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From the University Presses -- Georgia State and (Un)Fair Use: A Rebuttal to Kenneth Crews

Sanford G. Thatcher
Penn State Press, sgt3@psu.edu

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last year at this time.” Even if access has increased since last year and even if students are more likely to have access than non-students, these figures suggest that a significant number of college students can’t use their online library resources from home. Since the conference, I’ve been asking librarian guest speakers in my academic libraries course about students without home computers. Their response has been unanimous: they encounter many students for whom campus access is the only alternative.

Beyond the campus, the public library used to be the great equalizer. A poor kid whose parents couldn’t afford to buy books could check them out from the local library, take them home, read them, and then go back for more. A voracious reader could at least partially overcome the disadvantage of less than adequate schools and gain the knowledge and skills needed to get into a good college or land a good job. Large public libraries might even provide more convenient resources for college students, at least for undergraduates. While books remain for reading in the public library, access to scholarly online resources beyond those suitable for high school is less likely. Furthermore, some public libraries allow access only to information resources and don’t make available the software such as word processing and spreadsheets needed to complete assignments. Finally, according to Public Libraries and the Internet 2009: Study Results and Findings, around 18% don’t allow users to connect flash drives to public library computers, so the students can’t store their work or information findings for later use.

A digital divide that hinders getting educated is especially troublesome in these difficult economic times when employers require more skills and higher degrees. Detroit, where I live, used to be a place where a high school graduate could get a job that supported a middle class lifestyle. Manufacturing jobs moved abroad, and the remaining ones pay much less than they used to. My university’s enrollment is reasonably steady even in these tough times because area residents are getting more education in hopes of bettering their lives. While upward mobility in America has often been more of a myth than a reality, America nonetheless needs a better educated work force to compete in the global economy. Hindering intelligent, talented students whose only fault is being poor from accessing library resources to complete the assignments that will lead to academic success, needed skills, and required degrees seems to me a violation of the American social contract, if not an outright denial of the American dream.

This article has come a long way from the optimistic view of the digital future painted by Michael Stephens to a gloomy prediction of a permanent underclass from the lack of computer access and skills. Michael and I didn’t come up with an answer in Charleston. I still don’t have one now. I would suggest that all libraries, but especially academic libraries, think about those students without computers and perhaps more importantly without broadband Internet access as they implement new services that move away from print to digital. I do have a few suggestions. Buy the extra copy of an important book in print even if the library already has a digital copy. Make sure that students can download to their flash drives even if doing so increases security risks. Have enough fast computers somewhere on campus for all who need to use them. Maximize the library Website for speedy loading and subscribe to electronic resources that do the same in the hopes that some students might get by with a dial-up connection. I’m sure that others could come up with additional suggestions. I agree that digital is the future of academic libraries, but libraries could at least recognize that the change has a downside for some users.

I’ll close by confessing why this issue is so important to me. I grew up in a lower middle class family where money was tight. Through hard work, scholarships, and the help of public and academic libraries, I received a doctorate from Yale University and a masters in library science from Columbia University. I’d like hard working, intelligent students who are unlucky enough to be poor to have the same opportunities. To do so, they need to find a way to cross the digital divide. We should take it upon ourselves as individuals and as a profession to help them make it.

From the University Presses — Georgia State and (Un)Fair Use: A Rebuttal to Kenneth Crews

Column Editor: Sanford G. Thatcher (Director, Penn State Press, USB 1, Suite C, 820 N. University Drive, University Park, PA 16802-1003; Phone: 814-865-1327; Fax: 814-863-1408) <sgt3@psu.edu> www.psupress.org

The suit brought on April 15, 2008, by three academic publishers — the presses of Cambridge and Oxford universities and the commercial house Sage — against Georgia State University is wending its way through the legal process of the federal court of the Northern District of Georgia, and it may be several months yet before any judicial opinion is forthcoming. But the case has already included an interesting intervention by Columbia professor Kenneth D. Crews, well-known to many as a frequent lecturer and writer on copyright issues and the long-time head of Indiana University’s Copyright Management Center in Indianapolis, which produced a great deal of very useful educational material aimed at helping graduate students and faculty understand their rights and responsibilities under copyright law.

