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Recovering Fair Use

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Introduction

The Internet (especially in the so-called Web 2.0 phase), digital media and file-sharing networks have thrust copyright law under public scrutiny, provoking discourses questioning what is fair in the digital age. Accessible hardware and software has led to *prosumerism* – creativity blending media consumption with media production to create new works that are freely disseminated online via popular video-sharing Web sites such as [YouTube](#) or genre specific music sites like [GYBO](#) (“Get Your Bootleg On”) amongst many others. The term “prosumer” is older than the Web, and the conceptual convergence of producer and consumer roles is certainly not new, for “at electric speeds the consumer becomes producer as the public becomes participant role player” (McLuhan 4). Similarly, Toffler’s “Third Wave” challenges “old power relationships” and promises to “heal the historic breach between producer and consumer, giving rise to the ‘prosumer’ economics” (27). Prosumption blurs the traditionally separate consumer and producer creating a new creative era of mass customisation of artefacts culled from the (copyrighted) media landscape (Tapscott 62-3). Simultaneously, corporate interests dependent upon the protections provided by copyright law lobby for augmented rights and actively defend their intellectual property through law suits, takedown notices and technological reinforcement. Despite a lack demonstrable economic harm in many cases, the proprietarian approach is winning and frequently leading to absurd results (Collins).

The balance between private and public interests in creative works is facilitated by the doctrine of fair use (as codified in the United States Copyright Act 1976, [section 107](#)). The majority of copyright laws contain “fair” exceptions to claims of infringement, but fair use is characterised by a flexible, open-ended approach that allows the law to flex with the times. Until recently the defence was unique to the U.S., but on 2 January Israel amended its copyright laws to include a fair use defence. (For an overview of the new Israeli fair use exception, see Efroni.) Despite its flexibility, fair use has been systematically eroded by ever encroaching copyrights.

This paper argues that copyright enforcement has spun out of control and the *raison d’être* of the law has shifted from being “an engine of free expression” (*Harper & Row, Publishers, Inc. v. Nation Enterprises* 471 U.S. 539, 558 (1985)) towards a “legal regime for intellectual property that increasingly looks like the law of real property, or more properly an idealized construct of that law, one in which courts seeks out and punish virtually any use of an intellectual property right by another” (Lemley 1032). Although the copyright landscape appears bleak, two recent cases suggest that fair use has not fallen by the wayside and may well recover. This paper situates fair use as an essential legal and cultural mechanism for optimising creative expression.

A Brief History of Copyright

The law of copyright extends back to eighteenth century England when the Statute of Anne (1710) was enacted. Whilst the length of this paper precludes an in depth analysis of the law and its export to the U.S., it is important to stress the goals of copyright. “Copyright in the American tradition was not meant to be a “property right” as the public generally understands property. It was originally a narrow federal policy that granted a limited trade monopoly in exchange for universal use and access” (Vaidhyanathan 11). Copyright was designed as a right limited in scope and duration to ensure that culturally important creative works were not the victims of monopolies and were free (as later mandated in the U.S. Constitution) “to promote the progress.” During the 18th century English copyright discourse Lord Camden warned against proprietarian approaches lest “all our learning will be

locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves, as their own hackney compilers are" (*Donaldson v. Becket* 17 *Cobbett Parliamentary History*, col. 1000). Camden's sentiments found favour in subsequent years with members of the North American judiciary reiterating that copyright was a limited right in the interests of society—the law's primary beneficiary (see for example, *Wheaton v. Peters* 33 *US* 591 [1834]; *Fox Film Corporation v. Doyal* 286 *US* 123 [1932]; *US v. Paramount Pictures* 334 *US* 131 [1948]; *Mazer v. Stein* 347 *US* 201, 219 [1954]; *Twentieth Century Music Corp. v. Aitken* 422 *U.S.* 151 [1975]; *Aronson v. Quick Point Pencil Co.* 440 *US* 257 [1979]; *Dowling v. United States* 473 *US* 207 [1985]; *Harper & Row, Publishers, Inc. v. Nation Enterprises* 471 *U.S.* 539 [1985]; *Luther R. Campbell a.k.a. Luke Skyywalker, et al. v. Acuff-Rose Music, Inc.* 510 *U.S.* 569 [1994]).

