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From the University Presses-The Code of Best Practices in Fair Use for Academic and Research Libraries

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From the University Presses — The Code of Best Practices in Fair Use for Academic and Research Libraries

by **Richard Brown** (Director, Georgetown University Press) <reb7@georgetown.edu> <http://press.georgetown.edu/>

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The boundaries of fair use have been contested by academic and research librarians and scholarly publishers for decades, and the growth of e-reserves has only further blurred the lines.¹ Academic and research librarians view copyright as a constraint in exercising their mission of enabling teaching, learning, and research; asserting fair use in posting works on e-reserves gives them a greater degree of autonomy as they contribute to education in the academy. Scholarly publishers, on the other hand, see overly expansive interpretations of fair use as a violation of copyright and a potential threat to revenue and control of their content; restraining fair use allows them to better exercise their mission of publishing and disseminating peer-reviewed research in a financially responsible and sustainable manner. This dispute over fair use reflects a broader battle of ideas that has raged for the past two centuries in Western Europe and the United States: the tension between claiming property rights and sharing societal goods.

So it was with no small amount of trepidation that many scholarly publishers awaited the January 2012 release of the **ARL's Code of Best Practices in Fair Use for Academic and Research Libraries**.² At this time last year, those of us on the board of the **Association of American University Presses (AAUP)** — I have since rolled off that board and write simply as the director of a member press of that association — wondered just how far the *Code* would push the boundary of fair use. Adding to our concern was the fact that the **ARL** interviewed 65 librarians in the course of its research but did not seek the advice or counsel of scholarly publishers, a puzzling decision given how closely academic and research librarians and nonprofit scholarly publishers, not to mention the leadership of the **ARL** and the **AAUP**, have worked together in recent years on issues of common concern.

Nonprofit scholarly presses have now had a chance to discuss and digest the *Code* and assess how these practices might affect their publishing programs. And I am pleased to report

that there is good reason for presses to endorse nearly all of the *Code*, given that it provides much-needed clarity and reasonable guidance to many murky instances of potential fair use. The task was a difficult one, and the approach of the *Code* — to promote best practices, not promulgate rules — is both appropriate and useful. As the authors of the *Code* point out in their introductory remarks, no less than eight other codes of best practices of fair use have emerged since 2005 from filmmakers, dance archivists, poets, et al. The tortoise of copyright law, as librarian **Peggy Hoon** pointed out at the recent Center for Intellectual Property biennial symposium, simply has not kept pace with the hare of technological innovation. It seems that many of us engaged in the advancement of education and culture are trying to make sense of fair use, and the *Code* greatly enriches this discussion.

Examining eight specific practices, from digitizing to preserve at-risk items to maintaining the integrity of works deposited in insti-

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tutional repositories, the *Code* offers a background description and a succinct principle for each practice, then provides bullet-point lists of “limitations” and “enhancements” that attempt to clarify how the principle might apply in an institutional setting. This general framework is logical and easy to follow; the prose is focused and crisp. Rights managers and directors of scholarly presses will benefit immensely from a careful reading of this document.

But while the *Code* makes a major contribution to discussions over fair use, it also proposes one particular practice and principle that I find deeply troubling. In its discussion of the very first practice, supporting teaching and learning with access to library materials via digital technologies, the *Code* proposes this principle: “It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks.” A digital network, in fact, is another term for e-reserves. The justification of this principle is based on a transformativeness rationale, and the *Code* offers a tendentious interpretation of how the courts have treated transformativeness. Let me explain.

In the introduction to the *Code* the authors write: “In cases decided since the early 1990s, the courts have made it clear that in order for use to be considered ‘transformative,’ it need not be one that modifies or literally revises copyright 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” (p. 8, my italics). There is no explanatory footnote or case law cited.

