

**Defending Fair Use Against
Legal and Financial Market Infringement**

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Abstract

This paper reviews recent legislative changes to the U.S. Copyright Act and explains how these changes, along with the growth of a financial market for copyright clearance permissions, infringe on the original purpose of copyright protection, especially the fair use provision. The legislative changes have additionally caused increased copyright confusion, hesitancy, and misinformation regarding what can and cannot be used under the fair use provision, thus adversely affecting the quality of education. The author argues that librarians must now provide leadership to protect fair use from infringement by the law and financial markets.

Table of Contents

Introduction.....	4
Historical Framing	5
Copyright Act Amendments	6
Fair Use Threatened.....	11
An Ethical Defense	15
Conclusion	22

DEFENDING FAIR USE AGAINST LEGAL AND FINANCIAL MARKET INFRINGEMENT

Introduction

The U.S. Copyright Act¹ is a unique piece of legislation in that it contains both law and philosophy. The portions of the Copyright Act cast as legal decree create a limited monopoly of exclusive rights for authors and creators to protect the fruits of their labor for a period of time. The philosophy portion, commonly known as the fair use provision,² outlines limitations to these exclusive rights. The fair use provision can be considered ‘philosophy’ as it does not state specifics for the exceptions but rather requires determination of fair use based on a case-by-case analysis of four factors. It is at this juxtaposition of law and philosophy where confusion lurks: how can one be in compliance with the legal stipulations of exclusive rights while at the same time making use of a philosophy allowing exceptions?

To address this confusion, librarians must have knowledge of the Constitutional history of copyright law, a thorough understanding of the Copyright Act and its amendments, as well as a passion for protecting the rights of education. Why? Because the Copyright Act is not simply law to be obeyed. Since it also contains an expressed philosophy, librarians and educators must make ethical decisions about using and defending educational fair use.

¹ “Circular 92.”

² Ibid.

Historical Framing

While not widely discussed, copyright law had an historical, expressed purpose. Article I, Section 8 of the United States Constitution granted Congress the power to declare war, coin money, raise and support armies, and provide and maintain a navy. Additionally, stated clearly in clause 8: “The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³ At the time the Constitution was written, the term “Science” was understood to mean ‘knowledge and learning.’⁴

Being extremely cautious of monopolies due to historic abuse, the framers of the United States Constitution chose not to grant a full monopoly for a long period of time. They presumed that if copyright granted total protection, copyright owners would be likely to authorize only uses that promoted and favored their interests. Beneficial social uses, such as criticism, commentary, or parody, would inevitably suffer a decline, if not extinction, under a "protection-only" copyright regime.⁵ Additionally, the Constitution specifically allowed some ‘limited’ time period of protection so that authors and creators could reap the rewards of their labor before their works entered the public domain. The founding fathers felt such limited ownership protection would provide sufficient incentive to continue artistic creativity on the one hand, and allow for eventual use of the creative works for the general public good on the other. Thus, the Constitution’s expression of copyright’s original purpose was not to protect authors from the theft of

³ Ibid.

⁴ Fallis, “Information Ethics for 21st Century Library Professionals”; Pressman, “Fair Use.”

⁵ Buttler, “CONFU-sed,” 1309.

their wares, as is widely believed. Instead, the core purpose of copyright law, based on the Constitution, was to promote the progress of knowledge and learning.⁶

No other clause granting power to Congress had a stated purpose – only clause 8. One can interpret this fact as proof of the vital importance the purpose had to the founding fathers.

To honor the purpose of the Constitution, Congress wrote several exemptions for libraries, archives, and non-profit educational institutions into the Copyright Act. These exemptions allowed for the use of creative works during the protected period “To promote the Progress of Science and useful Arts.” Several of the exemptions spelled out specifically what was allowed or disallowed. The exemption widely known as ‘fair use,’ however, left such specifics out, and required that each proposed use be analyzed on its own merits as to whether it was fair to both parties: copyright owner and public user.

Copyright Act Amendments

There have been concerted efforts in recent years to address the length of time creative works are protected, the rapidly advancing capabilities of technology, and the changing nature of distance education. These have resulted in the passing of the Digital Millennium Copyright Act (DMCA) of 1998⁷, the Sonny Bono Copyright Term Extension Act of 1998⁸, the Technology, Education, and Copyright Harmonization (TEACH) Act of 2002,⁹ and the Enforcement of Intellectual Property Rights Act of

⁶ Loren, “The Purpose of Copyright.”