Putting the "Fair" in Fair Use

In *Folsom v. Marsh* 9 *F. Cas.* 342 (*C.C.D. Mass.* 1841) (No. 4,901) Justice Storey formulated the modern shape of fair use from a wealth of case law extending back to 1740 and across the Atlantic. Over the course of one hundred years the English judiciary developed a relatively cohesive set of principles governing the use of a first author's work by a subsequent author without consent. Storey's synthesis of these principles proved so comprehensive that later English courts would look to his decision for guidance (*Scott v. Stanford L.R.* 3 *Eq.* 718, 722 (1867)). Patry explains fair use as integral to the social utility of copyright to "encourage. . . learned men to compose and write useful books" by allowing a second author to use, under certain circumstances, a portion of a prior author's work, where the second author would himself produce a work promoting the goals of copyright (Patry 4-5).

Fair use is a safety valve on copyright law to prevent oppressive monopolies, but some scholars suggest that fair use is less a defence and more a right that subordinates copyrights. Lange and Lange Anderson argue that the doctrine is not fundamentally about copyright or a system of property, but is rather concerned with the recognition of the public domain and its preservation from the ever encroaching advances of copyright (2001). Fair use should not be understood as subordinate to the exclusive rights of copyright owners. Rather, as Lange and Lange Anderson claim, the doctrine should stand in the superior position: the complete spectrum of ownership through copyright can only be determined pursuant to a consideration of what is required by fair use (Lange and Lange Anderson 19). The language of [section 107](#) suggests that fair use is not subordinate to the bundle of rights enjoyed by copyright ownership: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright" (Copyright Act 1976, s.107). Fair use is not merely about the marketplace for copyright works; it is concerned with what Weinreb refers to as "a community's established practices and understandings" (1151-2). This argument boldly suggests that judicial application of fair use has consistently erred through subordinating the doctrine to copyright and considering simply the effect of the appropriation on the market place for the original work.

The emphasis on economic factors has led courts to sympathise with copyright owners leading to a propertarian or Blackstonian approach to copyright (Collins; Travis) propagating the myth that any use of copyrighted materials must be licensed. Law and media reports alike are potted with examples. For example, in *Bridgeport Music, Inc., et al v. Dimension Films et al* 383 *F. 3d* 400 (6th Cir. 2004) a Sixth Circuit Court of Appeals held that the transformative use of a three-note guitar sample infringed copyrights and that musicians must obtain licence from copyright owners for every appropriated audio fragment regardless of duration or recognisability. Similarly, in 2006 Christopher Knight self-produced a one-minute television advertisement to support his campaign to be elected to the board of education for Rockingham County, North Carolina. As a fan of *Star Wars*, Knight used a makeshift Death Star and lightsaber in his clip, capitalising on the imagery of the Jedi Knight opposing the oppressive regime of the Empire to protect the people. According to an interview in *The Register* the advertisement was well received by local audiences prompting Knight to upload it to his YouTube channel. Several months later, Knight's clip appeared on

Web Junk 2.0, a cable show broadcast by VH1, a channel owned by media conglomerate Viacom. Although his permission was not sought, Knight was pleased with the exposure, after all “how often does a local school board ad wind up on VH1?” (Metz). Uploading the segment of *Web Junk 2.0* featuring the advertisement to YouTube, however, led Viacom to quickly issue a take-down notice citing copyright infringement. Knight expressed his confusion at the apparent unfairness of the situation: “Viacom says that I can’t use my clip showing my commercial, claiming copy infringement? As we say in the South, that’s ass-backwards” (Metz).

The current state of copyright law is, as Patry says, “depressing”:

We are well past the healthy dose stage and into the serious illness stage ... things are getting worse, not better. Copyright law has abandoned its reason for being: to encourage learning and the creation of new works. Instead, its principal functions now are to preserve existing failed business models, to suppress new business models and technologies, and to obtain, if possible, enormous windfall profits from activity that not only causes no harm, but which is beneficial to copyright owners. Like Humpty-Dumpty, the copyright law we used to know can never be put back together.

The erosion of fair use by encroaching private interests represented by copyrights has led to strong critiques leveled at the judiciary and legislators by Lessig, McLeod and Vaidhyanathan. “Free culture” proponents warn that an overly strict copyright regime unbalanced by an equally prevalent fair use doctrine is dangerous to creativity, innovation, culture and democracy. After all,

“few, if any, things ... are strictly original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others” (*Emerson v. Davis*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845), qtd in *Campbell v. Acuff-Rose*, 62 U.S.L.W. at 4171 (1994)).

