Urban Copyright Legends

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As a copyright lawyer, I sometimes wish there were a copyright version of Snopes.com—a Web site where non-experts could check to see whether the things they read online about copyright are true or just urban legends. The recent dispute between the University of California, Los Angeles and an association of film distributors has been the occasion for earnest repetition of several copyright urban legends that are at best debatable and at worst plain false.[1] Tragically, these myths are just as likely to be repeated by librarians and educators as by advocates for rights holders. The discussion of streaming films provides an excellent opportunity to clear up some common misunderstandings about how copyright law works.

Copyright Basics: Control with Exceptions

US copyright law allows rights holders a degree of control over both reproduction and distribution of protected works. The law also includes several exceptions that allow libraries and others to make use of copyrighted materials without asking permission or paying a fee. Among those exceptions are Section 107 (fair use) and Section 110(2) (the TEACH Act).[2] These exceptions and limitations are just as important as copyright protection itself. They are a vital safety valve that prevents copyright from being an oppressive monopoly. In fact, the Supreme Court has said that without exceptions to facilitate access, copyright law would violate the First Amendment.[3]

Urban Fair Use Legends

Fair use provides the broadest, most flexible protection for unauthorized copying, performance, and display of copyrighted works. Determining whether a particular use of a copyrighted work is fair can seem intimidating, as the law has evolved from court cases and was written in an intentionally broad way to allow flexibility and continued evolution of the doctrine. Nevertheless, the situation is not nearly so dire as the following urban legends suggest.

"You cannot rely on fair use to protect a general policy because fair use determinations are made on a case-by-case basis."

It is often suggested that because some of the factors in fair use law have to do with the nature of the work that is being used, the user is required to conduct a fresh (and presumably arduous) legal analysis for each individual work she uses. In that case, it would be impossible to rely on fair use for a general policy or class of uses going forward. But if that were true, there would be no VCR (and no DVR), no Google, no compatible-software industry, and no *Daily Show*. Each of these relies on the general applicability of fair use every day, and would be crippled if the "case-by-case" legend were true.

In reality, Google is not required to have a lawyer review each Web site its robots crawl before adding the site to its database, nor does Motorola have a full-time legal staff checking whether every program on television qualifies to be recorded on a set-top box. Software engineers rely on case law that allows them to reverse engineer platforms and make compatible programs using fair use. The *Daily Show* surely does have a legal staff, but the show would never have been conceived if it could not generally rely on fair use of clips from other shows as the core of its nightly formula.

A good faith actor can and should rely on fair use to adopt a general policy or standard of practice where it can argue with confidence that the same fair use argument will apply in every case. The "case-by-case" legend need not stymie libraries and schools that are considering a broad policy such as allowing video streaming.

"Fair use is a defense, not an exemption, and accused infringers will bear a heavy burden of proving in court that their use was fair."

This urban copyright legend suggests fair use is a mere excuse for infringing behavior, impugning its moral status relative to other exceptions as well as implying that fair users (unlike, say, users who invoke Section 108) are presumed infringers and must do more to prove their actions are legitimate. The net effect is that librarians and administrators are made to feel like scofflaws when they rely on fair use and to perceive an inflated risk that they will be found guilty of infringement.

On the moral question, the text of Section 107 is clear: "the fair use of a copyrighted work…is not an infringement of copyright." The fair user is not an infringer who has gotten off the hook by providing an excuse. Her actions are

just as favored by the law as the teacher who shows a film clip in class. The Supreme Court has recognized the importance of a vigorous defense of copyright exceptions, writing, "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement."[4]

On the procedural question, it is true that courts treat a claim of fair use as if it were a defense, asking accused infringers to explain why their behavior is fair. But the implication that accused infringers will bear a *heavy* burden is unfounded. The law is clear that non-profit and educational uses are at the core of what fair use protects, citing "teaching (including multiple copies for classroom use), scholarship, or research," as examples of legitimate fair use purposes. Recent scholarship supports the idea that non-profit educational uses would have a presumption in their favor. A fairly simple showing from the educational user could shift the burden back to the rights holder, who must then prove the use is *not* fair.[5]

"If a license is available, then your use 'harms the market' for that work and cannot be fair."