The law firm of King & Spalding representing the defendants in the case commissioned Crews to prepare an “expert report” on copyright law and fair use as it pertains to the policies and practices carried on at Georgia State, and initially a 72-page document was submitted to the court on June 1, 2009. After responses were provided by the plaintiffs and their attorneys, Crews completed a rebuttal, filed on November 2. These are the two documents that will be the main focus of this article. They are accessible at Peter Hirtle’s LibraryLaw blog here: http://blog.librarylaw.com/librarylaw/2009/11/crews-important-studies-on-er-reserves.html.

First it may be helpful to lay out the background to this suit, briefly. Concern among publishers about the way that e-reserve systems were developing in libraries, threatening to take the place of print coursepacks, began to grow in the early 1990s. The first formal effort to reach some consensus about how e-reserve systems should function took place within the context of the Conference on Fair Use (CONFU), convened in September 1994 as part of the Clinton Administration’s National Information Infrastructure Initiative. (A useful summary of CONFU is available here: http://www.utsystem.edu/oig/intellectualproperty/confu2.htm.) E-reserves was one of five topics the CONFU participants discussed, but perhaps the most contentious, so much so that no recommendation about it was included in the final report of November 1998.

While Crews acknowledges his role in the CONFU process as someone who “participated in that subgroup” that developed the Fair Use Guidelines for Electronic Reserve Systems (Expert Report, p. 25), he is being far too modest. In fact, Crews was recruited to be the principal drafter of those guidelines.

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I know because I was the lead negotiator for the AAUP in working with Crews to incorporate language that would allow the AAUP to endorse the guidelines. (Lolly Gasaway was another member of the drafting committee.) Foremost among my objectives was to have the guidelines recognize explicitly that e-reserves were to function in the same fashion as traditional print reserve systems, in providing supplemental materials for a course and not constituting an entire coursepack. The key sentence in this regard is the following: “When materials are included as a matter of fair use, electronic reserve systems should constitute an ad hoc or supplemental source of information for students beyond a textbook or other materials.” (The full text of the Guidelines is available here: http://www.usg.edu/ogc/intellectualproperty/resvguid.htm.) This qualification is what allowed the AAUP to add its name to the list of groups endorsing the Guidelines (which also included the ACLS plus a number of smaller library associations, but not the ALA, ARL, or AAP, whose political positions at the time all were based on hopes of winning the battle subsequently in Congress). The judge in the GSU case is probably not aware of Crews’ role in the CONFU and his acceptance of this principle as a reasonable interpretation of fair use in application to e-reserves. The e-reserve policy as stated now at the University System of Georgia’s Website (http://www.usg.edu/copyright/additional_guidelines_for_electronic_reserves) conspicuously omits this consideration of e-reserves not substituting for coursepacks, although Crews’ own survey of policies in his Expert Report reveals this to be included in the policies at many other universities, which he admits adopted much of the approach taken in the CONFU Guidelines.

With the failure of CONFU to produce any consensus about e-reserves, publishers continued to worry and began to monitor practices as best they could be determined from Internet searches. I was a member of the Copyright Education Committee of the AAP during this period, and this group was asked by the AAP Copyright Committee to undertake a survey of e-reserve policies. Our research produced a report in February 2003 covering 103 institutions of higher education in 23 states, from community colleges through the largest public and private universities, and revealed that, despite the refusal of CONFU to adopt them, the Guidelines that Crews had drafted had de facto become the operating principles for many of these institutions, wherever they went beyond just a bald restatement of the law’s Section 107 itself. It appears that the sentiment expressed in the University of Texas System’s summary of CONFU was widespread: “the work performed by this group presents a valuable starting point for institutions wishing to develop their own electronic reserve guidelines.” In his Expert Report, Crews summarizes a similar survey he undertook, covering 37 institutions in 23 states. Although the two surveys only overlap to some degree, it was interesting to see that, when percentages were provided for amounts of material copied, the figure from our 2003 report was most often in the range of 10% to 15%, occasionally 20%, but never as much as the 25% that appears for a number of institutions in Crews’ survey — which suggests that over the past half-dozen years libraries have become bolder in their assertion of fair use with respect to e-reserve practices. This is not to suggest that even the lower figure can be taken as a reliable rule of thumb: as Crews himself emphasizes, no one factor is determinative in any fair-use analysis, and all four factors as well as other considerations that are relevant in any given case come into play in the assessment of what is fair in the particular circumstances.