⁷ UCLA Online Institute for Cyberspace Law and Policy, “The Digital Millennium Copyright Act: Overview.”

⁸ Keyt, “Sonny Bono Term Extension Act Extends Copyright Terms.”

⁹ Copyright Clearance Center, “The TEACH Act: New Roles, Rules and Responsibilities for Academic Institutions.”

2008.¹⁰ Understanding current copyright law is vital, as additional provisions and amendments instituted in recent years protect copyright owners for longer periods of time and in multiple ways. Both of these phenomena adversely affect the very heart of the Constitutional purpose of copyright. A brief overview of each of these copyright law amendments follows.

Digital Millennium Copyright Act

The DMCA consisted of two major parts: the first codified several international treaties to prevent copying of U.S. creative works, and the second outlined anti-circumvention provisions. The second portion notably provided exemptions from anti-circumvention provisions for nonprofit libraries, archives, and educational institutions under certain circumstances. These exemptions and circumstances, however, were very specific and extremely limited. The exemptions were to be reviewed every three years, and at this time the Registrar of Copyrights is accepting exemption proposals for the 2009 cycle.

The DMCA also limited the liability of nonprofit institutions of higher education (when they serve as online service providers and under certain circumstances) for copyright infringement by faculty members or graduate students. There were, however, a number of requirements an institution must agree to meet in order to gain these liability limitations.

The DMCA was supported by the software and entertainment industries (copyright owners) and opposed by scientists, librarians, and academics (public users). While it stated explicitly that "[n]othing in this section shall affect rights, remedies,

¹⁰ Albanesius, "President Bush Approves 'Copyright Czar' Bill."

limitations, or defenses to copyright infringement, including fair use...,¹¹ the DMCA made it a crime to circumvent anti-piracy measures built into most commercial software and media. It also outlawed the manufacture, sale, or distribution of code-cracking devices used to illegally copy software or media.¹²

Therefore, if a non-profit educational institution wished to use media in circumstances even slightly different than the limited circumstances currently exempted, it would be necessary to first crack the code in order to digitize the media, thus committing a crime and immediately losing all other privileges of copyright law. Pressman pointed out that the DMCA's failure to include a fair use exception as part of the anti-circumvention provision constituted a specific threat to fair use.¹³

The Sonny Bono Copyright Term Extension Act

Originally copyright law served as incentive for authors and creators to continue creating for the public good by protecting their works for a short period of time – time enough for them to reap benefits (financial or intellectual) prior to allowing the public's use of the material for further knowledge and/or creative endeavors. The Sonny Bono amendment changed the length of time creative works were protected before entering the public domain; from the short period of time originally protected by Congress (fourteen years, with the possibility of a second fourteen-year term if the author was still alive) to the life of the author plus an additional 70 years. For anonymous and pseudonymous

¹¹ UCLA Online Institute for Cyberspace Law and Policy, "The Digital Millennium Copyright Act: Overview."

¹² "Circular 92."

¹³ Pressman, "Fair Use," 96

works and works made for hire, the term was set at 95 years from the year of first publication or 120 years from the year of creation, whichever comes first.¹⁴

This amendment protected authors' rights, even after their death, rather than promoting the progress of knowledge and learning by extending protection by many years, thus keeping creative works out of the public domain and forcing fair use scrutiny on substantially more materials for a significantly longer period of time. "More and more, ... creation and sharing depend on the ability to use and circulate existing copyrighted work."¹⁵ The practical effect of keeping creative works from entering the public arena where they could be used and built upon was increased difficulty in creating new works. Additionally, this amendment contributed to the confusion surrounding copyright by stipulating differing lengths of protected time for different types of works.

Technology, Education, and Copyright Harmonization (TEACH) Act

Under the TEACH Act, instructors were allowed to use a wider range of works in distance learning environments, students could participate in distance learning sessions from virtually any location, and participants enjoyed greater latitude when it came to storing, copying and digitizing materials.¹⁶ As noted previously with the DMCA, there were also a multitude of requirements an institution must have in place in order to make use of the TEACH Act provisions. For some institutions it could be close to impossible to meet all of the requirements, thus rendering the benefits of the TEACH Act useless.

