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Recommended Citation

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Blurred Lines and Shifting Boundaries: Copyright and Transformation in the Multimodal Compositions of Teachers, Teacher Educators and Future Media Professionals

By J. P. McGrail and Ewa McGrail

ABSTRACT

The rapid proliferation of better quality “prosumer” equipment and powerful yet inexpensive editing software have helped erode the long-standing distinction between professional media producers and amateurs. Today’s aspiring young artists can take existing film, musical works, and other audiovisual material and transform them in varying degrees to create new work that comments on the world around them and that rivals in quality much of what Hollywood and professional musicians produce. However, this assessment is from the point of view of content. The looming specter of aggressive copyright policing by a litigious creative industry still divides the haves from the have nots. Industry monitors have been able to conduct mass takedowns of work they deem to be derived from their own, as provided for by the 1998 Digital Millennium Copyright Act (DMCA). Both pre-service teachers and aspiring media professionals must pay close attention to the copyright implications of creative work they choose to appropriate. They must take especial care that the work they find for secondary manipulation and reframing meets the standards for fair use and transformation as provided in the Copyright Act. In this chapter, we discuss the concept of transformation and how to best use its freedoms and assess its limits in the creation of new digital media objects and creative classroom tools.

Keywords: *copyright, fair use, transformation, digital multimodal composition, teachers, teacher educators, media professionals, mashup, remix*

Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design (Leval 1990: 1110).

* * *

What's the difference between a media professional and an amateur producer? The rapid proliferation of better quality "prosumer" (Anderson 2003) equipment and powerful yet inexpensive editing software have helped to erode the long-standing distinction between professional media producers and amateurs (Jenkins 2006; Dush 2009). High definition cameras, digital audio recorders and powerful editing and visual effects software are now available for relatively little money to the average aspiring audiovisual artist (Lessig 2004; Williams and Zenger 2012). When the Internet became searchable via browsers, the text, graphics, images, audio and video of web sites became downloadable elements that could be copied and re-used. In addition, the rise of social media has greatly accelerated the practice of sharing and distributing audiovisual content among the digitally literate (Palfrey et al. 2009).

A perhaps less anticipated result of this greatly enhanced access to digital media is the desire on the part of contemporary creators - a term that now regularly encompasses teachers, teacher educators and media professionals (Bishop 2009; Bruce and Chiu, 2015; Cremin and Baker 2014; Hundley and Holbrook 2013) - not only to use today's digital tools to create original productions, but also to use them to augment their originally-authored work with previously created media, and comment upon, satirize, parodize, or enhance, and thus to *transform* - this previously existing creative material (Burwell 2013; Jenkins 2006; Knobel and Lankshear 2008; Palfrey et al. 2009). Much of this preexisting material is part of our audiovisual culture,

including samples of pop songs, news broadcasts, popular films, television shows and iconic images.

Simply put, a predominant cultural practice in our time has facilitated a vast and fruitful commentary on both the past and present (Lessig 2008; McCorkle 2015; Porter 2015). As Fisher et al. (2012) argued *in re* the Shepard Fairey case:

[I]t is only in the past decade that all of the elements have come together to create an Internet-based ecosystem that is making the collective photographic record of the world accessible and usable by artists as common reference material. The components of this ecosystem include:

- (a) Digital cameras;
- (b) Ubiquitous broadband connectivity;
- (c) Standardized digital image formats;
- (d) Photo databases and consumer photo sharing sites;
- (e) Image search;
- (f) Photo editing and manipulation tool sets. (296)

Since the pre-existing materials appropriated for social and intracultural commentary (Knobel & Lankshear, 2008; Lessig, 2008) are copyright protected (McCorkle 2015; Porter 2015), understanding fair use and, more specifically, the construct of transformation underpinning fair use within copyright law is a crucially important skill to acquire (Aufderheide and Jaszi 2011; Hobbs et al. 2007). Fair use grants creators, under certain circumstances, “the right to use, transform, and critique cultural materials” without permission or payment (Burwell 2013: 209). Heymann (2008) points out, however, that just because “virtually everything is transformative,” it does not necessarily follow “that nothing is infringing” (466).

