



Copyright, Free Speech, and the Public's Right to Know: How Journalists Think about Fair Use

By Patricia Aufderheide and Peter Jaszi

Project Manager: Jan Lauren Boyles
Graduate Fellow and Assistant Manager: Katie Bieze

A Project of the Center for Social Media, School of Communication, American University, and the Program on Information Justice and Intellectual Property, Washington College of Law, American University

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EXECUTIVE SUMMARY

For journalists and journalistic enterprises, the copyright doctrine of fair use--the right in some circumstances to quote copyrighted material without permission or payment--is integral to getting work done and distributed. Journalists use it to quote sources and source material, refer to previous incidents, comment or critique, and to summarize, among other uses. The business of journalism is sustained in part by fair use, which enables appropriate, timely, unlicensed quotations and references to newsworthy material. Fair use incorporates journalists' free speech rights within copyright.

But journalists are facing ever-greater challenges to applying the doctrine in daily life. Social media, video, and user-generated content pose new challenges and unfamiliar choices. Online aggregators, bloggers and citizen journalists copy original material and further destabilize business models. The executives heading their own news organizations mistakenly point to fair use as imperilling their future. Legal conflicts and claims create confusion and anxiety.

This study, resulting from long-form interviews with 80 journalists, finds that journalistic mission is in peril, because of lack of clarity around copyright and fair use. Journalists' professional culture is highly conducive to a robust employment of their free speech

rights under the copyright doctrine of fair use, but their actual knowledge of fair use practice is low. Where they have received education on copyright and fair use, it has often been erroneous. Ironically, when they do not know that they are using fair use, they nevertheless do so with a logic and reasoning that accords extremely well with today's courts' interpretation of the law. But when they have to actively make a decision about whether to employ fair use, they often resort to myths and misconceptions. Furthermore, they sometimes take unnecessary risks.

The consequence of a failure to understand their free speech issues within the framework of fair use means that, when facing new practices or situations, journalists experience expense, delays and even failure to meet their mission of informing the public. These consequences are avoidable, with better and shared understanding of fair use within the experience of journalistic practice, whether it is original reporting, aggregation, within large institutions or a one-person outfit. Journalists need both to understand fair use and to articulate collectively the principles that govern its employment to meet journalistic mission.

INTRODUCTION

The Rise of the Importance of Fair Use

Journalism -- the practice of reporting timely news and information for public consumption -- is driven by a mission widely articulated and shared among its practitioners. This collective vision finds its roots in the First Amendment, from which journalists draw their function as societal watchdog. The Society of Professional Journalists' Code of Ethics notes that journalists "believe that public enlightenment is the forerunner of justice and the foundation of democracy." The profession of journalism is defined by its mission. It has no other entry requirements or professional boards.

Journalists daily bump into copyright policy while meeting this mission. They regularly quote from government documents, think-tank reports, books and papers, memos and interviewee's words—most of them copyrighted. State and local government documents, for example, are not necessarily in the public domain. Even federal documents may include copyrighted material or, if written by contractors, be copyrighted. Non-governmental sources, even if not published (for instance, a note or a diary entry), are all protected under the default copyright that is now national policy. As journalists increasingly move to a web-based environment, they meld images, music and video into new forms of multimedia -- work that contains multifaceted layers of copyright ownership rights.

Journalists experience the need for fair use in particular in the following typical situations:

- **Providing evidence or proof of a news item.** Quoting conclusions of a report; reproducing a damning memo; quoting a source's words; photographing breaking news on the scene; using an audio clip of a press conference.

- **Illustrating a news item.** Providing audio or visual amplification to a factual statement; providing “color” quotes; adding quotes from bystanders; including photographs twitpic’ed from the scene; recording natural sound for a radio piece
- **Including copyrighted material that incidentally appears in the news.** Music, posters, photos, copyrighted designs on T-shirts, and other incidental copyrighted material that merely travels with the core news elements being employed to tell the story.
- **Providing historical understanding or depth to the news.** Excerpts from earlier reports; archival photographs; a montage of previous magazine and newspaper covers; using UGC archived videos from YouTube.
- **Enhancing cultural critique.** Using excerpts from books or plays; reproducing art from press kits; including screen shots of a film being reviewed.

Legal environment

Changes in the legal environment make journalistic understanding of fair use ever more important. It has risen in importance with the unbalancing of copyright policy.

More of the world around us is copyrighted than ever before. Copyright legislation enacted in 1976 vastly expanded copyright protection, among other things extending copyright terms, eliminating the necessity for renewal and most other copyright formalities, making copyright the default for published and unpublished works (once you write down that shopping list, it’s copyrighted), and creating the conditions for an explosion of secondary liability. Since 1976, copyright law has given existing copyright holders more and more protection. For instance, a provision in the 1998 Digital Millennium Copyright Act created harsh penalties for breaking encryption on digital media, even when used to employ First Amendment rights. Meanwhile, courts have become more and more willing to find that non-identical copies (so-called “derivative works”) infringe on copyright.

These changes have eroded the amount of material available in the public domain (that is, not or no longer subject to copyright ownership claims). Material now stays copyrighted for many decades after an author’s death; more versions of it are subject to copyright claims; and everything is now copyrighted by default. Features of copyright law that provide access to copyrighted material that is still under a limited monopoly—the balancing features of copyright law—have grown in importance as a result. The most valuable and significant of these is the broad and flexible doctrine of fair use.