Additionally, while purporting to allow re-creation of a 'classroom' experience for distance education, the TEACH Act placed greater limits on materials than were, and

¹⁴ "Circular 92," 121

¹⁵ Jaszi and Aufderheide, *Code of Best Practices in Fair Use for Online Video*

¹⁶ Copyright Clearance Center, "The TEACH Act: New Roles, Rules and Responsibilities for Academic Institutions."

continue to be, in place for the face-to-face classroom. For example, a professor may choose to show a film in its entirety in the classroom to stimulate discussion and analysis, but that same material is not allowed in its entirety in the distance education realm.

At first glance the TEACH Act provided educators with a separate set of rights, in addition to fair use, to display and perform others' creative works regardless of the medium or whether the classroom was remote as opposed to face-to-face. Further reading reveals great disparity, along with a considerable number of additional limits and conditions on materials and formats, imposed by the statute. Educators could easily conclude that it is more trouble than its worth to rely on TEACH provisions. This statute's complexity introduced both more copyright confusion and a new digital context within which to think about fair use.

Enforcement of Intellectual Property Rights Act

Intended to give law enforcement new resources and tools to combat piracy and counterfeiting, this legislation explicitly allowed documents and records to be seized in the course of a civil copyright-infringement suit. Prior to the final vote by Congress, a number of professional associations including the American Association of Law Libraries, American Library Association, Electronic Frontier Foundation, and IP Justice sent a letter to Senators expressing their concern that an unbalanced approach to enforcement would lead to unintended harms and impede the Progress of Science and the useful Arts.¹⁷

Within days of the passage of this legislation, the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act was signed into law. The PRO-IP

¹⁷ American Association of Law Libraries et al., "Letter Re: Concerns Regarding S. 3325, the Enforcement of Intellectual Property Rights Act of 2008."

Act created several new government enforcement positions, including Intellectual Property Enforcement Coordinator (IPEC), who would serve within the Office of the President. The primary function of this position was defined thus: “to develop a ‘joint strategic plan’ to wage war on those who infringe copyrights, which include facilitating the sharing of information across law-enforcement agencies and between other countries.”¹⁸

Lessig¹⁹ stated that “The extreme of regulation that copyright law has become makes it difficult, sometimes impossible, for a wide range of creativity that any free society -- if it thought about it for just a second -- would allow to exist, legally.”

Fair Use Threatened

Several of the above-referenced amendments appeared to offer additional provisions for the educational use of copyrighted materials. However, these amendments also included substantial technological and legal requirements in order to put the new provisions into practice. It is easy to see how each of these additions to the Copyright Act engendered confusion and hesitation in librarians and educators. The “costs” of this confusion were less effective teaching materials, constriction of creativity for teachers and students, and the perpetuation of misinformation.²⁰ The deepened confusion and legal implications created by recent legislation also threatened fair use as a result of a legislative focus on enforcement and copyright owner rights. Many librarians and educators have thus chosen a conservative interpretation of fair use in order to feel ‘safe’ within the law. Yet fair use is a legal provision granting the ability for education and

¹⁸ Albanesius, “President Bush Approves ‘Copyright Czar’ Bill.”

¹⁹ Lessig, “In Defense of Piracy.”

²⁰ Rife, “The Importance of Understanding and Utilizing Fair Use in Educational Contexts: A Study on Media Literacy and Copyright Confusion.”

libraries to use small portions of copyrighted work, “including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, [and] is not an infringement of copyright.”²¹

In addition to Pressman’s previously noted declaration that the absence of a fair use exception as part of the anti-circumvention provision in the DMCA constituted a specific threat to fair use, Heins and Beckles outlined four specific practices that also threaten fair use: cease and desist letters, DMCA take-down notices, a ‘clearance culture,’ and negotiated guidelines.²² The first two are fully mature and have been aggressively used to control copyright abuse made possible through technologies now available in the Internet age. They each threatened legal action if material the copyright owner *believed* to be infringing were not removed. No proof of infringement was required. Research has shown that just the prospect of litigation, carrying potentially massive costs, can cause people to relinquish their rights. Simply the knowledge of such a litigation threat, and that it could be directed at an institution or an individual, could cause reduced comfort in using the rights granted by the fair use clause of copyright law. Because no proof of infringement was required, it didn’t even matter if the user considered the use of copyrighted material to be fair.

The development of financial markets for copyright clearance permissions, payable on a per-use basis or by annual license, also threatened fair use. Suddenly, there emerged the argument that educational institutions could no longer claim that the first use of copyrighted material leaned in favor of fair use due to the time and effort required to

²¹ “Circular 92.”