This is a red flag for publishers. A new audience? That’s all? Later, in its discussion of the first principle, the *Code* elaborates:

“Most of the information objects made available to students, in whatever format, are not originally intended for educational use. 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 purposes of illustration. Amounts of material used for online course support should be tailored to the educational purpose, though it will not infrequently be the case that access to the entire work ... will be necessary to fulfill the instructor’s pedagogical purpose” (p. 13, my italics). In the discussion of “limitations” of this practice the *Code* adds this: “Closer scrutiny should be applied to uses of content created and marketed primarily for use in courses such as the one at issue (e.g., a textbook, workbook, or anthology designed for the course).”

In other words, at the end of this passage teachers and librarians are cautioned about invoking fair use and posting on e-reserves digital editions of textbooks and workbooks and anthologies specifically designed for the classroom. Fair enough.

But what is troubling to me is the fact that **Georgetown University Press**, as a rule, does not publish *textbooks*; very few university presses do. That genre is dominated by commercial publishers such as **Macmillan**, **Pearson**, **Wiley**, et al. So while **Georgetown** does not publish textbooks per se, a significant amount of our revenue is derived from classroom adoption of our titles: Many of our scholarly monographs can be and are used as supplemental reading for undergraduate and graduate courses. And as the principle and its rationale are written, the *Code* leaves wide open the possibility that teachers and librarians can claim fair use and post on e-reserves entire books and multiple chapters of books that may have been initially aimed at the bookstore or professional market. And that, in my mind, represents a violation of copyright and a serious overreach of fair use.

For example, **Georgetown** recently published a monograph titled *Qatar: A Modern History*, by **Allen J. Fromherz** of **Georgia State University**(!). This book is primarily geared to bookstores and general readers, but, in fact, we expected, and we have seen, some classroom adoptions. And according to a liberal interpretation of the *Code*, *Qatar* could be posted on e-reserves in its entirety for a course, say, on The History and Politics of Arab Gulf States simply because the audience for the book, undergraduates, is different than its original and primary audience of bookstores and general readers. Can a teacher or a librarian really make that call about audience? Evidently so, says the *Code*, resulting in a claim of transformative repurposing. And this is the nub of my concern: The *Code* does not accurately represent the transformative use test.

Let me say a few words about transformative use. Recall that fair use is a doctrine — the *Code* describes fair use as a right, but I will not quibble about terminology — that has evolved through a number of court decisions and has been codified in section 107 of U.S.

copyright law. Section 107 sets out four factors to be considered in determining whether or not a particular use is fair:

1. The purpose and character of the use, including whether such use is of 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.
4. The effect of the use on the potential market for, or value of, the copyrighted work.

In a pivotal 1994 case, *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court emphasized the first factor as being the primary indicator of fair use. Has the material been used to make something new? Or is the copying a direct reflection? Has the material been transformed in some way? Has value

been added? According to the decision, the question is “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or character, altering the first with new expression, meaning, or message.” In sum, this definition of transformativeness does not focus on the audience involved.³

In a 1998 case, *Infinity Broadcasting Corp. v. Kirkwood*, the Second Circuit Court of Appeals reiterated this interpretation of transformativeness: “We agree that the difference in purpose tends to support [the defendant’s] fair use claim. However, difference in purpose is not quite the same thing as transformation, and **Campbell** instructs that transformation is the critical inquiry under this factor.”

Infinity also quotes a well-known law review by **Judge Leval**: “a use of copyright material that ‘merely repackages or republishes the original’ is unlikely to be deemed a fair use.”⁴

Now, a Ninth Circuit ruling in 2003, *Kelly v. Arriba Soft Corp.*, involving the duplication of thumbnail illustrations, is sometimes used to justify an expansive interpretation of transformative repurposing by appealing to the “function” of the work. But this is a different case than the kind of justification proposed by the *Code*. The core holding of the court is this: “Although **Arriba** made exact replications of **Kelly**’s images, the thumbnails were much smaller, low resolution images that served an entirely different function than **Kelly**’s original images. **Kelly**’s images are artistic works intended to inform and to engage the viewer in an aesthetic experience **Arriba**’s search engine functions as a tool to help index and improve access to images on the internet and their related Websites.” It is clear that this type of “different function” argument cannot be made with scholarly books and excerpts from those books.⁵