Determining whether a given use of copyrighted material in one's creative work is *transformative* is a difficult question, but it is a question that must first be answered, at least to an ethically satisfactory degree, by the end user of the material. Today's websites, photos, videos and other material are frequently available for downloading without technical barriers (Cobia 2009); therefore, if the use of a copyrighted work is contemplated by an end user, the user should articulate – at least for themselves– that the use is fair. This is because “transformativeness in itself can be broadly interpreted” (Aufderheide and Jaszi 2011: 93) and transformative use can vary across subject matter. For example, case law shows us that a transformative use has not as often been found in cases that involve musical sampling (Landau 2015). Hence, any decision-making that concerns transformation requires a nuanced understanding of its relation to the other analytic factors under the fair use exception. These are, generally, the nature, amount, and effect of the appropriation on the original work, as stipulated in the Copyright Act's Section 107 (Copyright Act 1976).

Copyright education is now an essential component of both the disciplines of communication and education. Today, both pre-service teachers and aspiring media professionals must pay close attention to the copyright implications of the multimedia work they create. They must take special care that the copyrighted content they select for use, manipulation and reframing meets the standards for fair use and transformation as provided in the Copyright Act (McKenna 2000). In this chapter, we discuss the doctrine of fair use and, in particular the concept of transformation. We consider how to best use its freedoms and assess its limits in the creation of new digital media objects and creative classroom tools.

The Doctrine of Transformation

The doctrine of transformation begins with a 19th century case, *Folsom v. Marsh* (1841). The Reverend Charles Upham had copied over 300 pages from the plaintiff's author, Jared Sparks. (Sparks and Upham were both authors; the case title's name comes from their respective publishers.) Because the copying, while egregious by today's standards, was not complete, the defense suggested that it was an abridgment, which was not considered a violation of copyright during that period. Judge Story (1845) dismissed this argument and declared:

It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. (115)

At the same time, however, Judge Story (1845) laid out in rough form the doctrines of fair use, which, with some changes of language, were statutorily encoded in the 1976 federal Copyright Act as 17 U.S.C. § 107. He wrote:

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. (116)

Compare this language to what has been enshrined in the Copyright Act and important differences may be noted. The applicable parts of Section 107, the doctrine of fair use, are:

(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 (Copyright Act of 1976).

As the reader can see, if anything, the language adopted in the Act is somewhat softer in tone than that provided by Story. Because it is fundamentally situational and contextual, perhaps more than in any other area of copyright, fair use continues to bedevil copyright attorneys, defendants (Porter 2015), and those who wonder if they can use some portion or modicum of a pre-existing work, and at what point their new creative works become transformed (Abruzzi 2012). The answer to whether a particular use of a copyrighted work is a fair use is generally, “It depends.”

The doctrine of fair use was enshrined in law because reasonable people realized that if it were not permitted as a defense, works of journalism, scholarship and criticism could not quote protected works, and many other quotidian uses of copyrighted work would become legally suspect (United States 2005). Political speech would also be severely restricted; after all, if copyright law were absolute, how could one candidate mention or make reference to the written remarks of another (Abruzzi 2012)? Moreover, as the ambit of protected expression has grown, it might become difficult in the future to create works not tainted by the specter of infringement (McGrail and McGrail 2010). Fair use is therefore an affirmative defense that offers essential balance to the law of copyright itself.

As early as the mid-nineteenth century, a tension existed between those who sought to earn a living from their creativity and those who required work that had gone before to provide context and perspective for the mounting of their own work (Lee 2009). In *Emerson v. Davies* (1845), the court remarked:

[In] truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. (The Federal Cases 619)

There are two major difficulties that may occur when a judge makes a decision about whether a particular use of copyrighted works is (or is not) a fair use. The first difficulty is that in some cases, the transformation in the secondary work is fully evident, but it may not be sufficiently different from the original work to be considered a new work in its own right.

