

From the University Presses — What Is Educational Fair Use?

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In December 2007 the **ARL** released a white paper titled *Educational Fair Use Today* by **Jonathan Band**, a well-known lawyer based in Washington, DC, who specializes in intellectual property issues related to technology law and policy. In its press release accompanying the posting of the paper at the **ARL's** Website (<http://www.arl.org/news/pr/ed-fair-use-12dec07.shtml>), the **ARL** presented the value of the paper in this way: “**Band** discusses three recent appellate decisions concerning fair use that should give educators and librarians greater confidence and guidance for asserting this important privilege.” I would like to suggest that educators and librarians are ill advised to use this paper as a basis for such “greater confidence.”

The paper analyzes three recent appellate court decisions, one in the **Ninth Circuit** and two in the **Second Circuit**. With **Band's** analysis of the two latter cases, *Blanch v. Koons* and *Bill Graham Archives v. Dorling Kindersley*, I have no argument. These are what might be regarded as classic fair-use cases fully in conformity with the long tradition of jurisprudence in this area. If there is anything controversial at all about the second of these two cases, it would be that the seven images of posters about the **Grateful Dead** owned by the **Archives** and included in the book published by **DK** were reproduced in their entirety, albeit in reduced size. But I don't think there are any copyright experts today who would argue that use of an entire work, especially an image, would automatically not be fair if used in a “transformative” way. So comfortable do most attorneys feel about such use these days that the counsel for **Penn State** are allowing our press to publish a book on the philosophy of black film using 35 film stills without permission from the rightsholders on the grounds that their use for purposes of scholarly comment and criticism in our book is exactly what

fair use has traditionally been meant to allow. University presses have perhaps been too timid in the past about testing the limits of fair use, shackled as they usually are by the risk-averse attitudes of university attorneys, but core uses like this are so clear-cut that the risks seem very minimal indeed.

The other case, *Perfect 10 v. Amazon.com*, decided in the **Ninth Circuit** is quite different and readily distinguishable from the **Second Circuit** cases in a way that **Band** obfuscates by emphasizing instead that, “in all three cases, the courts found commercial uses to be fair.” True, but it has been firmly established at least since the **Supreme Court** decided the landmark fair-use case of *Campbell v. Acuff Rose* in 1994 that the commercial nature of the use can be trumped by the “transformative” purpose of the use. This is what allows commercial publishers to rely on fair use just as nonprofit presses do, when they are publishing books and journals that quote passages or reproduce images from previous works in the process of advancing scholarship, the paradigmatic application of fair use that is undergirded by the Constitutional language of **Article 1**, which affirms the purpose of copyright protection to be “promoting the Progress of Science and the Useful Arts” or, in the words of the first **U.S. Copyright Act of 1790**, “the encouragement of learning.”

Before pointing to what importantly distinguishes the **Ninth Circuit** from the **Second Circuit** decisions, it may be useful to say a word about the differences between these two circuits themselves. The **Second Circuit** has long been regarded as the premier circuit for the adjudication of copyright cases. Such landmark cases as *Texaco and Kinko's* were decided in the **Second Circuit**, for example, and the *Google* case is currently in progress there. One reason, of course, is that

the publishing industry in the U.S. is heavily concentrated in New York City, and it is therefore no accident that so many copyright cases end up in this Circuit. Another reason is that the **Second Circuit** boasts probably the leading expert in copyright law in **Judge Pierre Leval**, long a district court judge (as he was in presiding over the *Texaco* case) but now a member of the **Court of Appeals** there. **Leval** is the author of what is perhaps the most widely cited article on fair use, “Toward a Fair Use Standard”, *Harvard Law Review* (March 1990). In it he argues strongly for the proposition that “transformative” use is “the soul of fair use.” The **Supreme Court's** ruling in *Campbell* embodies the spirit of **Leval's** argument as it viewed “transformative” use as the decisive element in weighing the four factors in this case involving a parody. So, too, do the two rulings in the **Second Circuit** cited by **Band** in his white paper, not surprisingly because **Judge Leval** sits on the appeals court that decided these cases!