Following upon this survey by the Copyright Education Committee, the AAP Copyright Committee set up an E-Reserves Task Force to which I was appointed. It began its work by reviewing the CONFU Guidelines but agreed after lengthy discussions over many months to settle for an FAQ rather than another set of guidelines. These have been posted since the summer of 2004 here: http://www. publishers.org/main/Copyright/CopyKey/ copyKey_01_02.htm. The preparation of this FAQ was spurred in part by investigations of practices at some campuses of the University of California where evidence had been uncovered of massive amounts of e-reserve copying that the AAP and AAUP considered to be well beyond what fair use permitted. Subsequent efforts to resolve these problems with the counsel’s office for the California system proved fruitless. Greater cooperation came later from a number of other universities that were approached in 2007 by the AAP, including Cornell, Hofstra, Marquette, and Syracuse. Georgia State was among the universities that engaged in these discussions, but it refuted every attempt. The suit was brought as a last resort.

It is very important for everyone to understand why Georgia State is taking such a position. The official copyright policy of the Regents of the University System of Georgia had been based on an idiosyncratic theory promulgated by a prominent copyright expert based at the University of Georgia Law School named L. Ray Patterson. This theory is explicated in, among other places, the book he co-authored with Stanley W. Lindberg titled The Nature of Copyright: Users’ Vantage Points and Rights published by the University of Georgia Press in 1991. The theory allows for a distinction between “use of the work” and “use of the copyright.” Use of the work, Patterson argues, is a right of “personal use” that copyright law must recognize as inherent in the Constitutional mandate for copyright to promote learning; “the personal-use principle prohibits copyright from being used to inhibit a user’s efforts to learn” (p. 70). Use of the copyright, which is the proper subject of fair use, pertains to the use by a competitor in another publication. Since no “publication” is involved in the use of a work included in a coursepack or posted on an e-reserve system, according to this theory there can be no infringement, no matter how much material is duplicated. It doesn’t matter to Patterson that this “may well enable individuals [or, presumably, their proxies in on-campus copy centers or libraries also] to make copies of copyrighted works instead of purchasing them” (p. 157).

Interestingly, the first draft of this book was presented in the guise of a “neutral” guide to fair use for faculty. I was a pre-publication reviewer of this book for the University of Georgia Press and, after much with the other reviewer, vociferously protested to the Press that it was anything but and, if published, should be honestly presented as the argumentative treatise it really was. Even though the Press followed this advice, the authors nevertheless succeeded in their goal of having the Georgia System adopt this theory as its official policy. I cite as an authority here Crews himself (who was, ironically, the first recipient of the L. Ray Patterson Award from the ALA in 2005). In Copyright, Fair Use, and the Challenge for Universities (Chicago, 1993), Crews observes that while he was completing the survey of university copyright policies for this book, “the legal counsel for the University of Georgia replied that the university had no such policy and that copyright issues simply were not a priority concern for the institution. After the closure of surveys...the university issued the most extraordinary, the most original, and the most ‘liberal’ of all university policy statements.” He goes on to say:

A committee of faculty, administrators, librarians, and legal counsel issued a 162-page “handbook” and a sixteen-page set of “guidelines” that survey the purpose and history of copyright, that outline the structure of the law, and that detail the law’s application to numerous specific situations. Two members of the committee were professors L. Ray Patterson and Stanley W. Lindberg, whose 1991 book took up the ideas that the book produced. The Georgia document is the most ambitious statement from any university on copyright’s underlying purposes and on the law’s implications for specific circumstances. The policy also asserts the limits of copyright interpretation. It is not known for conforming to the latest judicial opinions when he can argue that those opinions misinterpret the law and ignore its historical and constitutional foundation. Few institutions share the boldness of the University of Georgia. The university should be commended for avoiding form policy statements and for identifying the broadest scope of user rights. The Georgia policy is worthy of close study by any university establishing its own standards, but no university
should adopt those standards without a careful assessment of their full substantive implications and the possible consequences—both the beneficial and the troublesome consequences—of testing the law’s limits so extensively.” (pp. 117-118)

It should be perfectly clear from Crews’ own description that the Georgia System’s policy was way out at one extreme, being the most “lenient” of all university policies he surveyed for his book. In fact, it was so extreme that when the Georgia state attorney’s office became involved in the case after the suit was brought, it was determined that the policy would be indefensible in court, and subsequently the old policy itself was abandoned and a new one adopted in its place. Patterson may not have cared much about “the latest judicial opinions,” but the state attorney could hardly afford to ignore them in defending its client! Probably few people not involved closely in this case are aware that the policy now being defended by Georgia is not the same as the policy in effect when the suit was first brought. And it is this new policy, not the old one about which Crews had expressed such doubts himself, that is the subject of Crews’ own two reports to the court.

The playing field has thus shifted during the course of this case in very significant ways. Because the plaintiffs were not seeking damages for past infringements but only an injunction against future illegal copying, the defendants’ lawyers cleverly sought to avoid any responsibility for previous practices and at the same time preempt arguments about the likelihood of future infringement by changing the rules of the game with the adoption of a whole new policy and justificatory framework. Past actions were moot, they told the court, and the University should be judged only according to its promised new behavior. What is still very much at issue, however, is whether in spite of the new policy the practices have actually changed much, if at all. Crews notes at one point that “since the adoption of the new policy, the library has reviewed and rejected at least one request to copy a large portion of a book” (Expert Report, p. 55). Considering the massive amounts of copying that had been going on under the old policy, this “one request” hardly seems like much progress. Old habits die hard.

With this review of past developments concerning e-reserves as background, it is now time to take a closer look at Crews’ two reports. The first, called the Expert Report, has as its main aim an assessment of the new University System of Georgia policy adopted only after the publishers’ suit was brought. This report summarizes the growth and evolution of e-reserve systems since the early 1990s; traces how copyright law, especially fair use, has been applied by courts over the past couple of decades; analyzes the limitations of three model policies developed for reserve readings (the Classroom Guidelines, which were included in the legislative history accompanying the 1976 Copyright Act, the 1982 ALA Model Policy, which was adopted by that library association in response to the alleged overly restrictive nature of the Guidelines, and the CONFU Guidelines of 1996); surveys e-reserve policies in place at 23 colleges and universities; discusses common elements of an e-reserve policy; and finds the new policy in light of the foregoing review. Not surprisingly, Crews concludes that this policy “is consistent with the copyright law of the United States, and when followed by instructors, librarians, and others at the university, the policy will provide an effective means for promoting compliance with the law at the university” (p. 69). He further notes that “the policy is consistent with, and similar to, many policies that have been in place at colleges and universities throughout the country” (p. 70).