²² Heins and Beckles, “Will Fair Use Survive: Free Expression in the Age of Copyright Control.”

obtain permission, and thus did not require permission, simply because permissions were now suggested to be readily available. With copyright clearance permissions purportedly easy to obtain (albeit, for a fee and not always easy), educational institutions felt pressured to abandon fair use to only the occasional situation and pay for copyright permission on the majority of materials to be ‘safe,’ thus creating a ‘clearance culture.’ In a recent review of twenty randomly chosen courses, the author looked at electronic reserves processed by the university library. This review revealed that only 26% of the documents not already licensed (i.e., through subscription databases) or available on the Open Web were included in the annual campus copyright clearance license offered by Copyright Clearance Center (CCC). This left 74% of the documents needing copyright review still requiring procurement of pay-per-use permissions via CCC, special order, or direct contact with the copyright owner. This data suggested that the ‘umbrella coverage’ of such an annual license was not necessarily the full copyright clearance coverage implied.

There have also been attempts to negotiate guidelines to offer security to teachers and near-immunity from lawsuits to educational institutions that abide by them. These negotiated guidelines not only did not have the weight of law, but in addition contained arbitrary restrictions that ignored the flexible, case-by-case nature of fair use. While consensus on some of these guidelines was not reached, most notably the Conference on Fair Use (CONFU),²³ many in education adopted them in the search for a legal ‘safe harbor.’ To add to overall copyright confusion, there are currently seven different sets of

²³ Buttler, “CONFU-sed.”

educational fair use guidelines!²⁴ As Crews²⁵ pointed out, “The guidelines have become surrogates for a law that many individuals simply find unwieldy or disconcerting.” (630)

But why is fair use so important? The public policy report issued by the Brennan Center for Justice states,

“Fair use is critical to political and cultural life. If permission were required every time a document is copied for personal use, or a quote or image is incorporated into a new work, the costs and logistical difficulties of finding owners, seeking licenses, and paying for them would cripple our ability to share ideas. Education would be severely hampered if teachers had to get permission for every article or picture they copy for classroom use. And copyright owners could censor speech by denying permission to anyone whose views they disliked.”²⁶

Using the fair use provision has always been difficult because of the nebulous nature of the provision itself and the unpredictability of rulings by a court of law. Each case must be analyzed using four malleable and partly subjective factors, which does not necessarily predict how a court of law would rule. Even if one understood how to evaluate a use as fair, when brought to court the fair use defense had the potential of being discarded due to the encroaching and well-defined legal constraints on copyright as well as the growing financial market for purchasing copyright clearance permissions. Both of these developments cut deeply into understandings of when the fair use provision may be used. Yet Crews insisted that fair use “is an essential element of effective communication and education, and it is a crucial bridge for the widespread sharing of ideas.”²⁷

²⁴ Heins and Beckles, “Will Fair Use Survive: Free Expression in the Age of Copyright Control,” 5-6.

²⁵ Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines.”

²⁶ “Circular 92.”

²⁷ Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” 604

An Ethical Defense

In 1995, prior to any of the aforementioned amendments to copyright law aimed at dealing with the impact of electronic information technology, the Association of Research Libraries (ARL) wrote: “in order for copyright to truly serve its purpose of ‘promoting progress,’ the public’s right of fair use must continue in the electronic era, and these lawful uses of copyrighted works must be allowed without transaction fees.”²⁸ It is apparent from the legislation and financial market just discussed that this ARL statement unfortunately did little in subsequent years to protect and promote the Constitutional purpose of copyright: promoting progress of knowledge and learning for the public good.

Extending traditional property rights and other information controls and regulations into new media, such as the Internet, has proven to be problematic. All barriers to time and place normally associated with ownership disappear, causing information owners to become increasingly nervous about losing the rights to their creative work. Hence, there have been increased and successful lobbying efforts for Congress to increase copyright protection. Lipinski, in their review of various aspects of the legal infrastructure and globalization of information, found that “while the application of law to cyberspace is under development, there is the potential that a loss of information access and equity will occur.”²⁹ It was further suggested that the changed legal environment surrounding copyright law was “inconsistent with the original intent of the intellectual property laws. This is so because it upsets the ‘balance’ created by the

²⁸ Association of Research Libraries, “Fair Use in the Electronic Age: Serving the Public Interest.”