The second is that one court may find that a sufficient transformation has occurred, and a higher court may reverse, or *vice versa*. For example, in *Cariou v. Prince* (2011), a Federal District Court case, an artist manipulated the photographs of a photographer, and the question before the District Court was whether the processes undertaken were sufficient to transform the works to new, original works. The court found that for a work to be transformative, it must “in some way comment on, relate to the historical context of, or critically refer back” to the original work (Nguen 2015: 127). In *Cariou*, the federal court did not find that such a transformation had occurred, but when the case was appealed to the Second Circuit, *Cariou v. Prince* (2013), a transformation was found for 25 of the 30 photographs in question, and those works were adjudged not infringing. The Second Circuit remanded the case to the District Court for findings on the remaining five photographs, and the parties settled out of court (Nguen 2015).

Generally, transformation is now connected most strongly to the first of the four factors of fair use, *the purpose and character of the use* (Lee 2009). Prior to the *Campbell v. Acuff-Rose* (1994) case, the third factor probably had primacy (“the amount and substantiality” of a secondary use). Since then, *Campbell* (1994) has become the flagship for contemporary transformation theory in fair use. In 1993, the controversial rap group 2 Live Crew created a version of Roy Orbison’s classic 1964 hit, “Oh, Pretty Woman,” which they called “Pretty Woman.” In it, they borrowed the iconic opening guitar phrase, and the melody and lyrics that, in poking fun at the original, used a significant portion of Orbison’s original song. Prior to this, fair use cases had generally turned on how much of an earlier work had been borrowed (Supreme Court of US, “Syllabus” 12-16). In their case, however, 2 Live Crew had borrowed liberally from the preexisting song, and could not argue for a triviality of appropriation. The court emphasized that if the intent not been parodic, the group would have indeed run afoul of the third fair use factor, the amount and substantiality of the portion of the work used. Instead, the court found that parody was a *bona fide* transformative factor. While 2 Live Crew borrowed heavily from the original, the result did not supplant the original work, because it parodied it. Parody, the court ruled, if found to be legitimate, is then *per se* transformative (Supreme Court of US, “Syllabus” 17-20). In other kinds of appropriation, for a secondarily used work to be found transformed, it, too, must create something sufficiently original in meaning; the resulting work must stand on its own.

A number of modern artists, including Jeff Koons and Shepard Fairey, have perhaps taken transformation into the realm of context (McCorkle 2015). Shepard Fairey took a photograph of then-presidential candidate Barack Obama and attached below his image the legend, “Hope.” The photographer Manny Garcia, who took the photo for the Associated Press

(AP), threatened to sue Fairey, who, in association with the Stanford Fair Use Project, then sought a declaratory judgment against the AP [*Shepard Fairey v. Associated Press* (2010)], but the parties settled out of court, in a sense depriving us of further court guidance in this area (McCorkle 2015). However, Fairey teamed with a number of legal experts and wrote a lengthy monograph on his own case, noting:

Garcia's aim had been to take a realistic portrait of then-Senator Obama. Indeed, the primary purpose of all of the AP's photographs is (in the AP's own words) to provide "a truthful, unbiased report of the world's happenings." In keeping with that general commitment, Garcia had testified that he had no intention to promote Obama's candidacy. By contrast, Fairey's primary objective in creating the Hope Poster was to promote Obama's candidacy. (Fisher et al. 2012: 262)

Thus, as political speech, Fairey and his colleagues argued that his poster should be accorded the highest possible protection, for, as the Supreme Court has observed, "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office" (Citizens United 2010: 23).