The **Ninth Circuit**, by contrast, has been out on a limb in many ways in this area of jurisprudence, espousing theories that have no support in other circuits and little support among academic experts either. A good example is an extension of the *Perfect 10* case, *Perfect 10 v. Visa International*, which is now on appeal to the **Supreme Court**. In this case, *Perfect 10* is seeking to hold **Visa** and **Master Card** liable for vicarious and contributory infringement because they service offshore businesses that are known by these credit card companies to be illegally reproducing and selling images copyrighted by *Perfect 10*. The question presented on appeal is this: “Did the **Ninth Circuit** err in holding, contrary to long-established principles of secondary copyright liability, that financial institutions and credit card companies cannot be liable, as a matter of law, for the services they provide to Websites that traffic in stolen copyrighted works, even if they know the Websites are engaged in massive infringement, they profit from each infringing transaction, they have both the contractual right and the practical ability to stop or limit the infringing activity, and the infringing Websites cannot viably function without the services these companies provide?” In a sharp dissent commenting on the tortured reasoning his colleagues used to arrive at their decision, **Judge Kozinski** wrote that the court has made “very new — and very bad — law,” which “conflicts with every material assistance case that I know of” and “will prove to be no end of trouble.” He added: “If such active participation in infringing conduct does not amount to indirect infringement, it's hard to imagine what would.” Driving the majority's determination to reach the conclusion it did was

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a dubious theory of what public policy requires: “1. to promote the continued development of the Internet and other interactive media [and] 2. to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” Apart from the fact that it is the function of the legislature, not the judiciary, to decide what U.S. public policy is, the flaw of this analysis was succinctly noted by **Judge Kozinski**: “there is no policy of the United States to encourage electronic commerce in stolen goods, illegal drugs, or child pornography.”

This case alone should make people wary of relying on **Ninth Circuit** decisions as solid ground for inferring what copyright law is. But it might be noted, too, that the **Supreme Court** in a *unanimous* decision in June 2005 overturned the **Ninth Circuit Court of Appeals** decision of a year earlier finding in favor of **Grokster**, which of course went out of existence after the **Supreme Court** ruling in the face of multiple infringement suits. **Band** asks us to trust the **Ninth Circuit’s** judgment in the *Perfect 10 v. Amazon.com* rulings. Considered within this broader context, however, there is every reason to be suspicious of how this court arrives at its decisions. In fact, it offers a perfect example of what **Georgia Harper** argues to be the norm for deciding fair-use cases in her article “Google This!” (<http://www.utsystem.edu/ogc/intellectualproperty/googlethis.htm>). Building on an earlier analysis by **Wendy Gordon**, **Harper** shows that, at least in the more controversial cases where precedents may not be directly or clearly relevant, judges will ordinarily reach their conclusions about fair use on the basis of their own understanding of what is most socially beneficial and then, conforming to the requirements of legal procedure, explain their decisions in terms of the four-factor analysis. It is quite obvious in the *Perfect 10 v. Visa* case that the **Ninth Circuit** exactly followed this procedure, deciding first what “public policy” demands and then interpreting the law of vicarious and contributory liability accordingly. I would submit that the court did exactly the same in *Perfect 10 v. Amazon.com*. Because of its strong bias in favor of promoting the Internet as a crucial tool of “free market” commerce, the court here decided that the functionality of **Google’s** search engine entitles it to exalted status as a socially beneficial instrumentality. As **Mr. Band** says, “In fact, the court went so far as to say that ‘a search engine may be more transformative than a parody,’ the quintessential fair use, ‘because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.’” I submit that this is fundamentally flawed reasoning that it would be dangerous for any educational institution to take as gospel.

In a sense, of course, the Constitutional purpose as expressed in **Article 1** makes the utilitarian nature of copyright law clear enough: creators are given a limited monopoly over

their copyrighted works for the sake of advancing learning. But traditionally what fair use has meant as a crucial part of copyright is a means of making sure that the monopoly does not extend too far and thereby hinder the creativity of others who wish to build on past work, adding value to it by embedding it in new work in the context of comment and criticism. Until **Congress** passed the **1976 Copyright Act**, fair use never justified the sheer duplication of copies of the original as a substitute for it. Section 107 does, of course, contain a reference to the making of “multiple copies” for classroom use as an example of copying that might be considered fair use under certain circumstances. **Congress** claimed not to be changing the interpretation of fair use as already undertaken in the courts, but in this and some other respects, as **Kenny Crews** notes in his book *Copyright, Fair Use, and the Challenge for Universities* (Chicago, 1993), “despite its denials, **Congress** was unquestionably changing the law” (p. 32). The study of fair use commissioned by **Congress** as background for its deliberations leading up to the **1976 Act** found not a single case where such making of multiple copies for their own sake constituted fair use.