²⁹ Lipinski, “The Developing Legal Infrastructure and the Globalization of Information: Constructing a Framework for Critical Choices in the New Millennium Internet -- Character, Content and Confusion,” para. 68

dual nature of control and access rights. It is also irreconcilable with ethical principles of information ownership.”³⁰

New restrictions to information access come in the forms of elongated copyright protection periods, criminalized anti-circumvention stipulations disallowing digital access to media content, development of financial markets for copyright clearance permissions, a renewed copyright enforcement mentality, and the very nature of cyberspace. Floridi further outlined exactly what needs to be fought against:

“The infosphere is a transversal environment that is essentially intangible and immaterial but, not, for this reason, any less real or vital. The ethical problems it generates are best understood as environmental problems. ... Information Ethics is the new ecological ethics for the information environment. ... What we need to do is to fight any kind of *destruction, corruption, pollution, depletion* (marked reduction in quantity, content, quality, or value) or *unjustified closure* of the infosphere.”³¹

Therefore, due to the ethical dilemma between providing access and obeying national law, librarians need to take leadership in the defense of educational fair use as the original core purpose of copyright. It is essential that librarians step away from a conservative interpretation of fair use and step towards the defense of fair use against its infringement by legal and financial means.

Librarians have a rich history of ethics from which to draw in this regard. These ethical principles, as well as the professional organizations that promote them, can provide grounding for the defense of fair use.

In 1939 the American Library Association (ALA) adopted the Code of Ethics for Librarians:

³⁰ Lipinski and Britz, “Rethinking the ownership of information in the 21st century.”

³¹ Floridi, “Information Ethics.”

PREAMBLE

1. The library as an institution exists for the benefit of a given constituency, whether it be the citizens of a community, members of an educational institution, or some larger or more specialized group. Those who enter the library profession assume *an obligation to maintain ethical standards of behavior* in relation to the governing authority under which they work, to the library constituency, to the library as an institution and to fellow workers on the staff, to other members of the library profession, and *to society in general*.
2. The term librarian in this code applies to any person who is employed by a library to do work that is recognized to be professional in character according to standards established by the American Library Association.
3. This code sets forth *principles of ethical behavior* for the professional librarian. It is not a declaration of prerogatives, nor a statement of recommended practices in specific situations. ³² [*emphasis added*]

A new statement was added to the revised Code of Ethics adopted by the ALA Council in 1995: “We recognize and respect intellectual property rights.” In 1997, the ALA Council again revised and adopted the Code of Ethics to include, among other things, the changed wording: “We respect intellectual property rights and *advocate balance between the interests of information users and rights holders*.” [*emphasis added*] Hoffmann pointed out that our stated professional ethic to respect intellectual

³² American Library Association, “Code of Ethics for Librarians.”

property directly influences how we deal with copyrighted works.³³ Balancing between the use of information to expand knowledge and the rights of the copyright holder requires application of further ethics or moral codes.

As already shown in the discussion of copyright law's original purpose and recent amendments to copyright law, there exists a tension between what is legally permissible and what is morally responsible. When we consider the Internet and advances in technology, especially the Internet's many-to-many communicative mode, assigning responsibility (either legal or moral) becomes complex.³⁴ Therefore, it is extremely important that library professionals have a good working knowledge of information ethics: the question of who should have access to what information. The core issues of information ethics include the principles of intellectual freedom, equitable access to information, information privacy, and intellectual property.³⁵

While codes of professional ethics typically address the core issues of information ethics, they tend to leave a number of important questions unanswered, i.e. what exactly do these principles *mean*?, what should library professionals do when these principles *conflict* with other ethical principles?, and what is the *ethical justification* for these principles?³⁶ Both Fallis and Buchanan argued that courses specifically focused on providing an understanding of ethical theories must be part of the education for information professionals.

³³ Hoffmann, "The Ethics of Copyright," 110

³⁴ Buchanan, "Ethics in Library and Information Science: What are We Teaching?," 4

³⁵ Fallis, "Information Ethics for 21st Century Library Professionals."

³⁶ Ibid.

Ethical theories provide criteria for distinguishing between *right* actions and *wrong* actions. These theories can be channeled into four main types depending on whether they focus on consequences, duties, rights, or virtues.³⁷

Consequence-based theory determines right actions based on what has the best consequences. One argument for respecting intellectual property rights is that if copyright is not respected, authors will not be able to recover the costs of producing their work. As a result, they may not be willing to create more, which would clearly be a negative consequence.³⁸

Duty-based theorists posit that there are ethical duties that human beings must obey regardless of the consequences. A duty-based argument for respecting copyright law would state that we are duty-bound to obey the law of the land regardless of possible consequences.³⁹

Rights-based theory looks at things from the standpoint of the rights that human beings have merely by virtue of being human. It has been suggested that it is in the nature of human beings to think for themselves, which implies that we have certain rights. One may argue that we have a natural right to unrestricted access to information.⁴⁰

Virtue-based theorists think that the right thing to do is determined by the virtues that human beings ought to have. The right action is what a virtuous person would do in the same circumstances.⁴¹ Aristotle's (350BC) virtues included courage, temperance,

³⁷ Ibid.