Jeff Koons has been involved in a number of court cases that have turned on transformation and fair use. He has won some and lost some, and often on legally similar sets of facts. In *Rogers v. Koons* (1992), the Court ruled against him for his sculpture of puppies based on a photograph of the same. He lost two other court cases before winning in *Blanch v. Koons* (2006), in which he once again used an advertising photograph for a sculpture he made of legs. In doing so, he used material in what the courts call a "secondary" way, in order to comment upon the original, advertised material. In the holding in *Blanch*, the court quoted celebrated fair use scholar and jurist Pierre Leval, who wrote:

If...the secondary use adds value to the original - if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings - this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. (1111)

Both Fairey and Koons have thus performed a valuable societal service by helping us understand both the boundaries of copyright and where it sometimes comes into conflict with free speech and cultural investigation. Even when they have lost or have been forced to settle, they have helped maintain the vitality of artistic expression (McCorkle 2015). In Koons' case, he has revealed that the advertisements and popularly available graphical material that he frequently uses to create his *objets d'art*, have an effect on people, an effect that should be explored and commented upon. In Fairey's case, he made a simple politically motivated observation that served to rally followers of then-Senator Obama. In each case, their commentary could never have been so vivid nor so effective without the secondary use of a protected work, sublimely transformed. In the next section, we will examine how this commentary has come to be popular with teachers, teacher educators and media professionals.

Transformation, Remix, and Multimodal Creativity for Education and Media Professionals

Although digital content creation practices and the resulting products will continue to evolve, remixes and mashups have become the prevalent modes of communication and collaboration as well as means of expression for the social and cultural commentary contained in these creations among students, educators, and media professionals (Edwards 2016; Stedman 2012).

There are many reasons that someone in the teaching and media production professions might wish to create a remix or mashup in the 21st century. First, it is often an exercise where creativity is pressed into service for a specific pedagogical purpose (Cremin and Baker 2014; Hundley and Holbrook 2013). Using the vividness and reflexivity of preexisting works helps orient the works symbolically and create connections between them and existing works that, as “cultural tokens” or memes have emotive meaning to people (Lessig 2008: 75). This aids the process of meaning-making for the students of a teacher, teacher educator, or teaching media professional and situates the meaning in a real-world reference. It also locates the sociocultural context in which the creation dwells (Lankshear and Knobel 2010). Secondly, a teacher’s own facility with the building tools of remixing and mashups is improved with each remix, no matter the specific purpose of the piece. Thirdly, it may be the pedagogical point of the piece to actually convey how to make a mashup itself to students, aspiring artists and media professionals. Finally, teachers and teaching media professionals may feel they need to “keep their hand in it,” as the saying goes, and keep skills, interest and creative vim fresh and current.

Collages, montage, and sampling are examples of popular remix forms, which as a genre “use one or many materials, media either from other sources, art pieces (visual arts, film, music, video, literature etc.) or one’s own artworks through alteration, re-combination, manipulation, copying etc. to create a whole piece” (Sonvilla-Weiss 2010: 9). In remix and related creations, “the sources of origin may still be identifiable yet not perceived as the original version” (Sonvilla-Weiss 2010: 9). Mashups, on the other hand, Sonvilla-Weiss (2010) explains, “put together different information, media, or objects without changing their original source of information, i.e. the original format remains the same and can be retracted as the original form and content, although recombined in different new designs and contexts” (9).

As evident in these definitions of remix and mashup, there are many ways in which a portion of an original work can be transformed into something that helps make a new creative piece. Changes that lead to creative transformation can be for many reasons and via many methodologies, including the following:

- 1) content, changing message, meaning or position (Burwell 2013; Nguen 2015; Rife 2009),
- 2) expression and means of expression (Aufderheide and Jaszi 2011; Lessig 2008),
- 3) production process or technical aesthetics (Burwell 2013),
- 4) the source of the words or content (McIntosh 2012),
- 5) text form and structure (Cope and Kalantzis 2000; Mills and Exley 2014),
- 6) the audience and context (Aufderheide and Jaszi 2011; Edwards 2016; Nguen 2015); and
- 7) “purpose, delivery, design, and style” (Edwards 2016: 42; Hobbs and Donnelly 2011; Hobbs 2010).

The key question is, then, how to determine at what point something is or is not new, is transformed or changed enough, and what criteria or indicators one should use to make such a determination. Fortunately, we are not without guidance in this area.

