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Can the Internet Shrink Fair Use?

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Edmund W. Kitch*

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I. INTRODUCTION

The idea that the Internet will cause the scope of the permitted "fair use" of copyrighted works to shrink is plausible. This essay explores that idea.

The conception of fair use that has made the Internet relevant to fair use was set out in an influential 1982 article by Wendy Gordon.[1] She suggested that the fair use doctrine is and should be available to protect an infringer from liability only when the infringer's use is one that is socially beneficial and would be authorized by the copyright owner except for the fact that transaction costs make it too costly to seek and obtain permission for the copying. "Fair use should be awarded to the defendant in a copyright infringement action when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner."[2] An illustration of this test as it might be applied to a traditional form of fair use—the quotation of a copyrighted work in another work—is as follows. The use of the quotation in the second work is of such little value to the second author that it is not worth his time to locate and communicate with the copyright owner. Yet the use of the quotation helps the second author make the point, while it may help the first author by acting as publicity for his work. Everyone is better off if the quote is used, yet if permission is required the quote will not be used.

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1. Wendy J. Gordon, *Fair-Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).
2. *Id.* at 1614.

The fair use doctrine enables this use to occur, leaving everyone better off.

The connection between this conception of fair use and the Internet is the possibility that the Internet will make it easier for users of copyrighted work to communicate with, and obtain permission from, the copyright owner. As a result, there will be fewer situations in which there is the market failure that in Gordon's view justifies the fair use doctrine.

The 1994 decision of the Second Circuit in *American Geophysical Union v. Texaco, Inc.*[3] provided further support for the connection. *Texaco* was a test case between eighty-three publishers of scientific and technical journals against Texaco claiming that the photocopying of articles from the journals by Texaco research scientists was copyright infringement. Texaco's defense was that the copying was fair use. The court held that the copying was infringement, not fair use.[4] The court's opinion by Judge Jon Newman essayed the four statutory fair use factors,[5]—the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect upon the potential market for or value of the copyright. In connection with the last factor Texaco argued that there was no effect on the market for the articles because there was no market for journal articles, sold separately. In response, the plaintiffs argued that the availability of copyright licenses authorizing copying from a relatively new organization, the Copyright Clearance Center, or CCC, would provide significant revenue if copying of single articles was held not to be fair use. The court accepted this argument.

> Though the publishers still have not established a conventional market for the direct sale and distribution of individual articles, they have created, primarily through the CCC, a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying . . . . [I]t is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. This notion is not inherently troubling: it is sensible that a particular unauthorized use should be considered "more fair" when there is no ready market or means to pay for the use, while such an unauthorized use should be considered "less fair" when there is a ready market or means to pay for the use.[6]

3. 60 F.3d 913 (2d Cir. 1994).
4. *See id.* at 931.
5. *See id.* at 917 (citing 17 U.S.C. § 107 (1995), which provides in part: "In determining whether the use made of a work in a 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.").
6. *American Geophysical Union*, 60 F.3d at 930-931.

In September 1995 the Report of the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force, a U.S. government group studying proposals for changes in legislation in light of the rapidly developing information infrastructure or Internet, commented:

> Finally, it may be that technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine. Thus, one sees in *American Geophysical Union v. Texaco Inc.*, a court establishing liability for the unauthorized photocopying of journal articles based in part on the court's perception that obtaining a license for the right to make photocopies via the Copyright Clearance Center was not unreasonably burdensome.[7]

In 1996 the United States Court of Appeals for the Sixth Circuit, faced with the claim that copying articles and excerpts from books into course packs for distribution to students is fair use, expressed approval of the Second Circuit's analysis of *American Geophysical* and rejected the fair use claim.[8] The publishers in *American Geophysical* offered licenses to campus copy shops both directly and through the Copyright Clearance Center.