The rise of the Web 2.0 phase with its emphasis on end-user created content has led to an unrelenting wave of creativity, and much of it incorporates or “mashes up” copyright material. As Negativland observes, free appropriation is “inevitable when a population bombarded with electronic media meets the hardware [and software] that encourages them to capture it” and creatively express themselves through appropriated media forms (251).

The current state of copyright and fair use is bleak, but not beyond recovery. Two recent cases suggest a resurgence of the ideology underpinning the doctrine of fair use and the role played by copyright.

Let’s Go Crazy

In “Let’s Go Crazy #1” on YouTube, Holden Lenz (then eighteen months old) is caught bopping to a barely recognizable recording of Prince’s “Let’s Go Crazy” in his mother’s Pennsylvanian kitchen. The [twenty-nine second long video](#) was viewed a mere twenty-eight times by family and friends before Stephanie Lenz received an email from YouTube informing her of its compliance with a Digital Millennium Copyright Act (DMCA) take-down notice issued by Universal, copyright owners of Prince’s recording (McDonald). Lenz has since filed a counterclaim against Universal and YouTube has reinstated the video. Ironically, the media exposure surrounding Lenz’s situation has led to the video being

viewed 633,560 times at the time of writing. Comments associated with the video indicate a less than reverential opinion of Prince and Universal and support the fairness of using the song. On 8 Aug. 2008 a Californian District Court denied Universal's motion to dismiss Lenz's counterclaim. The question at the centre of the [court judgment](#) was whether copyright owners should consider "the fair use doctrine in formulating a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law." The court ultimately found in favour of Lenz and also reaffirmed the position of fair use in relation to copyright. Universal rested its argument on two key points. First, that copyright owners cannot be expected to consider fair use prior to issuing takedown notices because fair use is a defence, invoked after the act rather than a use authorized by the copyright owner or the law. Second, because the DMCA does not mention fair use, then there should be no requirement to consider it, or at the very least, it should not be considered until it is raised in legal defence.

In rejecting both arguments the court accepted Lenz's argument that fair use is an authorised use of copyrighted materials because the doctrine of fair use is embedded into the Copyright Act 1976. The court substantiated the point by emphasising the language of section 107. Although fair use is absent from the DMCA, the court reiterated that it is part of the Copyright Act and that "notwithstanding the provisions of sections 106 and 106A" a fair use "is not an infringement of copyright" (s.107, Copyright Act 1976). Overzealous rights holders frequently abuse the DMCA as a means to quash all use of copyrighted materials without considering fair use. This decision reaffirms that fair use "should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright design" but something that it is integral to the constitution of copyright law and essential in ensuring that copyright's goals can be fulfilled (Leval 1100).

Unlicensed musical sampling has never fared well in the courtroom. Three decades of rejection and admonishment by judges culminated in *Bridgeport Music, Inc., et al v. Dimension Films et al* 383 F. 3d 400 (6th Cir. 2004): "Get a license or do not sample. We do not see this stifling creativity in any significant way" was the ruling on an action brought against an unlicensed use of a three-note guitar sample under section 114, an audio piracy provision. The Bridgeport decision sounded a death knell for unlicensed sampling, ensuring that only artists with sufficient capital to pay the piper could legitimately be creative with the wealth of recorded music available. The cost of licensing samples can often outweigh the creative merit of the act itself as discussed by McLeod (86) and Beaujon (25). In August 2008 the Supreme Court of New York heard [EMI v. Premise Media](#) in which EMI sought an injunction against an unlicensed fifteen second excerpt of John Lennon's "Imagine" featured in *Expelled: No Intelligence Allowed*, a controversial documentary canvassing alleged chilling of intelligent design proponents in academic circles. (The family of John Lennon and EMI had previously failed to persuade a Manhattan federal court in a similar action.) The court upheld Premise Media's arguments for fair use and rejected the Bridgeport approach on which EMI had rested its entire complaint. Justice Lowe criticised the Bridgeport court for its failure to examine the legislative intent of section 114 suggesting that courts should look to the black letter of the law rather than blindly accept proprietarian arguments. This decision is of particular importance because it establishes that fair use applies to unlicensed use of sound recordings and re-establishes *de minimis* use.