Under fair use, people can quote copyrighted work without permission or payment in some circumstances (broadly, when social benefit is larger than individual owners' loss). Society benefits, according to copyright policy, when more culture is made. Fair use has received a broad embrace by judges over the last two decades. As judicial decisions spanning the last 20 years make clear, calculating how to balance benefit versus loss equates to asking two primary questions:

1. Is the new use of copyrighted material “**transformative**”—i.e. reusing for a new purpose rather than repeating the use for which there is an existing market?
2. And if so, is the amount used **appropriate** (even if it’s 100 percent) to the new use?

Finally, judges implicitly or explicitly refer to what community customs and practices are in executing the kind of work involved.

Does Fair Use Threaten the Health of Journalism?

At the same time, insecurity about how to employ fair use has grown. With changing and threatened business models, all large copyright holders—including publishers, the film industry, the record business, and newspapers—have demanded and won more and more monopoly rights. These monopoly rights have not however protected them from changes in their business model.

Popular wisdom in these businesses has inaccurately blamed the doctrine of fair use for destabilizing those business models, for instance for aggregation and quotation practices that are seen as stealing. News moguls such as Rupert Murdoch inveigh against fair use, as discussed below, even while their own staff are employing it openly in order to do the work of the day.

This denigrating of fair use is pernicious to the health of journalism, as well as inaccurate. Some features of U.S. copyright law may contribute to declining profits in traditional journalism, but fair use is definitely not one of them. Print news organizations complaining about aggregators and other new outlets that systematically exploit existing news content are up against some of the most general--and, at least until recently, non-controversial--dogmas of copyright:

- “Facts” are not subject to copyright, which means that no one can own the substance (as against the text) of a scoop or exclusive, once it has been published;
- Protection for individual words and short phrases (which includes many or even most headlines and ledes) is severely limited; and
- Just referring or pointing to a copyrighted work (even by way of a web link) is not an act of infringement.

None of these propositions have anything to do with the equally time-honored concept of fair use.

The three copyright principles just mentioned are foundational, and therefore would be tough to change. The notion that facts are free, for example, is constitutionally grounded, so it is questionable whether even legislation to protect “hot new” would pass judicial scrutiny. Copyright squabbles over who owns a simple, descriptive language fragment might prove disruptive in the extreme. And banning links would disrupt the functionality of the Internet itself, whether established news organizations want to pursue initiatives to challenge these foundational principles is beyond the scope of this report. What is clear is

that no one in the news business, from the individual blogger to the international corporate executive, has any rational basis to oppose – or propose restrictions on – fair use. Fair use, far from being a threat to journalism, is essential to it. Without it, the core mission of journalism is at risk.

Confusing Copyright Conflicts

Journalists are beginning to experience copyright decisions that they never used to have to face. For some the decision-making itself is new. For others, used to invoking their rights routinely, the environment is getting harder to work in. Journal Register Company Editor-in-Chief, Jim Brady said, “Before the Web, this type of thing fell on the business side of things with lawyers. It’s something that we never really had to think of. But once the web happened, every average journalist has to deal with it. The reasons journalists all need to worry about this now is that every one of them can publish in the new world, so they all need to be aware of what constitutes – or what we think constitutes – fair use.” One TV producer said, “In the past years, it’s become tougher [to employ fair use]. The culture has changed as...more eyeballs are watching.”

Copyright is becoming a key element in business controversies, as distribution and business models change and conflict with traditional business models. Prof. Amy Eisman, Director of Writing Programs at American University, noted that the distribution model of the print world had been, “We own it, go away.” Increasingly, she said, the web environment urges, “Please listen to what we’ve got and take it.”

But business models are not changing as quickly as distribution models. Media outlets are scrambling to protect their end product. An internal memo distributed to Associated Press executives in 2009 noted: “The evidence is everywhere: original news content is being scraped, syndicated and monetized without fair compensation to those who produce, report and verify it. AP’s legal division continues to document rampant unauthorized use of AP content on literally tens of thousands of websites.” Since then, the AP has worked to patrol and charge users for its content.

This concern has erupted in conflicts, some of which end up in headlines and some in court. Newspapers have used copyright to protect their material and reputations from political campaigns. In summer 2011, the editor of the *Des Moines Register* objected when campaign staffers for then-presidential candidate Tim Pawlenty republished more than 20 paragraphs of a *Register* story through an e-mail blast to campaign supporters. The correspondence selectively edited the *Register*'s original story -- omitting portions that painted Pawlenty unfavorably. Upon receiving complaints from the *Register*'s editorial staff, the Pawlenty campaign sent a second e-mail that contained a link to the article in its entirety.

Company policy has sometimes conflicted with executive pronouncements. Newscorp CEO Rupert Murdoch has inveighed against fair use. In 2009 Rupert Murdoch said that he would remove stories from Google’s search engines so that users would have to pay for the content. "There's a doctrine called fair use, which we believe to be challenged in

the courts," Murdoch said. He appeared unaware that broadcast journalists routinely employ fair use. Then in January 2010, an advisor to Michael Jackson, who claimed copyright in some interview material, sued Fox News and explicitly referenced Murdoch's contempt for fair use, and Fox invoked fair use as a defense. The lawsuit was settled out of court.