In 1997 Robert Merges summarized these developments:

> Digital networks call into question the assumptions that animate an important body of copyright law. In this section, I argue that because the contemporary fair use doctrine is predicated on a market failure rationale, and because an electronic exchange potentially eliminates this market failure for digital content, fair use law will significant[ly] shrink, or an alternative basis for fair use will be rediscovered . . . .
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> . . . [R]ecent opinions [*American Geophysical* and *Princeton*] show that if fair use is strictly dependent on market failure, it is a concept with a very limited future. If the market-making capacity of institutions such as the CCC makes such a dent in market failure, digital technologies will obliterate the fair use defense entirely. Put another way, if the fair use defense arises only when transaction costs are prohibitive, the dramatic reduction in those costs will give the defense a very limited role in the future.[9]

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7. INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 82 (Sept. 1995). As of February 10, 1999, this document could be found at: <http://www.uspto.gov/web/offices/com/doc/ipnii/index.html>.
8. *See* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996). "Where, on the other hand, the copyright holder clearly does have an interest in exploiting a licensing market—and especially where the copyright holder has actually succeeded in doing so—'it is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis.'" *Id.* at 1387 (quoting American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930 (2d Cir. 1994)).
9. Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 130, 132 (1997).

On July 13, 1999, the Copyright Clearance Center went online at <http://www.copyright.com>.[10]

Although the *Texaco* and *Princeton University Press* cases involve literary works in an academic or scientific setting, and the web site of the Copyright Clearance Center offers licenses principally for the copying of written works, the basic issue of the relationship between a more available permissions process and the scope of fair use has relevance for other kinds of works as well. For instance, in *Sony Corp. of America v. Universal City Studios, Inc.*,[11] the Supreme Court suggested that home copying of broadcast television programs by means of a video cassette recorder for purposes of viewing them at a later time is fair use. However, manufacturers are introducing a new generation of recorders.[12] These machines are dedicated computers that record the programs to a hard disk and use program information provided through a modem connection to manage the recording and replay process. Such machines could easily be programmed to keep track of the time shifting engaged in by a household and report that information to a central site where charges could be imposed. Will this technology mean that recording for purposes of time shifting is no longer fair use?

II. TWO VERSIONS OF THE INTERNET'S SHRINKING POWER

Is the idea that the Internet will shrink fair use simply because it exists? That is, will fair use shrink simply because the copyright owner could have established an Internet permission site, but chose not to do so? I will call this version of the idea the boundary version—that the possibility of Internet permissions affects the scope of boundaries of the copyright property. Or is the idea that the Internet will shrink fair use only for uses of works for which Internet permissions are easily available? In other words, if an Internet permission site is not available for a work, will an "unshrunk" or even expanded version of fair use be available as to that work? I will call this version of the idea the privilege version—that in a particular case the availability of Internet permissions on a reasonable basis affects the fair use "privilege" of making the particular use of the copyrighted work. None of

10. *See Copyright Clearance Center Announces Online Republication Licensing Service* (visited Feb. 10, 2000) <http://www.copyright.com/News/RLS.html>. The Republication Licensing Service, or RLS, is only one of a number of services the CCC offers on its website. The website has press releases dating back to 1996, but there are no earlier releases announcing the availability of online services.

11. 464 U.S. 417 (1984).

12. There are two such products, that of TiVo Inc. (manufactured and also marketed by Phillips, and shortly by Sony as well), *see* <http://www.tivo.com>, and that of Replay Networks, *see* <http://www.replaytv.com/home>. Both products are based on Quantum Corporation's QuickView Technology. *See* <http://www.quantum.com/products/quickview/quickview_wtb.htm>.

the short existing discussions of this issue have suggested the possibility of these different versions, much less specified which they have in mind. Wendy Gordon, who wrote before the Internet, clearly had in mind the basic, structural conditions for transacting, not the particular accidents of the relationship between a particular potential infringer and a particular copyright owner.[13] The comments of Judge Newman in *Texaco* and of Judge Nelson in *Princeton University Press*, on the other hand, appear to be referring to an actual, existing permissions process.[14] The existence of this process enables them to say in effect (I would guess with some relief) that "my decision does not mean that you will be unable to copy (that scientists will be unable to make copies of journal articles for the file, that professors will be unable to use course packs), all it means is that you will have to pay a relatively minor fee for permission." On the other hand, none of the discussions make any effort to describe in any detail the terms of the permissions process they consider relevant, suggesting that the actual details of the permissions process are not relevant.

The words of the fair use section of the copyright statute are not helpful on their face. The transaction cost idea is itself not to be found in the statute, so there is naturally enough no guidance on how it is to be applied. That does not undermine Gordon's idea, however, for it is agreed that the statutory section is but a partial codification of a judicial rule of reason. And if transaction cost conditions are relevant to the reasonableness of copying without permission—and Gordon appears to have carried the day on this point—then there is no reason why judges should not take them into account in their development of the doctrine.