Conclusion

This paper was partly inspired by the final entry on eminent copyright scholar William Patry's personal copyright law blog (1 Aug. 2008). A copyright lawyer for over 25 years, Patry articulated his belief that copyright law has swung too far away from its initial objectives and that balance could never be restored. The two cases presented in this paper demonstrate that fair use – and therefore balance – can be recovered in copyright. The federal Supreme Court and lower courts have stressed that copyright was intended to promote creativity and have upheld the fair doctrine, but in order for the balance to exist in copyright law, cases must come before the courts; copyright myth must be challenged. As McLeod states, "the real-world problems occur when institutions that actually have the resources to defend themselves against unwarranted or frivolous lawsuits choose to take

the safe route, thus eroding fair use" (146-7).

References

Beaujon, Andrew. "It's Not the Beat, It's the Mocean." *CMJ New Music Monthly*. April 1999.

Collins, Steve. "Good Copy, Bad Copy: Covers, Sampling and Copyright." *M/C Journal* 8.3 (2005). 26 Aug. 2008 <<http://journal.media-culture.org.au/0507/02-collins.php>>.

———. "'Property Talk' and the Revival of Blackstonian Copyright." *M/C Journal* 9.4 (2006). 26 Aug. 2008 <<http://journal.media-culture.org.au/0609/5-collins.php>>.

Donaldson v. Becket 17 Cobbett Parliamentary History, col. 953.

Efroni, Zohar. "Israel's Fair Use." *The Center for Internet and Society* (2008). 26 Aug. 2008 <<http://cyberlaw.stanford.edu/node/5670>>.

Lange, David, and Jennifer Lange Anderson. "Copyright, Fair Use and Transformative Critical Appropriation." *Conference on the Public Domain, Duke Law School*. 2001. 26 Aug. 2008 <<http://www.law.duke.edu/pd/papers/langeand.pdf>>.

Lemley, Mark. "Property, Intellectual Property, and Free Riding." *Texas Law Review* 83 (2005): 1031.

Lessig, Lawrence. *The Future of Ideas*. New York: Random House, 2001.

———. *Free Culture*. New York: Penguin, 2004.

Leval, Pierre. "Toward a Fair Use Standard." *Harvard Law Review* 103 (1990): 1105.

McDonald, Heather. "Holden Lenz, 18 Months, versus Prince and Universal Music Group." *About.com: Music Careers* 2007. 26 Aug. 2008 <<http://musicians.about.com/b/2007/10/27/holden-lenz-18-months-versus-prince-and-universal-music-group.htm>>.

McLeod, Kembrew. "How Copyright Law Changed Hip Hop: An interview with Public Enemy's Chuck D and Hank Shocklee." *Stay Free* 2002. 26 Aug. 2008 <http://www.stayfreemagazine.org/archives/20/public_enemy.html>.

———. *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity*. United States: Doubleday, 2005.

McLuhan, Marshall, and Barrington Nevitt. *Take Today: The Executive as Dropout*. Ontario: Longman Canada, 1972.

Metz, Cade. "Viacom Slaps YouTuber for Behaving like Viacom." *The Register* 2007. 26 Aug. 2008 <http://www.theregister.co.uk/2007/08/30/viacom_slaps_pol/>.

Negativland, ed. *Fair Use: The Story of the Letter U and the Numeral 2*. Concord: Seeland, 1995.

Patry, William. *The Fair Use Privilege in Copyright Law*. Washington DC: Bureau of National Affairs, 1985.

———. "End of the Blog." *The Patry Copyright Blog*. 1 Aug. 2008. 27 Aug. 2008 <<http://williampatry.blogspot.com/2008/08/end-of-blog.html>>.

Tapscott, Don. *The Digital Economy: Promise and Peril in the Age of Networked Intelligence*. New York: McGraw Hill, 1996.

Toffler, Alvin. *The Third Wave*. London, Glasgow, Sydney, Auckland. Toronto, Johannesburg: William Collins, 1980.

Travis, Hannibal. "Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment." *Berkeley Technology Law Journal*, Vol. 15 (2000), No. 777.

Vaidhyanathan, Siva. *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*. New York; London: New York UP, 2003.