Copyright litigation has even become a business model, if briefly and unsuccessfully. The copyright holding company, Righthaven, purchased the copyright rights to newspaper stories from large metropolitan dailies, such as the *Las Vegas Review-Journal* and the *Denver Post* (which in 2011 opted out of what its CEO called a "dumb idea"), and without warning sued those quoting from that material. Small-time bloggers were often intimidated into paying hundreds or thousands of dollars to Righthaven, even when they may have been correctly employing fair use. When cases went to court, though, Righthaven's claims were summarily rejected; Righthaven's ability to claim standing was shaky, and so was its claim that users had infringed rather than employing their fair use rights. Now, Righthaven's very existence appears in doubt.

Copyright holders are also trying to create micro-licensing models. More than two dozen major media companies, including the Associated Press, McClatchy, Hearst and the New York Times, have launched NewsRight. This is a refinement of the Associated Press' earlier News Registry. NewsRight will offer both licensing and analytics. Such services may be useful both to those who do not wish to make their own fair use determination and to those whose uses would exceed fair use. Such services will not, of course, address situations in which a licensor might refuse to license; in that case, even users averse to using their free speech rights under fair use would have to use them, or abandon journalistic mission.

Social media creators have become invested in their copyrights. After a powerful earthquake rocked Haiti in early 2010, Haitian photographer Daniel Morel posted his images on Twitter. Agence France-Presse then retransmitted the startling photographs around the world. Morel claimed he never consented to the wire service redistributing his work. In court filings, AFP claims it contacted the wrong Twitter user for permission. The case is still working its way through the courts.

Incumbent media owners have considered changes in copyright law to reinforce ageing business models. One such proposal is codifying of old case law protecting "hot news" from direct competitors as part of the United States Code. However, the proposal is so fraught with problems—how to determine if only one source could have found out something? How could such a proposal be implemented while still observing the separation between facts (not copyrightable) and stories? How long is enough? What if embargoing information harms the public?—that the proposal appears highly unlikely. Certainly journalists themselves regard it as fanciful in concept and destructive of mission if applied.

However, the issue emerged in summer 2011 when Barclays, Morgan Stanley and other Wall Street banks sued TheFlyontheWall.com, for misappropriating their research when

time-sensitive ratings were published on Fly's Website. Fourteen news organizations -- including Google and Twitter -- filed amicus curiae briefs, which argued that "hot news" is no longer relevant in the advent of the 24-hour news cycle. The court sided with Fly, and said that it was merely breaking news. Fly properly attributed the information to the banks, the ruling found.

These legal conflicts demonstrate the way in which copyright policy has become a weapon as well as a tool in journalism, and a source of contention in a changing journalistic environment. Confusion, intimidation, expensive legal battles, and potentially destructive legislation all mark the moment.

Understanding copyright as protection both for yesterday's and for tomorrow's journalists is integral to maintaining the journalistic mission. This means valuing the features permitting access to copyrighted material as highly as those protecting that material. Leaning exclusively on the limited-monopoly side of copyright imperils the future of journalism. It can create needless tensions between one zone of journalism, traditional journalistic outlets, and the more informal sector of digital, DIY and citizen journalists. It can limit the depth of a journalistic work and discourage creative development of multimedia. It can even threaten the development of new business models, which could employ fair use to aggregate appropriately, provide enriching commentary, and provide a deeper historical understanding of news.

REPORT

Methods

In order to assess the problems faced in journalism today by copyright confusion, we explored how journalists understand copyright and fair use. We employed in-depth interviews, engaging 80 journalists throughout the U.S., through networks of contacts, conference meetings, and snowball sampling.

We selected journalists with at least five years of full-time experience. Journalistic venues included daily and long-form print publications (newspapers and magazines), online outlets, radio and television stations (both commercial and public media) and bloggers/citizen journalists. We interviewed both reporters and editors (many of whom had been reporters), including photo/video editors and web producers. Many of those we interviewed worked simultaneously in one or another analog medium, as well as online. We interviewed representatives of most major media including prestige dailies, national networks, regional chains and syndicated services. When we interviewed freelancers (contractors), we sought out those who make and have consistently made a living through freelancing (usually through a few enduring relationships with major media outlets). Our sample encompassed all geographic regions of the country, although top markets in the northeast were overrepresented.

In order to assure both frankness and confidentiality, we offered these subjects complete anonymity. (Our process was reviewed and approved by American University's

Institutional Review Board.) We used a password-protected website to house all interviews until the report's release, when we deleted all interview materials. Journalists were consulted about all direct quotes in this report, so that their words would not inadvertently reveal their identities. Finally, we also offered the subjects an option to reveal their names in the final report, if they so wished, which some of them did.

Findings

Cultural habits of journalists

Journalistic culture predisposes journalists to a strong dedication to core mission, which also strongly supports a vigorous and robust employment of fair use. The Society of Professional Journalists' Code of Ethics emphasizes the responsibility to the mission to inform the public: "The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues. Conscientious journalists from all media and specialties strive to serve the public with thoroughness and honesty." We saw this commitment clearly in decision-making described by the interviewees. "It's important for us to have access to as much material to inform the public as possible," one academic said.