One reason for this similarity is that the Georgia System took advantage of the new policy the fair-use checklist that Crews himself had pioneered at Indiana University in 1997 (as he acknowledges on p. 58) and then instituted at Columbia University when he went there in 2007 to become director of its Copyright Advisory Office. Crews could hardly fault Georgia for practicing what he himself had preached, but this certainly makes Georgia’s hiring him as an expert a very incestuous relationship. It also helps explain why Crews’ evaluation of the checklist is very biased and hardly “objective.” While emphasizing elsewhere in his Expert Report the situational nature of fair-use analysis and the need to be flexible in applying it, Crews glosses over what is the major defect of the checklist as it is applied at Georgia, viz., its highly mechanical deployment. The instructions on the checklist itself, which faculty are urged to fill out and keep as a permanent record to show their “good faith” (for the purpose of taking advantage of section 504(c)(2)’s limitations on liability), begin thus: “Where the factors favoring fair use outnumber those against it, reliance on fair use is justified. Where fewer than half the factors favor fair use, instructors should seek permission from the rights holder. Where the factors are evenly split, instructors should consider the total facts weighing in favor of fair use as opposed to the total facts weighing against fair use in deciding whether fair use is justified.” This additive method is contrary to the spirit of fair use, and Crews should have condemned it. He knows better. This passage from an article by Robert Kasunic in the Columbia Journal of Law & the Arts captures that spirit well:

Only by accepting the value of all of the factors will the promise of the multifaceted approach espoused by Judge Leval (and Justice Souter in Campbell) become a reality. No factor is superior, nor is any interrelationship of the factors dominant. All of the factors are perspectives of the whole picture, and the whole picture can only be understood by mining all of the information that is available from the unique perspective of each factor. The factors are guides to intensive fact gathering. None of the factors weigh in favor or against fair use. Rather, their cumulative information provides the basis for the analysis as a whole. The fair use analysis is not a tally sheet, but an examination of the interrelationships of the facts and the factors, while keeping in mind the primary purpose of copyright. (pp. 115-116)

The full article is available here: http://www.kasunic.com/Articles/CJL%20Kasun ic%20Final%202008.pdf. It was favorably cited by Kevin L. Smith on his blog at Duke’s library: http://library.duke.edu/blogs/schol com/2009/08/13/choosing-between-reform and-revolution. Presumably, Smith would agree with this characterization of fair-use analysis, and I think Crews, if pressed, would agree as well. The Georgia checklist does not conform to this way of understanding fair use, and Crews should have criticized it in this regard.

In his Expert Report, Crews makes much of the “one time use is fair use” doctrine, claiming that it has operated to raise costs for universities because they have not exercised their fair-use rights for subsequent uses. But there is another way of looking at this doctrine. Crews wants to argue that there are many good reasons to consider subsequent uses fair as well as the initial uses, and he blames the widespread adoption of this rule on the concept of “spontaneity” that was incorporated into the Classroom Guidelines in 1976 and later accepted by the ALA Model Policy, too. But one could equally argue now that, with the ability to secure many permissions now almost instantly, this rule has outlived its original justification. The origin of this doctrine as a university policy can be traced to the University of Texas System’s copyright guidelines developed by Georgia Harper, which greatly influenced the way policies at other universities were written. Harper had herself challenged the Classroom Guidelines’ interpretation of “spontaneity” as far too restrictive when applied to higher education. Where it could or should have been exercised, this rule has saved many months to secure permissions. Hence, she argued, first-time use should be fair use given the difficulty of obtaining permissions quickly, but then permission for use in subsequent semesters should be obtained because there would indeed be enough time to get the licenses needed. But with the development by the CCC of virtually instant permissioning processes, this rationale no longer obtains. Hence the real question to raise is not, as Crews would have it, whether subsequent uses should be allowed under fair use also, but rather whether even that first-time use should be permitted as fair use. Georgia Harper has made this case herself in an article titled “Digital Distribution of Educational Materials” in which this revealing footnote appears:

‘The recent introduction by CCC of its Blackboard tool allowing educators to obtain and pay for permission instantly’ has theoretically eliminated the logical justification underlying the Classroom Guidelines’ ‘spontaneity’ requirement and underwriting the claim for ‘first time fair use,’ which was based on an historically significant time delay

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Crews seen as "transformative." Hence, on p. 19, that e-reserve and coursepack use could be on educational use for the Jonathan Band unleashes the same seductive argument that evolved, in Part V of the.