At root in this discussion, at least for scholarly publishers, is control of intellectual property and revenue. Recall that one of the four factors in fair use cited above is the effect of the use on the potential market for, or value of, the copyrighted work. Many university presses and nonprofit scholarly publishers rely on permissions revenue and classroom adoptions to cover their costs. While I cannot generalize about university presses, last year college bookstores accounted for 38 percent of **Georgetown**’s overall sales — and we know for a fact that more and more students are buying books for their courses through **Amazon** and other online vendors, making that classroom adoption percentage even higher. If every university press title could be scanned and presented as “course-related content available to enrolled students via digital networks,” it is not too much to suppose that the health and possible survival of university presses would be at stake. And this is why the *Code*’s first practice and principle matter so much.

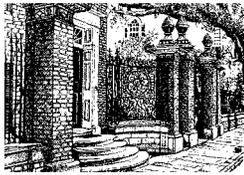
Can nonprofit scholarly publishers and academic and research libraries move toward community practices of fair use that fully satisfy both parties and teachers? I think so. Nonprofit scholarly presses and academic and research

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libraries have more in common than we sometimes realize: an allegiance to our parent institution; a pre-occupation with mission rather than shareholders; and an urgent need, in times of strained budgets, to communicate the value we add to the academic enterprise. I propose that we look beyond **Georgia State** and continue to discuss and debate fair use and the true meaning of transformiveness both on our campuses and within the more formal structure of the **ARL** and the **AAUP**. And I urge research librarians *not* to take at face value the *Code*'s interpretation of transformative repurposing. In fact, I urge research librarians to seek out nonprofit scholarly press directors and rights managers, at their own institutions and beyond, to engage in discussion and debate around the appropriate limits of fair use. This kind of cooperation and collaboration is essential. All of us, I think, will benefit — just as all of us will benefit from further study of the *Code*. 🌸

Endnotes

1. I would like to thank the following for their comments on an earlier draft of this article: **Peter Dougherty, Peter Givler, Alex Holzman, Laura Leichum, Linda Steinman, and John Warren.**
2. www.arl.org/pp/ppcopyright/codefairuse/code/index.shtml.
3. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).
4. *Infinity Broadcasting Corp. v. Kirkwood*, 150 F. 3d 108 (2d Cir. 2008).
5. *Kelly v. Arriba Soft Corp.*, 336 F. 3d 811 (9th Cir. 2003).

Something to Think About — Looking for Answers

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Seems like we tend to relax a little when summer arrives. The main part of the year drives us to make so many choices and work at 100% energy levels. Having a bit of time to stop and think, I find that our profession requires us to constantly look for answers. Whether we work in the public eye or behind the scenes, answers are the most important things we pursue. The quarry is elusive, but our determination to succeed is the most important thing — our goal. The majority of answers we seek are patron-associated — filling their needs because that's why we exist. I seek answers for patrons and administrators, but what about my personal answers at work? There are times as a supervisor when employee management is so very impossible. We never know people well enough to understand how they will react to criticism, reprimand,

or even firing. The answers we seek are extremely important to the smooth flow of the work environment and also to the mental health of our coworkers. Our behavior and choices determine how things progress. Being able to counsel all your employees together tends to remove the stigma of singling out one person at a time. Holding strategy meetings with your group and asking their opinions and keeping them in the loop for all changes and challenges are very important. Look for the answers in the team you direct. Teamwork is a wonderful way to have many people input viable answers and make your life less stressful. Remember, answers are our most important products. It is wise to incorporate the finding of answers into our whole work life. Don't you think that's something to think about? 🌸