Interviewees routinely relied upon the mission of journalism as societal watchdog as the primary criterion behind most copyright decisions. "I'm in the business to inform the public," said an online news producer. "The reason why I'm a journalist is to inform the public legally and ethically." This commitment to mission—enhanced by an irreverent, skeptical and sometimes combative professional culture—provides a solid justification for journalists to question and even, potentially, override perceived or expressed claims to copyrighted material, if the public's need to know was clear.

They also generally demonstrated irreverence and skepticism as professional attributes, making it relatively easy for them to disregard advice that stood in the way of mission or when receiving intimidating information. Journalists also described their own professional hierarchy as relatively flat, with collegiality extending across institutional boundaries. Copyright conflicts sometimes are avoided because sharing and quoting are part of the culture. Within this collegial network, they trusted that others shared the commitment to mission. This collegial approach to their work often gave journalists a strong confidence in their behaviors because they were surrounded by people behaving similarly.

The collegiality of journalists did not always hold across digital and institutional boundaries. In particular there was a marked mutual suspicion between journalists working in well-established media institutions and those working in newer, online-only and in solo operations.

Journalists familiar with traditional news-media institutions often expressed enormous suspicion of "bloggers" and of young people in general, for not participating in core journalistic values and also for poaching the good work of professional journalists.

Several journalists bemoaned the way young people—particularly their students, in the case of people who also taught—freely snatched material from the Internet. “Every semester my students think just because it’s on the web they can use it,” said one academic. “A lot of students don’t seem to hesitate to use whatever they find, because that’s the world they grew up on...If it’s on the Internet, it belongs to the world,” said another long-term newspaper reporter who now teaches. One mainstream reporter referred to “these rogue players who have no formal journalistic training. Everyone can have a blog now. They don’t know that all content on the Web is intrinsically copyrighted.”

Numerous journalists also, however, noted that with experience, bloggers became journalists with shared values and habits. “There’s a tiered problem there,” said online journalist Mandy Jenkins. “There’s people who know what they’re doing without knowing the law, but know what’s wrong when you see it. And there’s a whole class of bloggers who are great about it and they will learn as they go on.”

Bloggers we interviewed, all of whom would be in the top tier of the online journalist’s schema, actually shared values with more traditional journalists. In fact, they said that blogging culture replicates the collegial atmosphere of newsrooms in a different environment. Photojournalist Jennifer Simonson said that most bloggers, when presented with the ethical tenets that underlie the field, adapt to the professional norms. “I think what I like about the blogging world is that there is a need to support and credit one another. People link to one another and post materials, and credit one another.”

Bloggers, meanwhile, often expressed suspicion of “mainstream” journalists. They criticized mainstream outlets for poaching story ideas and information without credit. Days after posting exclusive content online, bloggers in metropolitan markets often found their stories re-reported with no attribution in local print publications. “You grow very sensitive to those issues when you do it yourself, because it’s all about trying to carve out that space where you’re trying to establish your voice as an authority,” said one blogger.

While copyright tensions put some distance between different parts of the journalistic community, professional culture nonetheless maintains remarkably coherence across media, institutions, and generations. In general, this culture is highly conducive to robust employment of fair use to meet journalistic mission.

How Journalists Learn about Copyright and Fair Use

Journalists have lacked the opportunity to grasp the centrality of fair use to their practice, partly because in the past it has been so thoroughly integrated into newsroom practice that it was backgrounded. With the explosion of citizen and informal journalism and the proliferation of digital opportunities, they can no longer afford to do so.

The journalists we interviewed showed a strong intuitive sense of the logic of fair use, while rarely demonstrating confident or even explicit knowledge of the policy. “I would love it if you could define fair use for me, because I’m not entirely sure what it means,”

one interviewee among many said. They typically had not either received or felt the need of much training on copyright, unlike other aspects of their practice.

Interviewees formulated their knowledge of copyright and fair use from a loose combination of their own on-the-job experience, training in media law courses in journalism schools, style manuals and workshops given by their employers. When asked whom they trusted for information on copyright, they referenced peers and current practice far more often than authorities such as professors, books, professional organizations, websites or their own lawyers.

Newsroom practice was key. Interviewees who work within institutions had confidence that their editors had established a newsroom practice that they could comfortably follow. Journalists also referred often to “common sense,” or as one put it, “You just know in general you shouldn’t park too close to a hydrant.” Through this process, most journalists acquire baseline knowledge of fair use, often without realizing they are even relying on it. Those who lack newsroom support often display less confidence.