First of all, teachers, teacher educators and teaching media professionals typically do not create digital multimodal creations that feature externally authored material without having a prevailing pedagogical purpose. Moreover, educators need to remember that statutorily, they may display any material they wish, as long as it is in a face to face classroom situation (McGrail and McGrail 2010; Westbrook 2011). For educators, a fair use analysis would be necessary if the work in question became available to the public, such as on a public site like YouTube, or through social media such as Instagram, Snapchat, Facebook or Twitter (Westbrook 2011). Nevertheless, in today’s educational milieu, such a circumstance might well be often

encountered (Purcell et al. 2013; Thibaut 2015), and in that event, the re-use of externally authored material should be examined. Students can learn how to make a fair use determination by using a reasoning process that considers the balance between the rights of the copyright holder and the rights of the user.

Although there is not and there never will be an exhaustive or “bulletproof” list of criteria for the fair use of protected works, we can derive some general understanding of, and arrive at guidelines based on the statutory definitions of fair use, relying on previous key court decisions, as well as exemplars of practice in the professional literature (e.g., McIntosh, 2012; Navas 2009). Because every court case is different – both in the material being argued over and the legal personnel arguing it – similar facts can lead to dissimilar results (compare the court decisions from 2011 and 2013 for *Cariou v. Prince*).

Therefore, the first fair use analysis undertaken should *not* be the one that takes place in a courtroom. Teachers, teacher educators, and teaching media professionals should embark on this analysis with every digital multimodal composition that they create. Recently, Porter (2015) has argued:

[w]hat is needed, I would argue, is a rhetorical frame of thinking about context and a heuristic methodology—that is, a critical procedure for making ethical and legal judgments about the use of others’ intellectual property. This type of ethical reasoning is what Aristotle called *phronesis*, or the art of practical judgment. Such an approach would include some broad principles and guidelines, some heuristic questions, and some case examples—of clear-cut fair uses, clear-cut infringements, and the vast of gray area in between. (269)

Practical Wisdom: Exploring Transformative Use of Copyrighted Content

We believe that acting on the basis of practical judgment, reasoning, or phronesis, is essential to understanding fair use transformativeness. In order to acquire such a mode of thinking, a process should be developed of asking specific and pointed questions about, and interrogating proposed actions with respect to the use of appropriated material for multimodal composition. Here are some preliminary questions and “food for thought” that should push forward the concept of phronesis for teacher educators and teaching media professionals interrogating their proposed use of externally authored material for new and creatively transformed works.

1. *Is my secondary use a direct appropriation of material, as with sampling, or merely based on existing material, such as using characters from an existing novel?* Each of these exigencies invites different fair use issues.
 - a. In the first instance, sampling, current copyright law permits free “sound-alike” recording, as long as composers, if any, are compensated [(17 U.S.C. § 114 (b)(2)]. Therefore, if the sample is not particularly distinctive, it may be wiser and legally safer to make a sound-alike version of it.
 - b. The second instance deals usually with so called “fan fiction,” in which fans of a game, book, graphic novel, movie, etc. take the recognizable characters, usually with their names, histories and situations intact (Stedman 2012). If this is done privately, there is usually no fair use issue. If however, these are distributed widely, litigation may result, even if there is no commercial gain proposed or realized. This is because such work may weaken or supplant the ambit of the original characters or situations. The more distinctive such characters, situations or events are, the more likely they are to be protected by copyright, even if no words or images are exactly appropriated. If, however, your

characters are merely loosely based on others, generally it is not an infringement. For example, it is fine to have a caped flying character who has super powers; there are dozens, perhaps hundreds of such characters. Described thus, it is insufficiently distinctive to replace any former work. Having one who is vulnerable to kryptonite or who is called the Man of Steel, on the other hand, would likely not be a fair use, because it would be too similar to the protected character of Superman. Details matter.

