

Copyright Perspective:
Current Issues in Libraries & Academia



Miami University

Oxford, Ohio

September 21, 2017

Kenneth D. Crews

Gipson Hoffman & Pancione (Los Angeles)

Columbia Law School (New York City)

We all Know Copyright!

- Roots in the Constitution
- First U.S. enactment in American law
- Expansion of scope and rights
- Proliferation of exceptions



Q: We all Know Copyright!

- Roots in the Constitution?
- **True or False:**

Copyright is specifically mentioned in the U.S. Constitution.

Q: We all Know Copyright!

- First U.S. enactment in American law?
- **True or False:**

The U.S. Congress was finally motivated to enact the first copyright law in the early 1900s as a result of international trade and the invention of new technologies such as sound recordings.

Q: We all Know Copyright!

- Expansion of scope and rights?
- **True or False:**

The duration of copyright protection can be determined by calculating a number of years from the date of creation of the work.

Q: We all Know Copyright!

- Proliferation of exceptions?
- **True or False:**

The exceptions to copyright exist to support socially beneficial causes, such as education, research, libraries, persons with disabilities, and other important needs.

Quandaries and Dilemmas

- Automatic Protection
 - No requirement of Formalities
- Broad Scope of Works
- Long Term of Protection
- Subject to Exceptions
 - Fair Use
 - Many Specific Exceptions
- Infringement & Liability
 - Protection for education and libraries

Always Something New

- Statutes and Regulations
 - Circumvention Exceptions
 - Bills in Congress
- Rulings from the Courts
 - Google Books & HathiTrust
 - Georgia State & E-Reserves
- International Developments
 - WIPO and Treaties
 - Free Trade Agreements

What's New?

- Adventuring
- Building
- Advocating
- Implementing



**** Adventuring**

- Exploring the Potential of Court Rulings
 - New Meanings of Fair Use
 - Google Books
 - HathiTrust
 - DK Publishing
- Making use of Circumvention Regulation
 - DMCA
 - Triennial Regulatory Measures

What is Fair Use?

- Section 107 of the Copyright Act
- Based on Four Factors:
 - **Purpose** of the Use
 - **Nature** of the Work Used
 - **Amount** and Substantiality of the Portion
 - **Effect** on the Market for the Work



Notwithstanding the provisions of sections 106 and 106A, the fair use of a 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, is not an infringement of copyright. 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 fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The HathiTrust case

The Authors Guild v. HathiTrust, 902 F.Supp.2d 445 (S.D.N.Y. 2012).

- Storing and preserving, with limited access, millions of copyrighted books.
- Transformative Uses.
- Restricted Uses and Access.
- Furthers Research and access for Impaired.
- *Affirmed by the Second Circuit.*

The HathiTrust case

The Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

“Added value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it.”

“To defeat a claim of fair use, the copyright holder must point to market harm that results because the secondary use serves as a substitute for the original work.”

Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2nd Cir. 2006).



**** Building**

- Building Resources
 - Expand our own Creativity
 - Keep your Copyrights
 - Open and Shared Repositories
- Building the Public Domain
 - Where is the Boundary?
 - Accepting Risks
 - Establishing a “Public Resource”

New Directions

- **Open Access**
- **No barrier to Access**
- **No restrictions on Downloading**
- **No restrictions on Uses**
- **Creative Commons**
- **Exercise of Copyright Ownership Rights**
- **Sharing of Rights with the Public**

**** Implementing**

- Craft Effective Policies & Resources
 - Fair Use
 - Ownership
 - Creative Commons
 - Publication Agreements
- Build a Copyright Team
 - First Responders!
 - Protection & Insight across the Institution

The Georgia State Case

- District Court, 2012
- Court of Appeals, 2014
 - Fair Use for Electronic Reserves
 - Purpose: Nonprofit Education
 - Nature: Nonfiction Books
 - Amount: Appropriate to the Purpose
 - Effect: **It's Complicated**
- **Transformative? Policy Implications?**

Making Sense of Fair Use



- Working with Fair Use
 - Base decisions on the Four Factors.
 - Discern principles from leading cases.
 - Develop written standards.
- Do not Work in Isolation
 - Public Domain.
 - Permissions and Licenses – including CC.
 - Specific Statutory Exceptions.

** Advocating



- Local
 - Policy and Team
 - Education for the Community
- Regional
 - Consortium and Cooperation
- National
 - Legislation and Regulation
- The World
 - WIPO, Trade, and International Agreements

New Directions: *This Week!*

- **Proposed reform of Section 108**
- Find it here: www.copyright.gov
 - Expanded scope of works that may be copied for researchers.
 - Digital performance of AV and more.
 - More flexibility for preservation.
 - May contract services to third parties.
 - Adds museums to the list.
 - Clearer reorganization.

Thank You!

Kenneth D. Crews
Gipson Hoffman & Pancione, **L.A.**
Columbia Law School, **NYC**
www.twitter.com/kcrews