It is not hard to see why journalists would look to practice rather than texts for advice on employing copyrighted material without licensing it. Some news organizations produce written guidelines including guidance on fair use that is unuseable--usually some version of “don’t try this at home.” Some examples:

- The *Washington Post*’s site warns that “there is no clear answer as to what sort of use constitutes a fair use” and that (and this in bold), “The Legal Department should therefore be consulted whenever we wish to make use of copyrighted work and we have not obtained permission.” This is clearly an injunction observed primarily in the breach, given the ubiquity of fair use in daily text-based journalism, where uncleared quotes from sources, think-tank reports, memos and websites are routine.
- *PBS NewsHour*, on its “the.News.for.Educators” site, links to several sites that provide for educators confusing or discouraging information on fair use generally, including this draconian advice from a Library of Congress site: “The safest course is always to get permission from the copyright owner before using copyrighted material... When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the doctrine of fair use would clearly apply to the situation... If there is any doubt, it is advisable to consult an attorney.” This is another example of advice followed in the breach by the *NewsHour* itself, since every nightly news program has fairly used material in it every night.
- A more casual guide created for online journalists, “Social Media Guidelines to Live By” (<http://zombiejournalism.com/2010/06/social-media-guidelines-to-live-by/>), states categorically: “Don’t use anyone’s stuff without getting permission and giving credit – you’d want that, right?” This too flouts routine practice in the online environment, where quoting from, embedding, and linking are core

activities and perfectly legal when done according to the principles of the doctrine of fair use.

Journalists' legal services were also often unhelpful. Indeed, interviewees said they often avoided consulting their lawyers. "I worked at [a major radio network] for several years, and there you avoid talking to a lawyer at all costs," one radio producer said. "They're risk averse and literal."

Legal information from professional organizations and think tanks were rarely helpful in cases dealing with fair use, interviewees said. But they were often driven to it anyway. On an ad-hoc basis, journalists searched for information, piecing together notions from a smattering of online resources. "I've just had to read Wikipedia pretty closely, think long and hard about what's there, and come to my own conclusions about what exactly the rules are," said San Francisco-based freelancer, Matt Baume.

Blogger and citizen journalist interviewees, lacking a physical newsroom culture, said they often rely on listservs and bulletin boards, crowdsourcing answers to fair use conundrums. In general, this results in more confusion and misinformation, since explicit teachings such as those provided in manuals referenced above are unhelpful. Some bloggers pay for legal counsel through consortiums, but most do not.

No matter what their location or activity, journalists do not have authoritative, reliable and useful information on fair use. Instead they are forced to draw from habit and custom, if they can; when they are isolated or facing new kinds of choices, their searches for answers often yield misinformation.

How journalists think about copyright when they don't think about it

Interviewees demonstrated a robust confidence in their ability to access other people's copyrighted material without permission or payment, in some situations, typically without knowing they were employing fair use. Further, when they employed fair use without identifying it as such, they often accurately used the reigning logic of the doctrine—transformative purpose, and appropriate amount. One said, "This is information the public needs, it's an issue of relevance to the public." One broadcast journalist explained that he starts collecting material on the basis of what he needs, and assumes that the legal department will find a way to justify the use, unless for some outlier reason it won't work. "It's my job to get what I need. I can go out and collect material that I want to use and I can say at the end of the day to the lawyer, 'Is this okay?'"

While most journalists said that incidental music often poses a technical journalistic challenge (the music in the background may interfere with the clarity of the interview in the foreground), they understood mission to trump any copyright consideration. "In news reporting I didn't feel like I needed protection [for incidental use], it's just, 'Hey this is reality -- I'm sorry, I have every right to just report what we see or let you hear what we hear,' and I would fight that tooth and nail if anybody challenged me on that," said

veteran radio news manager Michael Marcotte. Another radio producer said. “If there's the sound of a crowd, or traffic, or music playing over speakers in a store, that to me is all ambient. It's the sound of the world...I'm just tapping into a public thing.”

When asked if they would consider publishing a local government memorandum or internal corporate document—both likely copyrighted—if it would be evidence or proof in a story, journalists unhesitatingly said yes. When asked how extensive their quotations would be, they typically noted that they had space and attention considerations, but that they would use the amount necessary to inform the public. These arguments conform comfortably to the core reasoning required to employ fair use in today's legal environment.

When a court verdict resulted in star athlete Barry Bonds' conviction on perjury charges, an interviewee who worked as a television news producer said he would not have hesitated to use video of the baseball star at work -- footage that is clearly owned by Major League Baseball. This too is a clear rationale under fair use.

At the same time, interviewees were typically unaware that in so doing, they were employing fair use. They operated under misconceptions that they were exempt from weighing copyright considerations for other reasons:

- **The First Amendment Pass:** Some thought that journalists had a special exemption of some kind under the First Amendment for doing their jobs. In actuality, fair use is a free speech right, and is so recognized by the Supreme Court, and it is through fair use that journalists have the right to override the limited monopoly rights of copyright holders in the course of their work.
- **The Public Domain Pass:** Some interviewees believed that some material was simply not subject to copyright (which would mean that in copyright terms it would be in the public domain). Most believed that all government documents—not merely federal documents produced entirely by a government employee during work—were copyright-free. Some drew a distinction between work that was created by organizations in order to promote and circulate ideas (think tanks, advocacy groups, research organizations, government entities) and work created by someone trying to earn a living from it or express themselves artistically. They believed that the former were free to use and the latter were off-limits. In reality, both are copyrighted and subject both to limited monopoly rights and to fair use, among other copyright exemptions.

In some cases, they believed that if material was specifically in “the public domain,” it was free to use. Interviewees usually meant by “public domain” that it was available to the public and circulating in the marketplace. Almost all that material is copyrighted.