The issue of whether the boundary or the privilege version is the correct one is related to basic questions of how we conceive the doctrine of fair use. Is "fair use" part of the definition of the boundaries of the copyright property, so that when a court says that a defendant's actions are fair use the court is saying "the copyright was not infringed?" If so, then the boundary version would be correct, for when the copyright owner chooses not to create an Internet permissions site, the copyright owner is simply exercising her right, as owner, not to license the use. Or is "fair use" a privileged form of trespass,[15] so that when a court is saying that a defendant's use is fair use the court is saying, "the copyright was infringed, but in these particular circum-

13. *See* Gordon, *supra* note 1.
14. *See* American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994); Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996).
15. Perhaps fair use is similar to the privilege in tort law for a traveler on a public highway who reasonably believes that the highway is impassable to enter, to a reasonable extent and in a reasonable manner, upon neighboring land in order to continue his journey. *See* RESTATEMENT (SECOND) OF TORTS § 195 (1965).

stances the defendant's trespass is excused"? If so, then the privilege version would be correct, for when the copyright owner chooses not to create an Internet permissions site, then the Internet has no relevance to the reasonableness of the particular alleged infringer's failure to obtain permission to copy.

The wording of Section 107 is clear on this point. "Notwithstanding the provisions of sections 106 and 106A [which define the exclusive rights possessed by the owner of copyright property], the fair use of a copyrighted work . . . is not an infringement of copyright."[16] This language treats the fair use doctrine as integral to the definition of the property rights, requiring that people consult sections 106, 106A and 107 together to determine the boundaries of the property. Thus when Section 106(1) confers the exclusive right "to reproduce the copyrighted work in copies,"[17] that really means "to reproduce the copyrighted work in copies if the reproduction is not fair use."[18]

Despite the wording of Section 107, courts and commentators have viewed fair use as a privilege. The Supreme Court said:

> Fair use was traditionally defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine.[19]

Following the logic of this observation, the Supreme Court has said that fair use is an affirmative defense.[20] This suggests that the privilege approach is the correct one and that facts specific to the particular situation are relevant to the scope of the available fair use.

One clear disadvantage of the privilege approach, and a disadvantage relevant to the transaction costs involved in Internet permissions, is that the privilege approach requires a court to evaluate, in every case, the reasonableness of the Internet permission process available in the context of the particular alleged infringement. A reasonableness determination would include an evaluation of the license

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16. 17 U.S.C. § 107 (1995).

17. *Id.* § 106(1).

18. The "notwithstanding" formulation of § 107 is repeated at numerous points in §§ 108-121 of the Copyright Act. Sections 107 through 121 create numerous different modifications of the rights conferred by § 106. The usage of "notwithstanding" in all of these sections is consistent with the construction of § 107 offered here.

19. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (citations omitted).

20. *See id.* at 561; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994). This view of the fair use defense is based not on the statutory language of the 1976 Copyright Act but on the precedents under the 1909 Act. Under the 1909 Act, fair use had no basis in the statute, and was said to be an exception and affirmative defense. The legislative history of the 1976 Act said that Congress did not intend to change the doctrine.

fee offered, and would require the courts to address the kinds of questions addressed in any compulsory licensing scheme.

There is nothing in the extensive precedents and commentary on fair use which bears on the specific question of whether a court would look at the licensing potential of the Internet as affecting the scope of fair use as a boundary matter, or as a privilege matter, and no conclusive answer to that question is offered here. It is clear that the fair use doctrine is strikingly fact intensive, and a very wide range of facts indeed is potentially relevant. Some of the most insightful academic commentators have tended to despair of any meaningful generalizations, leaving the development of the law to the common law process.[21] Yet the facts one finds considered in the cases tend to be generically specific—was the defendant a thief, how much did the defendant take, for what purpose was the taking, and so on. There is no case that suggests that George could not make use of Sam's copyrighted work because George knew Sam, knew his phone number, and knew he owned the copyright; so the polite and "fair" thing to do was to call him up and ask him.