2. *If my use is a direct, or exact appropriation, is it necessary for the point I am trying to make?*
 - a. If you seize an image because it is convenient, you should inquire as to whether it is *absolutely necessary* for the point of the remix you are building. If it is not absolutely necessary, while it still may be legal to appropriate it, you need to be aware that the copyright holder may avail themselves of remedies, such as a DMCA takedown notice, cease and desist letter, or formal legal notice (Cobia 2009).
 - b. If it is necessary, the question falls to the amount of the appropriation (the third factor in fair use, 17 U.S.C., § 107). The greater the degree or amount of appropriation, the more it is incumbent upon the appropriator to show how the amount of the seizure is justifiable. Since there is no “bright line” rule, proportionality and reasonableness are key. Rife (2009) elaborates on this point further in this advisory statement: “Use as little as possible (either in size, amount...) in order to accomplish your own writerly goals, but do not be afraid to *use what you need to make your point*” (149).
3. *If it is a direct appropriation, what is its specific purpose in my oeuvre as a whole?* The piece taken from a copyright-protected work should have a *specific* purpose in the remix.

- a. One purpose enshrined in case law is parodic intent (see *Campbell v. Acuff Rose* (1994)).
If a work is seized for the purpose of a parody of the original work, the courts generally assume that the amount of the appropriation is far less relevant to fair use.
 - b. You may feel that it is necessary to seize a portion of a work to comment upon it in another way, perhaps to offer criticism of it, whether journalistic or otherwise. One of the most common uses of this kind is to select a portion of a work to comment upon it for purposes of scholarship, criticism or commentary. This may be done with any sort of work. In the case of audio, video or text, a small but relevant portion may be used. Again, no bright line rule exists for guidance, especially in light of the 11th Circuit Court's decision to specifically decline to use the 10% rule in the Georgia State copyright case [*Cambridge University Press et al. v. Patton et al.* (also captioned *v. Becker* 2014)]. In the case of still images, since a portion or detail of a protected photograph is often insufficient to comment upon, case law suggests that the reproduction of a protected work be at a lower level than the original, sufficient for commentary, but which does not facilitate illicit copying (*Kelly v. Arriba Soft Corporation* 2002-3). In such a case, the transformation is to a form that cannot serve to replace the original.
4. *If it is a direct appropriation, is the use proportional to the amount needed for me to make the point, observation, or aesthetic trope of my piece?*
- a. Copyright law does not make a *per se* distinction between a journalistic use, which comments upon a work, and a purely aesthetic use, which may attempt to use found digital objects for aesthetic elaboration. Because of this, even *bona fide* journalists generally may not reproduce an entire copyrighted work in service of their own work. The third factor of fair use – the amount and substantiality factor – weighs in here. One of

the most important cases as to “how much is too much” is the J. D. Salinger case (*Salinger v. Random House Inc.* 1987), where letters from the renowned but reclusive author were commented upon and heavily quoted prior to publication. It resulted in the important finding that whether a work is unpublished does not absolutely bar a fair use analysis, but compels its strict observation. Commensurate language on this point was added to US Code (Copyright Act, Title 17 1992).

5. *If it is a direct or exact appropriation, as with a musical sample, is the portion borrowed the most recognizable part of the work, the “heart” of the work?*
 - a. The heart of a work refers to the most recognizable portion of a copyrighted work, the part of the work that produces its greatest artistic or economic service to the author (*Campbell v. Acuff-Rose* 1994). Consider that many books, movies or songs may elaborate on more than one element. For example, *Star Wars* features dozens of major characters appearing over the course of many movies, books, games and other creative forms. If one were to appropriate, for example, the character of Luke Skywalker, it would be disingenuous to argue that this was a minor character because there were so many others. While the actual “time” of Skywalker’s entrance and exit in the story may be, as a proportion of the whole, brief, Skywalker, along with a handful of other characters, such as Princess Leia and Han Solo, is part of the “heart” of the franchise. Skywalker forms one of the most important characteristic elements of the story, and much of the narrative arc depends on his existence. If you were to appropriate the Skywalker character – including his history and character arc – you might materially diminish his artistic puissance in the original work. It is therefore likely to arouse litigation on the part of the copyright holder.