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in getting permission (weeks, if not months). Before the introduction of the instant permissions tool in Blackboard, one would evaluate whether a use were fair (for example, whether it was the first time the professor used these materials for this class) before seeking permission from CCC. Now, however, with its rationale gone, first time fair use may be insupportable. It seems to make more sense to check CCC first and only if permission is not available there, consider whether the use might be fair before undertaking the still time-consuming and potentially unfruitful search for the copyright owner.

In explaining how copyright law has evolved, in Part V of the Expert Report, Crews unleashes the same seductive argument that Jonathan Band deployed in his white paper on educational use for the ARL, claiming that e-reserve and coursepack use could be seen as "transformative." Hence, on p. 19, Crews says:

In some respects, the use of the materials may be transformative. For example, an article in a scholarly journal was originally written and published for purposes of advancing scholarship. If the article is about medicine, the purpose is for advancing medical treatment and improving health conditions. If that same article is part of the assigned reading in a course, its use is transformed into a teaching tool. The article may be assigned for purposes of advancing medicine, but it might also be assigned as an example of research methods or even to study trends in research funding or scholarly publishing. In an electronic environment, the instructor may add questions and references for further study, and students may add commentary and observations. In the hands of the teacher and student, the article takes on a new purpose.

Without repeating all the arguments I made in response to Band's white paper (in "What Is Educational Fair Use?" Against the Grain, v.20#2, April 2008), let me admit that there may be a point on the spectrum where "transformative" begins to make sense, as it would if a teacher really integrated all the readings into some kind of running commentary surrounding them (and maybe this is why the Kinko's judge did not rule out anthologizing altogether as beyond the reach of fair use, as Crews notes elsewhere in a different context). But, typically, the readings are just assigned via a syllabus, which hardly offers enough by way of "transformation" to qualify as fair use. It is also disingenuous to argue that scholarly work is produced just for the "purpose" of advancing scholarship, and that teaching is a different "purpose" altogether for use of scholarly work. That distinction flies in the face of all that universities talk about in promoting the integration of teaching and research, and it certainly does not correspond with the actual activities of academic publishers in making scholarly books available in paperback precisely for use in the classroom. There is a real direct impact on the market here that Crews glosses over by claiming that "noncommercial" uses are likely not to have much impact on "commercial" markets. He forgets that 90% of what we university presses publish have no other market than the academy! Crews' attempt to argue for flexibility about determining what amount to copy, following on the Supreme Court's decision in Campbell, depends on the notion of using whatever amount is "necessary" to serve the purpose at hand — which is an open invitation to instructors to use whatever amount they want since they can always justify it in reference to the "educational purpose" they have for any given assignment. We would here quickly get onto a slippery slope, and what judge is going to substitute his or her own understanding of "educational purpose" for the instructor's? (It may be worth noting here, though, that applying the lessons of Campbell herself in a 1979 case involving a musical comedy called "Scarlett Fever" whose creators claimed it to be fair use as a parody of Gone with the Wind, the judge presiding in the GSU case found it not to contain enough elements to make it overall transformative as a work of parody, ruled it to have used much more than was necessary for that purpose, and — using a functional test continued on page 58

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developed by David Nimmer to determine what is a purpose different from the original purpose — held it to be harmful to the market for the original at a higher rate. crews here goes beyond what the Georgia System itself claims: the e-reserve policy at the Georgia Website now does not currently make this argument about “transformative use.”

The rebuttal expert report (hereinafter called just the rebuttal report) has a more limited aim than the initial report. it addresses just two questions: 1) is licensing of copyrighted works a substitute for the implementation of a fair-use standard and policy? 2) does the exercise of fair use pose risks to the survival of scholarly publishing? crews answers both questions in the negative.

