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Leadership and Advocacy

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

HEARING ON THE SCOPE OF FAIR USE

STATEMENT OF HIGHER EDUCATION

Submitted on behalf of:
American Council on Education
American Association of Community Colleges
American Association of Public and Land-grant Universities
American Association of State Colleges and Universities
Association of American Universities
National Association of Independent Colleges and Universities

Submitted January 27, 2014

Fair use, a basic copyright law principle, is intended to advance the purpose of copyright, which as the Constitution says at Article 1, Section 8, is to "promote the Progress of Science." The fair use principle is rooted in court rulings that date as far back as 1740 (*Gyles v. Wilcox*, Chancery Court of England), was extensively developed in U.S. jurisprudence over many decades, and was enshrined in the Copyright Act of 1976 ("Act"). Fair use is the scale on which our nation balances, on the one hand, proprietary interests established by copyright, and on the other hand, vital public rights of communication, commentary, research, and artistic creation that are anchored in the First Amendment. The mission of American higher education — to advance education, increase knowledge through research, and foster public service — depends on the fair use principle.

Fair use ensures that copyright law does not stifle the very learning that copyright is designed to promote. Students, faculty and researchers depend on fair use to incorporate quotations, images and commentary in coursework and scholarly publications. Educational innovation depends on fair use. New digital sources of information that scholars access to develop ideas often rely on fair use. Fair use facilitates access to information for print-disabled students, faculty and researchers. Fair use protects information from deterioration and preserves knowledge for future generations.

The organizations listed above strongly support the continued viability of a flexible fair use doctrine as codified in Section 107 of the Act. We collectively represent the broad range of higher education institutions in the United States, including two-year and four-year public and private colleges and universities, and research universities with comprehensive graduate and professional education

programs. Our members educate the vast majority of American college and university students and conduct most of the nation's basic research. As illustrated below, fair use is critical to higher education because it advances teaching, research and public service. We respectfully request that this statement be included in the hearing record.

1. Fair Use Is Essential to the Purpose of Copyright and the Legal Framework Established to Promote Creation and Dissemination of Creative Works.

The power to enact copyright law was included in the Constitution to stimulate creative expression. The nation's founders believed copyright would benefit society by promoting public access to information and thereby encourage learning. The Supreme Court has consistently emphasized that the primary goal of copyright is to serve the public interest, not the author's private interest:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.¹

The Act's fair use provision, Section 107, is fundamental to achieving this public interest purpose. Fair use is a qualification on a copyright owner's rights as delineated in Section 106, and provides assurance that the Act's central purpose can be accomplished. The Act provides that although a copyright owner has rights with respect to copyrighted works, those rights are subject to constraints set forth in the Act, including those in Section 107. Section 107 specifies the circumstances under which portions of a copyrighted work may be used without permission from the copyright owner for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research; such uses are not an infringement of copyright. Section 107 provides a flexible fair-use standard that entails case-specific analysis of whether a particular use of copyrighted work is a fair use:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a 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; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fair use standard's multi-factored approach ensures that public and private interests are appropriately balanced.

Copyright and fair use are thus bound together by the purpose of promoting knowledge and learning for the public good. Fair use empowers intellectual discourse, enriches our understanding of

¹ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

American and international culture, and facilitates creative expression. Without fair use, valuable uses of copyrighted works would be chilled for fear of legal challenge. Educators, scholars, the press and citizens of our nation regularly make limited use of copyrighted works of others — to make a point, to argue an issue, and to inform one another. Such everyday uses are too small in individual value to merit complex and potentially expensive licenses for the use, yet important enough in the aggregate to constitute and sustain intellectual and cultural ideas. Fair use doctrine is not an affront to copyright or owners of copyrighted works. To the contrary, it is how we celebrate those works and encourage their use in ways important to society.

2. Fair Use Supports and Advances the Core Functions of Higher Education.

The core functions of American higher education — teaching, research, and public service — are the foundation of citizenship and democracy, and a source of incalculable economic benefit to our nation. The role of higher education in America catalyzed the development of the fair use doctrine. As the Supreme Court has explained, fair use serves as a “built-in First Amendment accommodation[.]”² and “affords considerable latitude for scholarship and comment.”³ The right to acquire knowledge and ideas is basic to our nation’s schools and universities. Teachers and students must be free to inquire, to study, to evaluate and to gain new knowledge. Fair use fosters criticism, explication and correction of copyrighted works, and thus expands prior knowledge.

Higher education institutions rely on the flexibility fair use assures. Statutory fair use guidelines enable appropriate use and obviate unnecessary and overly conservative licensing requests. The availability of fair use thereby prevents the lack of access to copyrighted works when licenses are not reasonably available. For example, universities have found that several major educational publishers refuse to license content for library reserves, and that many copyright owners fail to respond to requests to use copyrighted work. If fair use applies, the university may elect to use the work, but the well-perceived risk of aggressive, misguided legal challenge may cause the university to forego the legitimate use. Universities and their faculty — who are themselves authors — recognize the important copyright rights granted to publishers and other copyright owners. Fair use must be employed, however, if the mission of higher education is to be realized.

3. Innovation in Higher Education Requires Fair Use.

Colleges and universities utilize fair use to teach and research in innovative ways. Extensive use of online resources in education is perhaps the most significant development related to fair use since the 1976 Act. Access to and dissemination of digital works for purposes of teaching, scholarship and research are essential to the education process.

² Eldred v. Ashcroft, 537 U.S. 186, 219 (2003)

³ Eldred, 537 U.S. at 220 (quotation omitted).

Fair use enhances the capacity of the digitization of copyrighted works to stimulate innovative teaching and research. Full-text searching has been called the most significant advance in library search technology in the last five decades, for it allows scholars to perform searches in seconds that used to take days, months or even years — if the search was possible at all. “Text mining” is a new form of statistical research made possible through application of fair use to digitized works. With such works, educators can compare student papers against a database of existing works to detect plagiarism, a practice challenged as copyright infringement but acceptable under the fair use doctrine. With a flexible and adaptable standard, fair use cultivates innovation in higher education.

4. Fair Use Expands Opportunities for the Disabled.

Fair use expands educational opportunities for print-disabled persons. Digitization based on fair use is necessary to overcome disadvantages that print-disabled persons have historically faced in research, scholarship, and learning. Print-disabled persons are now able to access a universe of knowledge that in its traditional form they could not. Fair use facilitates compliance with federal nondiscrimination laws that require higher education institutions to provide reasonable accommodations to disabled persons.

5. Fair Use Facilitates Preservation and Expansion of Knowledge.

Fair use augments the provisions of Section 108 to assure preservation of information for future generations, notably through digitization of copyrighted works for scholarship and research purposes. The creation of digital copies of copyright-protected works protects them against purposeful, inadvertent, or unavoidable deterioration or destruction.

A key Constitutional purpose of copyright law is to promote learning. As an integral part of copyright law, fair use plays a critical role in achieving this purpose. Without fair use and robust application of its flexible standards, educational, scholarship and research opportunities would be lost to the detriment of students, scholars and researchers at America’s higher education institutions, and to the detriment of our nation and its economy. Thoughtful interpretation must not eviscerate the essential need for and functions of fair use in the 21st century context. To weaken fair use would be to impede teaching, learning, research and scholarship, the very “Progress of Science” the founders intended copyright to promote.