It is **Congress’s** prerogative to decide what activities should be regarded as legal if they benefit the public sufficiently, and in this instance its preference (as influenced by heavy lobbying from the educational sector) was made clear thenceforth. But it is important to realize how radical a departure this was from the previous judicial history of fair use, and it remains to be seen how much the judiciary will itself sanction this departure from settled legal precedent. In one notable instance, it did not. **Judge Newman**, writing for the majority in the *Texaco* decision, declared: “We would seriously question whether the fair use analysis that has developed with respect to works of authorship alleged to use portions of copyrighted material is precisely applicable to copies produced by mechanical means. The traditional fair use analysis, now codified in section 107, developed in an effort to adjust the competing interests of the authors — the author of the original copyrighted work and the author of the secondary work that ‘copies’ a portion of the original work in the course of producing what is claimed to be a new work. Mechanical ‘copying’ of an entire document, made readily feasible by the advent of xerography is obviously an activity entirely different from creating a work of authorship. *Whatever social utility copying of this sort achieves, it is not concerned with creative authorship* (italics added).” Please note that this decision was made by the **Second Circuit Court of Appeals** and therefore exists as binding precedent for this Circuit.

It is easy to infer from this decision that the **Second Circuit** holds a much different view of what may be considered “transformative” than the **Ninth Circuit** does. The functional utility of **Google** indexing and searching is much more akin to the “social utility” of photocopying than it is to the paradigmatic kind of transformation by way of value added that goes on when one writer or scholar builds creatively upon the work of another. **Judge**

Newman clearly saw the difference. **Band**, however, does not. The advice he gives therefore needs to be taken with great caution. The general conclusion that he draws from the three cases he analyzes is that “repurposing” alone suffices to ground a claim of fair use because of its social utility. Thus he thinks it reasonable for an educational institution to assume that “an educational use of an entertainment product is transformative because the work is being repurposed...[and, when a teacher reproduces a poem, a sound recording, or a photograph so that his students can study the work, his use is transformative] — as though, magically, merely making copies available to students somehow adds value to them because of the new context of their use. He further suggests that “tools like **Blackboard** permit an instructor to create an online anthology for a class, including copyrighted works, commentary, lecture notes, and student reactions” and “this recontextualization appears to provide a stronger fair use defense than would a library-run e-reserves containing just the plain text of works.” This theory would also presumably sanction publishing such an anthology online through the library or an institutional repository, eliminating the need for any permissioning of the copyrighted contents. **Band** does admit that “the repurposing argument provides less protection with respect to works that target the education market,” but he goes on to distinguish in this respect textbooks from journal articles and academic books. Journal articles, he asserts, have scholars as their primary audience and “because undergraduates are not the target audience of journal articles, inclusion of such articles in e-reserves or a course Website might well be treated as a form of repurposing.” Academic books, he believes, fall in a middle ground, “but even if the book is aimed to some extent at the student market, a course Website could recontextualize the book.”

To his credit, **Band** recognizes that “without doubt, many copyright owners will not agree with this analysis of the possible implications of the three decisions.” I am not a copyright owner, but I do head a university press that publishes scholarly books and journals whose copyright is owned by **Penn State University**. In that capacity I have a fiduciary responsibility to manage the university’s copyrights in the best interests of the university, which I interpret to mean that we should challenge uses of our works that do not add value to them in the usual way understood in fair-use jurisprudence but merely reproduce more copies for the educational market, which is the principal (and often the only) market for our publications. By blurring the distinction between what I have elsewhere dubbed as “creative” and “quantitative” uses, **Band** offers advice to universities that may get them in trouble. My difference with **Band**, in a sense, comes down to a bet: will the **Second Circuit’s** traditionalist interpretation of what “transformative” means ultimately prevail over the **Ninth Circuit’s** when a case involving sheer duplication reaches the **Supreme Court**? Given how the **Supreme Court** has already reacted to **Ninth Circuit** decisionmaking in the *Grokster* case, I think I have the safer bet. 🍀