³⁸ Hoffmann, "The Ethics of Copyright," 7

³⁹ Ibid., 8

⁴⁰ Ibid.

⁴¹ Ibid., 10

friendliness, and generosity. Librarians will require courage to stand up for the principle of fair use in the face of current trends toward protecting authors' rights.

It may be argued that our ethical development has been much slower than our technological growth. Now, however, with the convergence of strengthened legal support of copyright owners' rights and economic constraints on institutions of education, it is important that we work on the former to catch up with the latter.

Professional codes of ethics, or formal moral codes, provide a generalized grounding of ethical norms for the profession. Informal moral codes are more flexible and can be better adapted to particular situations. Informal moral codes control behavior more than formal codes – they are closer to the real morality of people. Being that informal moral codes are not usually written down, we learn them from observing which choices produce a good or bad reaction in others.⁴² One could argue that the vigorousness with which copyright owners are defending their rights indicates a bad reaction to making the choice of claiming fair use, especially in the boundless arena of cyberspace. However, the core purpose of copyright law may carry more weight than a bad reaction by copyright owners, as using creative works for the purpose of expanding knowledge and learning is expressly stated in the U.S. Constitution. Therefore, informal moral codes must take more than reactions into account; they must also consider the purpose of the law, especially when such purpose was written into our country's defining document.

“One can understand the complex validity claims of legal norms ... to compromise competing interests in a manner compatible with the common good.”⁴³ It is

⁴² McDowell, *Ethics and Excuses: The Crisis in Professional Responsibility*.

⁴³ Habermas, “Three Normative Models of Democracy: Liberal, Republican, and Procedural.”

apparent that the framers of the Constitution felt that promoting the progress of knowledge and learning served the common good. To that end they provided for a short period of time in which exclusive rights were given to creators *as well as* the privilege of the fair use provision for education. Recent amendments to the copyright law have changed the ‘short period of time’ into a long period of time to the benefit of copyright owners, but that does not in any way mean that the privilege of fair use exclusions are no longer valid. It could be argued that fair use must be empowered above and *beyond* the original intent of Congress. In fact, as the Supreme Court has pointed out, fair use keeps copyright law from violating the First Amendment.

As copyright law was amended to protect more works for longer periods of time, it made new creation even harder by blocking or making copyrighted works more difficult to legally use. For generations it has been widely believed that new creative works are products of one building upon the creative works of others. The authors of the original Copyright Act indicated that fourteen years (with the possibility of an additional fourteen years if the author was still living) was a sufficient period of time to keep creative works out of the public domain. They were aware even then of the importance of using and building upon the work of others. In 2008 Jaszi and Aufderheide affirmed this by stating, “In spite of our romantic clichés about the anguished lone creator, the entire history of cultural production from Aeschylus through Shakespeare to *Clueless* has shown that all creators stand, as Isaac Newton (and so many others) put it, ‘on the shoulders of giants.’”⁴⁴

⁴⁴ Jaszi and Aufderheide, *Code of Best Practices in Fair Use for Online Video*, 2

Conclusion

Fair use is more important today than ever before. United States copyright law and financial permission markets have converged on the themes that quantifiably *more* creative works must remain out of the public domain for *longer* periods of time, copyright owners must be protected from the *theft* of their work, and copyright *permissions* are ‘easy’ and economical to obtain. Thus, the law and financial permission markets suggest that, because fair use cannot be relied upon as a legal defense, libraries and educational institutions should ‘pay up’ for permissions to be legally safe rather than embrace the ‘safe harbor’ the fair use provision allows.

In light of legal strength and new precedents, it will take a strong ethical stance on the part of librarians and educators to maintain the right of fair use “To promote the Progress of Science and useful Arts,” as our Constitution demands. Copyright law provides important protection for well-meaning librarians, faculty and others who apply fair use. Fair use must not be abandoned in reaction to increased copyright owner protection or the ‘clearance culture’ created by copyright permission markets. Instead, librarians and educators must defend fair use against its infringement by new laws and financial markets.

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