Rights holders often suggest that if they are willing to accept a license fee to permit a practice, then that practice cannot be fair use. It is true that "the effect of the use upon the potential market for or value of the copyrighted work" is one of the four factors in Section 107, but that factor is not decisive. Instead, the Supreme Court has required that it be weighed together with the other three factors "in light of the purposes of copyright."[6] In recent cases, courts have found the use of a work to be fair despite the existence of a licensing market.[7] The DVR is again instructive, as it can record broadcast programming as well as make programs available "on demand" for a fee. Studios and programmers likely coordinate their schedules so that the same program is rarely, if ever, available through both channels, but it seems unlikely that such a coincidence would turn innocent time shifting into shameless piracy.

Section 110 Legends

While fair use has been the subject of misinformation for decades, Section 110 has also come in for some distortion in recent discussions. Here are two of the worst misstatements about Section 110.

"For digital transmissions, Section 110 trumps fair use. If a use does not qualify for 110 protection, it cannot be a fair use."

This may be the most harmful notion that circulates in debates over educational use of films. It is also the most demonstrably false. During the drafting of the TEACH Act, which modified Section 110(2) to allow digital streaming, the Register of Copyrights prepared a report that urged Congress to include key points about fair use in the legislative history of the statute. The Conference Report on the TEACH Act did just that, quoting the Register's conclusion that, "Fair use could apply as well to instructional transmissions not covered by the changes to section 110(2)…." Congress clearly had no intention of preempting fair use when it enacted 110(2). On the contrary, legislative history and subsequent analysis show Congress intended for fair use to fill in the gaps where the specific exception may not apply.[8]

"If a video is marketed for educational use, it cannot be transmitted digitally under 110(2)."

This legend expands the exception in the law far beyond its plain meaning. The TEACH Act does not allow transmission of works "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks." Many works are produced or marketed to some extent for educational use in some contexts. Productions of Shakespeare's plays filmed by the BBC, for example, are commonly sold to high schools and colleges for showing in literature classes. But to be excluded from the 110(2) educational provision, a work must be produced or marketed *primarily* for digital distance education. The vast majority of feature films simply do not have such a targeted audience. If the work is marketed primarily for commercial audiences, or for face-to-face educational use, repurposing it for digital distance education is precisely what 110(2) is meant to allow.

Conclusion

Copyright law can be confusing, but the proliferation of misinformation and misstatements about copyright has made rational discussion considerably more difficult, not to mention chilling beneficial behavior. Hopefully bringing some popular misconceptions to light will help clear the way for a calmer, more reasonable discussion of these issues.

[1] The Library Copyright Alliance (a coalition of ARL, the American Library Association, and the Association of College and Research Libraries) attempted to clear up some of the confusion when it published an Issue Brief discussing in some detail the streaming of films for educational purposes. That brief is available at http://www.arl.org/bm~doc/ibstreamingfilms_021810pdf.pdf.

[2] There are several other provisions in the law that grant special rights to libraries and educational institutions, chief among them Section 109, without which libraries would violate the law by performing one of their traditional core functions: circulating collections. Other provisions include: Section 108, Section 121, Section 504(c)(2)(i), Section 512(e), Section 602(a)(3)(C), Section 1201(d), Section 1203(c)(5)(B), and Section 1204(b). Among other things, these provisions make it possible for libraries to make books accessible to the print-disabled, to preserve deteriorating collections materials, to break digital locks for limited purposes, and to provide Internet access with the same protections as for-profit ISPs.

[3] See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (citing fair use and other exceptions).

[4] See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

[5] See, e.g., Deborah Gerhardt and Madelyn Wessel, "Fair Use and Fairness on Campus," *North Carolina Journal of Law & Technology* (forthcoming Spring 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594934.

[6] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (cited in Gerhardt and Wessel).

[7] See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2006). For a more in-depth discussion of this "Market Myth," see Gerhardt and Wessel.

[8] See, e.g., Jared Huber, Brian T. Yeh, and Robin Jeweler, *Copyright Exemptions for Distance Education: 17 U.S.C. § 110(2), the Technology, Education, and Copyright Harmonization Act of 2002*, CRS Report RL33516 (Congressional Research Service, Library of Congress: 2006), 7, http://opencrs.com/document/RL33516/.

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