive online project titled "The Virtual Window Interactive," created in collaboration with designer Erik Loyer and ultimately published in the *Vectors* "Perception" theme issue in 2006. [The Virtual Window Interactive](#) was created with the knowledge and approval of Friedberg's editors, but it received no direct support from MIT press. The resulting project offers an opportunity to view video clips and still images referenced in the book (an illustrated extension), but more importantly, it includes an experiential component that allows users to "play" with different combinations of media content and historically contextualize framing devices, ranging from a camera obscura or Renaissance frame to a Cinemascope screen or mobile video device. (20)

Friedberg's project incorporated dozens of video clips in accordance with a draft version of the fair use guidelines distributed by the Society for Cinema and Media Studies (SCMS) in 2007 and was also informed by the work emerging from the Center for Social Media in creating their initial Codes of Best Practices in Fair Use. The CSM guides are intended to offer an alternative to evaluations of fair use based on the "Four Factors" identified in Section 107 of the U.S. Copyright Act of 1976. Because they are rooted in community needs and actual practices, the CSM guides can allow for context-specific nuances and needs that are specific to a particular mode of use. A parallel – some would say competing – tool devoted to empowering non-specialists may be found in the [Fair Use Evaluator](#) (21) tool created by Michael Brewer of the University of Arizona Library. The Fair Use Evaluator guides users through a series of questions designed to self-evaluate the legitimacy of a proposed fair use. At the conclusion of the evaluation, users may print out a time-stamped statement reflecting the user's assertions regarding the relative fairness of their use.

Legitimate debates over the relative significance of the "Four Factors" (and their reflection in tools such as the Fair Use Evaluator) versus Best Practices continue, but it seems clear that the greatest potential for long-term transformation lies with communities of users and practitioners for whom robust applications of fair use are a crucial part of the cultural value they are producing. In principle, as uses that are based on clearly articulated community values proliferate, such work constitutes a basis from which progressive legislative reform might emerge. Throughout the 20th century, university presses took a leadership role at key moments of disciplinary evolution, fostering cultures of inquiry, contestation and

transformation that made them worthy stewards of many academic fields. It's time for electronic publishers and journals to recapture their role as leaders in defining and supporting the most innovative and richly mediated forms of scholarly work in the context of the 21st century. Electronic publishers have an opportunity to participate in shaping the nature of this transition in ways that will serve them in the long run, or risk being rendered increasingly irrelevant and disconnected from the most vibrant modes of media studies scholarship. Instead of occupying a position of dubious regard within the rigid hierarchies of academic credentialing, publishers of electronic scholarship are best positioned to affirmatively transform the culture, standards and expectations related to media-rich publishing and the responsible expansions of fair use.

Endnotes:

(1) For a compelling argument for the transformation of University Press funding from a retail to a subsidy model, see Chapter five, "The University" in Kathleen Fitzpatrick's *Planned Obsolescence* (New York: NYU Press 2011); the book's open peer review via CommentPress is also available online at: <http://mediacommons.futureofthebook.org/mcpres/plannedobsolescence/> (Accessed May 3, 2012).

(2) Although this discussion focuses on fair use within the context of United States copyright law, the principles of access and benefits of richly mediated scholarship applies to broader, international contexts as well. See also Jaimie Baron's and Kristin Thompson's contributions to this issue of *Frames*.

(3) William W. Fisher & William McGeeveran, "The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age," Cambridge: Berkman Center for Internet and Society at Harvard Law School, Research Publication No. 2006-09 (August 10, 2006).

(4) It is worth noting that MIT's OCW initiative still devotes significant efforts to removing copyrighted content from its online course portfolios, even when those uses would have a strong claim to being fair use, as outlined in the CSM Guidelines for Fair Use in Open Courseware <http://www.centerforsocialmedia.org/ocw> (Accessed May 3, 2012).

(5) Renee Hobbs, Peter Jaszi, and Pat Aufderheide, "The Cost of Copyright Confusion for Media Literacy." Washington, D.C.: Center for Social Media at American University School of Communication (September 2007).

(6) Here, it would be appropriate to offer a nod of acknowledgment to the tiered licensing structure of Creative Commons (CC). Creative Commons has brilliantly addressed a relatively narrow spectrum of the problem of reuse of existing works, but the attribution of tiered licenses requires forethought on the part of creators, who are invited to specify the terms and conditions under which their works may be used by others. While this represents a huge step forward in undermining the hegemony of conventional copyright, CC licensing makes no inroads into the vast oceans of commercial media that are already copyrighted and protected by digital rights management systems and enforced by well-funded corporate legal departments and federal authorities.

(7) <http://openvideconference.org> (Accessed May 3, 2012).

(8) <http://www.participatoryculture.org> (Accessed May 3, 2012).

(9) See Patricia Aufderheide’s essay [elsewhere in this issue of Frames](#).

(10) CSM Best Practices in Fair Use may be downloaded here: <http://www.centerforsocialmedia.org/fair-use/best-practices> (Accessed May 3, 2012).

(11) Lenz v. Universal, <http://www.eff.org/deeplinks/2008/08/judge-rules-content-owners-must-consider-fair-use-> (Accessed May 3, 2012).

(12) Viacom v. YouTube, <http://www.eff.org/deeplinks/2010/06/youtube-wins-summary-judgment-viacom-dmca> (Accessed May 3, 2012).

(13) The actual quotation from Lessig’s *Free Culture* is too infrequently reproduced in its full context: “But fair use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad—in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides it- self on the rule of law.” Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin 2004), 187.

(14) Peter Jaszi, Keynote address at the University of Southern California conference on Fair Use and the Future of the Commons, Institute for Multimedia Literacy (October 27, 2008).

(15) This is seen most clearly in his most recent book *Remix: Making Art and Culture Thrive in the Hybrid Economy* (New York: Penguin 2008) in which Lessig celebrates the flourishing of remix culture throughout online spaces in spite of continuing resistance from the copyright industries.

(16) It's about time the limited scale of academic publishing turned out to be a positive factor!

(17) U.S. Copyright Law Title 17, Section 107.
<http://www.copyright.gov/title17/92chap1.html#107> (Accessed May 3, 2012).

(18) <http://www.vectorsjournal.org/journal/index.php?page=Introduction> (Accessed May 3, 2012).

(19) Indeed, this recognition is implicit in the *Vectors* team's recent transition to developing a next-generation authoring platform called "Scalar." Developed by Erik Loyer and Craig Dietrich, Scalar is an authoring platform designed to encourage authors to develop

sophisticated systems of information architecture to deliver combinations of text, image, sound and video. By focusing an author's attention on the structure of an information system for reconfiguring the contents of a media archive, Scalar projects aim to encourage subsequent revision, contestation or expansion of individual works.

(20) At the time of this writing, a non-bubbled internet search for "The Virtual Window" returns the *Virtual Window Interactive* site as the top search return.

(21) <http://librarycopyright.net/fairuse/> (Accessed August 10, 2010).

Copyright:

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