6. *If it is a direct appropriation, what kind of work is it from? Is it more factual or more creative?*
- a. The Supreme Court has materially abandoned the “sweat of the brow” standard in copyright, which means that the amount of effort (as opposed to the novelty or creativity) in assembling elements to make a work of copyright is not relevant to its protected status (see in particular the Feist case, *Feist Publications Inc. v. Rural Telephone Service Co.* 1991). Thus, it is expected that scientific, historical and other nearly completely factual accounts depend upon earlier factual accounts for their scholarly worthiness. Facts cannot be protected by copyright. Therefore, the courts accept a more relaxed standard in the application of fair use to these works than to those that are more purely creative, such as musical works, novels, fictional motion pictures, etc. (Rife 2009). So the use, for example, of a scientific finding, formula or equation is rarely the cause of litigation.
 - b. This doesn’t mean that a factually-based work is entirely open for free appropriation. Many scientific or factual works contain new findings or new assertions, and the copying of these may expose you to litigation. On the whole, however, a more liberal use of preexisting protected material would probably be acceptable to the courts.
 - c. It is also true that one may use anything in the public domain as liberally as one chooses, even if another, protected work uses the same selection.
7. *If it is an appropriation, have I altered or processed the portion to change it to fit the artistic raison d’etre of my work?*
- a. If you wish to use some aspect of a protected work, but you wish to alter it significantly in order to fit the new work, this is not only creative, but prudent. If preexisting material is altered sufficiently that it is not recognizable, there is no infringement. This is because

the recognition of the earlier protected work in listeners is key to whether the latter work is in danger of supplanting it. If a picture, drum beat, graphic, etc. is so altered, it is considered transformed for the purposes of fair use, and so it forms a completely different kind of work. It generally would not attract litigation, because it is not recognizable as belonging to someone else's earlier work.

8. *If it is an appropriation, have I changed the audience and purpose for my creative work?*

a. This can happen in a number of different ways. Jeff Koons, mentioned several times above, repurposed work as to both genre and audience. In the case of audience, it is likely that those who look at and admire his provocative sculptures would not have studied the advertising art and other quotidian ephemera of mass communication from which he appropriates images so intently (Farago 2014, June June 25). This is also a form of transformation. Koons' sculptures are hardly replacements for the persuasory commercial work from which he has borrowed certain elements.

9. *If it is an appropriation, have I changed the genre of an appropriated work?*

10. A change of genre can be that across a medium, such as a change from a book to a movie, or it can involve a change from a comedy to a more serious work. It can also involve both of these changes. When *Buffy the Vampire Slayer* (Kuzui 1992) was made into a movie, the movie decided to take an overtly comical and spoofing look at the subject matter, a cheerleader who had been anointed to kill vampires. However, when the popular television program of the same name *Buffy the Vampire Slayer* (Whedon 1997) was developed using the movie as a stem, the entire tone of the piece changed to a very serious speculative fiction take.

Discussion and Conclusion

Teachers, teacher educators and those who teach future media professionals need to assert themselves in the copyright sphere more forcefully than they have been doing (Aufderheide and Jaszi 2011). In many cases, more conservative members of this cohort have assumed that any use of exterior work requires a raft of written permissions (Hobbs et al. 2007; Rife 2009). Of course, large copyright holders wish to preserve this status quo, because it serves their financial interests (Grimmelmann 2009). The truth is that the constantly evolving court guidelines for fair use and copyright require a full-throated and aggressively creative approach by those who seek to use protected work, especially in the education and media literacy professions. A timid approach will only result in the goal line being moved back (Aufderheide and Jaszi 2011). Because Congress has increased the period of protection for copyrighted works so extensively (17 U.S.C. 2011; Lessig 2004), fair use is extremely important, not just for commentary, but for more artistic projects as well (Aufderheide and Jaszi 2011; Lessig 2008).