On the first point crews argues strenuously against viewing licensing as an effective solution to the problems faced by faculty and accords it, at best, a partial role in supplementing what fair-use analysis should instead provide. Rather than try rebutting his arguments myself, I defer to georgia harper, who took up this question in her connectea blog in july 2007 where she responded to James Boyle’s essay “The inefficiencies of freedom” criticizing the then new CCC blanket license:

“I’ve read many works by Boyle and always find his analysis to be thoughtful and thought-provoking. As a result, I was stunned to see that he imploled labeled as irresponsible large universities like mine that might consider including among the many sources we use to provide legal access to educational materials CCC’s new academic license…. Somehow this license will sweep away all of fair use, as though one couldn’t thoughtfully concede that paying for permission was in many cases the right thing to do because a good part of what we do is not fair use. He easily equated fair use for creative uses (parody, criticism, commentary) with fair use for the massive duplication of works created, in many cases, just for our higher education market…. As much as we may dislike the fact that the market for permissions and licensed works has been held numerous times to negatively affect the exercise of fair use, that is how the cases involving systematic duplication and distribution have gone. Further, I don’t believe our not making a profit on these copies will completely flip the results of those types of cases.

… Boyle is singling out, as incompatible with fair use, this particular way of paying for uses we make of others’ works. He’s afraid that if your university just writes a check to CCC for, let’s say, $100,000, so that all the works that are covered by the license (the “repe-
In fact, the study of fair-use jurisprudence that Congress asked the Copyright Office to prepare leading up to the revision of the law in 1976 revealed that no judge had ever ruled that straightforward reproduction of a copyrighted work for its own sake was a fair use. While “multiple copies” are now referenced in Section 107 explicitly, we can reasonably argue that this should be interpreted in a de minimis sense because, as Judge Newman famously said in the Texaco decision, whatever social utility this kind of copying may have, it has nothing to do with what fair use traditionally meant: We would seriously question whether the fair use analysis that has developed with respect to works of authorship alleged to use portions of copyrighted material is precisely applicable to copies produced by mechanical means. The traditional fair use analysis, now codified in Section 107, developed in an effort to adjust the competing interests of the authors — the author of the original copyrighted work and the author of the secondary work that “copies” a portion of the original work in the course of producing what is claimed to be a new work. Mechanical “copying” of an entire document, made readily feasible by the advent of xerography… is obviously an activity entirely different from creating a work of authorship. Whatever social utility copying of this sort achieves, it is not concerned with creative authorship.

It is anyone’s guess how the GSU case will ultimately turn out, and it is not the purpose of this article to make any predictions. Judge Evans, presiding in this case, has shown herself to be well-informed about copyright and respectful of past opinions. She is no L. Ray Patterson, who was actually the defense attorney in one of the copyright cases she handled in her district in which he was on the losing side. And her interpretation of “transformative use” follows the functional test developed by David Nimmer in the authoritative treatise Nimmer on Copyright rather than the radically new type of functional analysis propagated by the Ninth Circuit in various of its rulings over the past several years. (For more about these types of functional tests, see my article “Is ‘Functional’ Use ‘Transformative’ and Hence ‘Fair’?” in Against the Grain, v.21/#3, June 2009.) While I had earlier predicted that Judge Pierre Leval, who is credited with greatly influencing judicial thinking about “transformative use,” would not find the Ninth Circuit’s decisions to be consistent with his own concept, only to be disabused by Leval himself when he gave the Christopher Meyer Memorial Lecture titled “Did Campbell Repair Fair Use?” at George Washington University on June 2, 2009, Leval in private correspondence subsequently did affirm that he does not “read Perfect 10 as authorizing, or opening the door to, free distribution of books to students on the grounds that that is a transformative use, all the more so when the books are themselves of an educational nature. I rejected virtually the same argument in the Texaco case, which I had in the district court. I recall making the observation that allowing Texaco free access to the scientific publications of the plaintiffs on the ground that Texaco was using them for scientific purposes would be an appropriations of the plaintiffs’ market.” So, whatever Judge Evans may think about the Ninth Circuit cases, we may hope that she, like Leval, will still reject the kind of sweeping argument about “transformative use” that Crews, following Band, puts forward to turn fair use into a truly radical justification for merely “duplicative” copying.

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At the only Edge that Means Anything / How We Understand What We Do

by Dennis Brunning (E Humanities Development Librarian, Arizona State University) <dennis.brunning@gmail.com>