- **The Permissions Pass:** In other cases, they used their fair use rights under the belief that they acted with implicit permission. This was the case, for instance,

with some critics who quoted from passages in books or lines from films, who used photographs from popular culture in their blog posts (although in some cases they were working with electronic press kits that do provide limited rights to reproduce), and those drawing from think-tank and advocacy reports (“They’re begging me to use it!” said one interviewee). In general, interviewers used the words of their interviewees freely (even though these too were copyrighted) because they believed the interviewees had permitted them to quote by talking to them. “If I am interviewing someone, it is implicit that what they contribute is material I can use,” said Matt Thompson, an Editorial Product Manager at NPR. In many cases, implicit permission may provide access to copyrighted material, but not in all cases.

Michael Jackson: Celebrity, Death and Fair Use

The unexpected death of Michael Jackson demonstrated interviewees’ intuitive grasp of fair use. Jackson’s obituary was executed in every medium—text, radio, TV, photography, web—and nearly every interviewee had some experience with that moment. His life was conducted in public, and in performance. The timing of the news made it difficult for anyone to consult in-house counsel. (Many organizations, however, had prepared multi-media obituaries to draw from, which had been approved.) Interviewees typically did not trouble to think of copyright at that moment, even though the choices involved both music and video.

However, they often cited erroneous justification. “When somebody dies, we now have audio/video that we didn’t have before,” said a TV producer. “If they are dead, it’s in the public domain. If somebody dies, you don’t have to worry about what to use.”

It is not true that death liberates material into the public domain; copyright terms currently extend many decades past the death of the author. But it is true that Michael Jackson’s death triggered a journalistic mission, which enabled journalists’ fair use right to access enough of his performances to tell his life story journalistically. The producer was using the right logic, even with erroneous reasons why. Jackson’s death gave news producers access they would not have had without the newsworthiness of his death, which precipitated a reason to do a roundup of his life and career.

Photo editors were less likely than other editors to intuitively employ fair use rights. They showed great sensitivity to the concerns of photographers, who generally asserted that photographs they or their photographer peers created should not be reused without licensing. To discourage stealing of photos, many photo editors reported that they post lower resolution photos on the Web or watermark the images.

Photographers often expressed their concern about unlicensed copying of photographs, and justified this by construing their work more as an artistic process than a journalistic one. This justification demonstrated confusion; fair use applies in art as well as journalism.

However, in one large area photographers and photographic editors vigorously and intuitively employed their fair use rights: in the capturing of copyrighted material in photographs they took or used. Copyrighted material—a poster on a wall, a sculpture in the garden, a book on a shelf—is routinely captured in journalistic photography. All but one simply took for granted that they had a right to represent other people’s copyrighted material if it appeared within the photograph, although they were unaware that the use fell under fair use.

Only one photojournalist surveyed even registered the issue. He described a photo, which appeared on the paper’s living section, depicting two people sitting on a bench in front of a painting. The photographer explained, “It’s an article about the [museum], and it’s a famous painting in art history. But because it’s not a picture of the picture – which is owned by the museum... it’s a picture of people looking at it. We changed it [the painting’s use], and it’s okay.” The photographers’ lack of concern about capturing copyrighted material would, in general, be well justified under fair use. In the case of the museum painting caught in the photograph, the photographer actually articulated a completely legitimate, transformative fair use argument.

Although interviewees often did not realize that they were employing their fair use rights in many situations, they actually did so intuitively with confidence and employing the principles governing fair use reasoning today. They asked how it was necessary to the mission of public information, and how much was necessary to match that mission. But because they were unaware that they were employing their rights, they were unable to exercise them appropriately when they encountered situations that were less familiar to them.

How journalists think about copyright when they do think about it

When interviewees had to consider whether they had the right to employ fair use, they often experienced uncertainty, sometimes hesitated or desisted, and if they pursued the use sometimes faced resistance from gatekeepers.

Journalists faced copyright decisions in several kinds of unfamiliar situations--scenarios for which there was not settled newsroom practice, and environments that often encompassed digital, Internet-based, non-textual and social media. Typically, they were

most confident in their right to access with word-based documents; having not understood the rationale for their completely justified confidence, they then failed to carry over their confidence into other media such as music and video, and to other platforms such as digital. Some situations came up repeatedly:

- **Web-based material.** Interviewees were unsure about the copyright status of material on the Internet in general, and particularly of images. In general, reporters know “you can’t just take an image off of Google.” Beyond this, journalists expressed uncertainty about how to best use the materials, worrying about who has the rights to reproduce the pictures. One blogger expressed issues surrounding art on her hyperlocal site. “We typically feature a story on the top of the homepage with art. We borrow the art from an affiliate organization, one of our partners. We never ask explicitly to repost the work there. I don’t know. I just feel funny about it.” Some reporters avoid using photos from the Web altogether because of copyright concerns. “I try to use something that I’ve created – even if it’s not as good,” said freelance journalist Matt Baume, in efforts to circumvent copyright concerns.
- **Social media.** Interviewees were unsure about whether it would be appropriate to use Facebook photos or Twitpics in news publications. “When someone dies first thing everyone does is go to their Facebook page and take it [the profile picture], and I’m like ‘Did you ask? You can’t just take it, it’s not yours,’” said online journalist Mandy Jenkins. Most believed that social media content is fair game for replication. “Hey, it was you that put it on the Internet,” a reporter at the St. Petersburg Times said. “I’m sorry. I’m going to use it.” However, murky terms of service on Twitter and Facebook complicate decisions on using content.
- **Music.** The question of when it is appropriate to clear music and when music in news can be employed under fair use was bedeviling for many journalists. Insecurity sometimes resulted in decisions for licensing at all times, or even substituting pre-cleared audio. Sometimes it resulted in dubious halfway measures—e.g. cutting down on the amount of music used, but not in a way that would make any clearer fair use case. It may be that in some cases such insecurity has delayed decisions to produce audio podcasts and audio-visual material, although this conclusion was a speculative one on the part of interviewees.
- **Video.** Video on the Web provoked the most questions among our interviewees. Journalists were unsure about a range of uses of copyrighted material, including background images, music, and performances. They were unsure about non-copyright questions such as the use of personal releases and celebrity rights as well, sometimes confusing those questions with copyright. They repeatedly referred to the problem of quoting other news sources in summaries of ongoing news stories. In some situations, an agreement for mutual clearance removed ambiguity. Network news organizations, for instance, have informal agreements for sharing segment clips for a couple days after the original airdate. But like most licenses, these permissions were very limited. If a producer sought archival

footage of a Sunday talk show aired months previously, these agreements would be invalid. As with music, in this situation journalists making audio-visual work could have availed themselves of the Documentary Filmmakers' Statement of Best Practices in Fair Use (available at centerforsocialmedia.org/fair-use), where appropriate fair use of music among other copyrighted elements is discussed. But they were typically unaware of these resources, as they were of dependable resources on fair use in general.

When journalists needed explicitly to consider fair use, subjects often articulated partial or erroneous understandings. In particular, they lost their firm grasp on the match to mission of their uses of copyrighted materials, and the question of appropriate amount to serve that mission. They defaulted to secondary and sometimes mythical explanations, all of them framed by a fear-driven risk analysis.

The most common erroneous fair use understandings were:

- **Fixed amount.** They often believed that there was an absolute number out there somewhere, beyond which lay lawsuits. (This common misapprehension is reinforced by a plethora of misguided attempts, available on the Web, to simplify fair use decisions.) Examples varied: “three graphs from a *New York Times Magazine*,” or “two to five paragraphs but make damn sure you source and attribute and are transparent and don’t use a whole page” or “keep it under 30 seconds” or “100 words in an article and 300 words in a book.” The comments of one print journalist—“the rule in the back of my head was it should only be a few seconds”—embodied the typical rule-of-thumb understanding many articulated.
- **Noncommerciality.** A journalist working in public media said, “there’s an attitude that it’s more loose because it’s not for profit.” In fact, the dispositive factor in fair use is transformativeness—recontextualizing. While noncommerciality can feature in a decision, it is a secondary feature and never one that can make the difference. Furthermore, most journalism, including public broadcasting, has commercial elements.
- **Market loss.** Another common but erroneous belief was that the “fourth factor” of fair use—effect on the market—was key. One academic said, “Infringement on the copyright holder’s ability to make money from their original work is the issue.” While relevant up to a point and within context, this factor is not dispositive in today’s legal climate. The key concept of transformativeness will safely ensure that a new user will not sap the market for the original work, even if the owner suffers the (hypothetical) loss of a licensing opportunity.

These myths and misunderstandings understandably made it difficult for interviewees to have confidence in their fair use judgments. Worse, they made all those judgments on the backdrop of risk analysis that was unfounded. In the absence of knowledge, they asked: how much trouble could they get into? The risk analysis was usually ungrounded in any information about actual risk. Litigation (as opposed to threats, cease-and-desist orders

and other forms of intimidation, which can be groundless) on fair use today is extremely rare. Were a fair user who had applied fair use within today's judicial standards to be sued and the case actually proceeded (rather than, as often happens, either being thrown out for being groundless or being settled out of court), then the user would find him- or herself surrounded by organizations eager to take on pro-bono defense of fair users.

Interviewees knew none of this. If they had to undertake any risk around copyright, they often decided that the risk was too high—unaware that they routinely engaged in such risk. They referred frequently to the threat of litigation. “How many paragraphs does it take for me not to get sued? I don't want to be the guy that finds that out,” one journalist-academic said. Journalists working within large organizations did not want to put their organization--vulnerable because of its “deep pockets,” as several put it—at risk.

Bloggers and citizen journalists were particularly cautious. “I have no resources to fight a lawsuit,” was a comment in many interviews. “I work for myself, and it's my own company and my own site. I try to be extremely careful, and do whatever I can to protect myself,” said online journalist and editor Laura Amico, who runs Homicide Watch DC.

This perception of risk is notable, not only because these same people were routinely exercising their fair use rights without knowing it but also because the work of journalists involves public revelations of the kind that could, and does, trigger many kinds of litigation. The affected parties hypothetically could sue, for instance, over violation of privacy, libel, slander or false light. But copyright infringement liability appears to loom particularly large in decisions that journalists need to make actively around copyright.