In many cases, even a fairly liberal use of earlier works has been tolerated, if the result is a completely new work. A good example is DJ Danger Mouse's *Grey Album*, which is a mashup of the Beatles' *White Album* and Jay-Z's *Black Album*. Both Jay-Z and the two surviving Beatles highly praised the result (Gross 2010), which in the current litigious atmosphere, is particularly surprising. However, again, as we have emphasized, the parts created by the Beatles and Jay-Z, while evident and obvious throughout the transformed work, do not supplant or stand in for the work of their preexisting musical art. Instead, the album forms a kind of homage to them, even as it comments upon them, and demonstrates that further aesthetic purposes exist for the music it builds upon. The music of the Beatles and hip-hop star Jay-Z have thus been commented upon in

a completely creative way, even though the *Grey Album* consists mostly of their earlier work (York 2014). It has been transformed, and a thing of new value has been created.

Teachers, teacher educators and teaching media professionals are already in a presumed “good” group of copyright “citizens.” As educators, the first of the four factors of fair use already supports them, as written in the statute (Copyright Act of 1976, Section 107). Moreover, the Register of Copyrights has recognized the special status of media literacy educators in permitting the unlocking of protected DVD content for fair use purposes (Hobbs 2011), even when such use violates technological barriers that have been secured by the Digital Millennium Copyright Act (1988). However, to keep the goodwill of legislators and the courts, educators must make good faith efforts to create work that errs on the side of creativity and transformation (Rife 2009), and away from mere copying. Engaging in a prior fair use analysis goes a long way toward this good end. Teachers are uniquely positioned to do the work of moving the goal line back to a more balanced ambit between copyright owners and end users. The law and practice are ours to use and amend. Hayek (2010) wrote:

The fundamental contrast between government by rules, whose main purpose is to inform the individual what is his sphere of responsibility within which he must shape his own life, and government by orders which impose specific duties has become so blurred in recent years that it is necessary to consider it a little further. It involves nothing less than the distinction between freedom under the law and the use of the legislative machinery, whether democratic or not, to abolish freedom. (62-63)

The interpretation of fair use in the last twenty years has been, in the view of Lessig (2008) and others moved to a position out of balance. It is important that we use our understanding of transformation— and the “legislative machinery” Hayek mentions, to assure that copyright and

fair use, which specifically exist for our commonweal – remain balanced as to what accepted practice is. This does not necessarily mean that we must change the law; rather, we must ensure that others outside the field of media education accept the good faith practices of those of us within it, that is, educators and media professionals. From this, we can change what the courts and society will find to be infringing, and what they will deem a just yet creative use.

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FURTHER READING

Aufderheide, P., & Jaszi, P. (2011). *Reclaiming fair use: How to put balance back in copyright*. Chicago, IL: University of Chicago Press.

Aufderheide and Jaszi have created a more general, yet essential work about the importance of fair use and why it is essential for educators, students and media professionals to assert fair use instead of avoiding it.

Hobbs, R., & Donnelly, K. (2011). Toward a pedagogy of fair use for multimedia composition.

In M.C. Rife, S. Slattery, S., & D.N. DeVoss, (2011). *Copy(write): Intellectual property in the writing classroom* (pp. 275-294). Fort Collins, CO: The WAC Clearinghouse.

Hobbs & Donnelly lay out a strong argument for fair use and its importance in critique and production in both mass and social media. They urge educators to become aware of their rights under fair use.

Lessig, L. (2008). *Remix: Making art and commerce thrive in the hybrid economy*. New York, NY: Penguin Press.

Lawrence Lessig has a justly deserved reputation as a copyright reformer. In *Remix*, he lays out the case for transformative work based on existing work as part of our heritage and crucial to the preservation of our creative culture.

Porter, J. E. (2015). Response to part II: Being rhetorical when we teach intellectual property and

fair use. In M.C. Rife, S. Slattery, S., & D.N. DeVoss, (2011). *Copy(write): Intellectual property in the writing classroom* (pp. 263-272). Fort Collins, CO: The WAC Clearinghouse.

Porter's adaptation of Aristotle's "practical wisdom" about intellectual property, or phronesis, we found especially engaging and applicable to our arguments here.