Under either approach, however, it will be necessary for the courts to explore the question of what can be done through the Internet to facilitate the licensing process. Under the boundary approach, a court would have to be satisfied that it is possible through the use of the Internet for owners of copyrights to make licenses available to potential users with minimal transaction cost. The owner of the copyright involved in the particular case might have chosen not to set up and operate such a site, but if it could not be done even if the owner wanted to do it, then the Internet would not be relevant to fair use. Under the transaction approach, a court would have to be satisfied that the copyright owner actually set up and operated such an Internet site. In either case, the actual possibilities offered by the Internet are important.

III. THE TRANSACTION COST MINIMIZING INTERNET PERMISSIONS PROCESS

What would a transaction cost minimizing, Internet-based permissions process look like? Assume, for purposes of the following discus-

21. *See* Lloyd L. Weintreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137, 1138 (1990) ("What is fair is as fact-specific and resistant to generalization in this context as it is in others. Development of the doctrine of fair use ought to proceed, therefore, not by deduction from principle but by induction from concrete cases."); Diane Leenheer Zimmerman, *The More Things Change the Less They Seem "Transformed." Some Reflections on Fair Use*, 46 J. of the Copyright Soc'y 251, 266 (1998) ("I am beginning to think that the only way will be by building our set of fair use rules from the bottom up, and not from the top down.").

sion, that basic issues of Internet access and usability have been resolved. Free (at least at the margin), fast and reliable Internet connections are available everywhere. Knowledge of how to use the Internet is widespread—say as widespread as knowledge of how to use the U.S. Postal Service—and users are comfortable browsing the Internet. Any reasonably prominent website is for most users only a few clicks away. That is not the world of today, but it is not unreasonable to assume that it will be the world of tomorrow.

Now that we are all ready to surf, what should we be able to find in the way of copyright permissions that should make a difference to the doctrine of fair use?

First, it would be important that there be one or a few sites to which a user could go to find out whether Internet permission is available for a particular work. The user should not have to spend significant amounts of time hunting for a site offering licenses for the particular work the user wishes to use. These sites could either provide links to the copyright owners offering permissions or the permissions could be offered at the site. The user should be able to search for the work by the commonly used identifiers—author, title, publisher, and ISBN or comparable number—and learn immediately whether or not the work is available for licensing. The user should be able to obtain this information from the site without paying a fee and without having to provide information.

Once the user learns that a license is available, the user should then be able to learn the terms of the license for the use that the user wants to make of the work. For instance, if the user wants to quote the work for a scholarly article, reprint it in a corporate magazine with a print run of 30,000, or provide it to an academic class, the user should be able to determine what that would cost. Then the user should be able to make payment in a convenient form, and receive electronic evidence that the permission has been granted. All of this should take place promptly so that the user can decide whether to accept the license and use the work, reject the license and not use the work, or reject the license and rely on what remains of fair use. Comparable processes occur routinely on today's Internet, so none of these requirements should present any problem.

But what terms should be offered? Does the copyright owner have to offer different prices, depending upon what use is to be made of the work? Does it matter whether the requester is a for-profit institution or a not for profit entity? Does it matter what the impact of the use will be on the market for the work? How many price gradations have to be offered? If different prices have to be offered, how much information does the requester need to supply so that the copyright owner can determine the price? What can the copyright owner require to verify the information? Does the requester have to have the opportunity to

negotiate with the copyright owner, for instance, by making offers? If so, how rapidly does the copyright owner have to respond?

If we accept Gordon's hypothesis that the purpose of the fair use doctrine is to make possible uses of the work where the value to the user and the copyright owner are positive, doesn't the copyright owner have to take account of the value to the user in her pricing? If a copyright owner offers to license making copies of a work at $20.00 a page because the work may be used to brief a group of investment bankers, does the copyright owner have to offer a lower price to an economics professor who want to distribute copies of the same work to his sophomore class?

The Internet does nothing to solve the transaction cost problems of creating and administering a licensing pricing structure and the costs of administering such a structure in a world where licensees have incentives to qualify for the lowest price category.

IV. THE INTERNET SITE OF THE COPYRIGHT CLEARANCE CENTER

We need not confine ourselves to speculation, however, since there is a real life, functioning Internet copyright permissions website at <http://www.copyright.com>.[22] The site is that of the Copyright Clearance Center, the not for profit organization whose existence was mentioned in the *Texaco* and *Princeton University Press* cases.

The Copyright Clearance Center offers targeted licensing services. For example, one service offers blanket institutional site licensing for in-house copying of copyrighted documents like that involved in the *Texaco* case. Another offers licensing for course packs like those involved in the *Princeton University Press* case. The additional services are described on the CCC web pages. As far as I can tell from exploration of the site, the only way to find out whether or not the CCC can quickly grant a request is to submit one and wait for a response. The site does offer a "database of works" with a limited search capability (no search by author is available, for instance) but that database includes price information only as to some of the works, and the fact that a price is stated does not mean that a particular request will be granted. In order to submit a request, users must provide a good deal of information. Each permission is subject to explicit contractual terms. One notable term is the condition that "Any act by User that involves copying beyond that set forth in the notification shall be deemed in its entirety to be an unpermitted act of copying,"[23] which appears to mean that once a requester has obtained permission to copy some portion of a work the user cannot copy any other portion or

22. Copyright Clearance Center (visited Feb. 23, 2000) <http://www.copyright.com>.
23. *Id.* at APS Terms and Conditions, cl. 2.

copy for any other purpose, even if that copying would be fair use. As to each permission, users agree to maintain books and records for at least four full calendar years and to permit the CCC to audit them. If the audit uncovers a user's underreporting or underpayment of three percent or more, the user pays the costs of the audit.[24] Notably, the license is provided "as is," with no warranty that it is effective and no indemnification if it turns out to be ineffective.[25]

The CCC is not currently operating a web site that undertakes to offer licensing for all possible fair uses of a copyrighted work. The CCC has instead targeted specific uses which are at best questionable candidates for fair use,[26] uses such as the systematic production of course packs provided in place of the purchase of educational texts, or massive and systematic in-house copying for commercial purposes. The CCC has generated licensing revenue by licensing uses that would otherwise be infringing, but it has not generated, nor attempted to generate, revenue from traditional fair use activities. Nor does the web site attempt to provide the public with a list of works for which permission is automatically available. As presently structured, the CCC website appears likely to have little impact on the scope of fair use. However, the website can be improved over time.

V. CONCLUSION

The Internet can only take some of the transaction costs out of licensing. The costs of creating and administering a pricing system,

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24. *See id.* at APS Terms and Conditions, cl. 8.

25. For instance, if the entity with which the CCC deals in fact does not own the copyright and the person obtaining permission is sued by the actual owner the CCC will not indemnify the user. The full clause is:

> 7. *Warranty*. THE WORK(S) AND RIGHT(S) ARE PROVIDED 'AS IS'. THE RIGHTSHOLDER(S) HAS GRANTED CCC THE RIGHT TO GRANT PERMISSION UNDER THE APS AND HAS WARRANTED THAT IT HAS ALL RIGHTS NECESSARY TO AUTHORIZE CCC TO ACT ON ITS BEHALF. CCC AND THE RIGHTSHOLDER DISCLAIM ALL OTHER WARRANTIES RELATING TO THE WORK(S) AND RIGHT(S), EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Id. So the user who carefully navigates the CCC website, applies for and receives permission, and pays the fee, still has no commitment from the CCC that the permission is valid.

26. *See* Copyright Clearance Center (visited Feb. 23, 2000) <http://www.copyright.com>. This statement does not suggest that the possible applicability of fair use did not stimulate the creation of these services. In both *Texaco* and *Princeton University Press* there were dissenting judges (and in *Princeton*, the copyright owners lost before a panel of the Sixth Circuit, a decision that was then reversed by the court en banc). *See* Texaco, Inc. v. Academic Press, Inc., 60 F.3d 913 (2d Cir. 1994); Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996). Perhaps, absent these services, the cases would have come out differently.

combined with the follow-up steps necessary to ensure a reasonable level of compliance with the licensing conditions, remain. These costs are substantial. If the courts were to take a boundary view of the issue, it seems unlikely that a court would conclude that any Internet site, no matter how wondrous, effects such a potential dramatic reduction in transaction costs that the scope of fair use should significantly shrink. If, on the other hand, a court were to take the privilege approach, and to assume the task of assessing on a case-by-case basis whether permission was so easily available at such minimal cost that it should have been obtained, then the very cost of that transaction by transaction assessment would burden the process. For in each case a potential license would have to assess whether the price and other terms and conditions of any given licenses are so reasonable as to foreclose fair use; and if the potential licensee chose to proceed without a license, a court, in the event of an infringement suit, would have to do the same thing.