At the same time, interviewees told stories of situations in which they did actually incur risk as a result of copyright confusion—while thinking they were avoiding risk. For instance, as a result of trying to avoid constraining licensing agreements with other media companies on archived news items, interviewees in television news said they looked to YouTube to find such material, rather than having to go to a competitor's legal department. “If you can find it on the Web, then anybody can use it, and anybody can take it,” a veteran TV producer said. And it doesn't matter if the clip is on the network's official YouTube channel, journalists reported. As another rival TV producer shared, “Yes, if it's a random user – we can kind of fudge it that way.” Their assumption that YouTube material was copyright-free or copyright-light was also erroneous; such material was just as encumbered by limited monopoly rights as the material in the competitor's archive.

One radio freelancer wanted to use excerpts from the score of a commercial film for a national news program. Unsure of whether using the music in this way constituted fair use, he attempted to secure permission from the record company. After an inconclusive conversation with the record company representative and multiple follow-up calls that were not returned, the interviewee decided to go ahead and use the music for the piece, assuming that radio stations would be covered by their ASCAP/BMI agreements. But his organization refused to include the piece on an iTunes compilation offered for sale to the general public. The interviewee expressed frustration that the record company ignored his

permission request: “We're too small for them to fuss with -- leaving us in the position of not knowing what's right and what's wrong.”

Consequences of insecurity on fair use

The consequences of lacking knowledge or confidence on fair use involve expense, delay and even failure to meet basic mission by failing to inform the public.

Expense. Journalists or their organizations may incur expenses that are inappropriate, because they cannot articulate their rights and the limits of those rights. “I’m so baffled with fair use in music that I’ve decided to just pay a composer to write music for [a documentary],” said another journalist. In some cases, for instance soundtrack, original or licensed music is indeed appropriate; in others, however, fair use is entirely appropriate. Morgan Holm, Vice President of News and Public Affairs for Oregon Public Broadcasting wished to use a snippet of a “Saturday Night Live” sketch to vivify a historical sequence. The producer licensed the 10-second clip from NBC Universal rather than explore the options under fair use.

Many news organizations are licensing all information from social media sources, even if fair use might suffice. Media outlets are becoming more proactive in licensing user-generated content not only for one-time use, but for rights in perpetuity. Licensing, of course, is not only expensive but limited. “They say how you can use it. You can only use it up to a certain amount of time for the day. You can’t give it to affiliates. You can’t archive it. And generally, there will be on screen courtesy rules for it,” one network news producer explained.

Licensing is routine in sports journalism, apparently because of the clubby nature of the biggest players, and aside from expense it both limits what can be done and how it is done. Major sports franchises zealously guard their material, typically offer high rates for use, and impose restrictions. Fair use is available to journalists in this area, as it is in any other, but many sports outlets are chary of impairing their relationships with the franchises. ESPN, for instance notoriously shuns fair use. Instead, the media organization requires producers obtain written permission for every piece of video, audio and still photography aired. This practice is imitated by sports programs elsewhere as well. “Leagues will license footage to us, but it's at pretty high cost, so we have to be judicious about how much we use,” said one sports journalist. “When we have to limit our shot selections because of budget, it always feels like the content suffers. We'll sometimes design a way to do a project where we limit or don't have to use league footage, using photos or other elements, and that's frustrating because you feel like the content would have more potential if you had the ability to use the footage.”

While at the aquatic center in Beijing covering the 2008 Olympics, a reporter was recording audio of the water polo team in the pool for a multimedia piece. A representative from NBC, who owns the broadcast rights to the games in the U.S., told the reporter that the media corporation owns the copyright to all sound at Olympic venues. “She stood there and made me erase the tape,” a sportswriter for a large

metropolitan daily said. Other reporters cited similar restrictions with Major League Baseball, the National Football League and the U.S. Open – and have expressed that counsel from those organizations actively police the licensing guidelines. "You can't hold onto that stuff forever," says one television producer about sports content. "Those are very strict rules. And the sports leagues enforce those quite a bit."

Time (and money). In some cases, attempting without success to get rights or checking with legal departments incurs costs and introduces lag time into a time-sensitive business.

One reporter recalled working on the Michael Jackson obituary. "We tried to let the music run for an additional 20 seconds to give the audience more of a feel for the music," one reporter said. Jackson's estate then threatened to sue media organizations for using too much material. "We went back and reedited our pieces and used the music intelligently, having a critic comment on the music specifically. In this case, it made for a stronger piece of journalism." A more solid understanding of acceptable fair use, at the levels of reporter, editor and legal, could have made original decisions and responses to the Jackson estate easier and quicker.

A television producer was making a documentary about a disgraced politician who had held a menial job after falling from grace. For two years, the producer worked to obtain permission to use material garnered by a news crew who had interviewed him. "I called. I begged. I pleaded," the producer said. "It was this very short piece of video, like a minute, and they refused to answer. They didn't want to bother." After doing research on fair use parameters, the producer decided to use the material. "Driving that cab is what made him famous, and we needed it." The program was thus delayed for two years before the interviewee resorted to his free speech rights, and successfully employed the material under fair use.

Degradation of mission. Not employing the right of fair use may mean weakening the work. Images created enough anxiety that stories went without relevant illustrative photographs, interviewees said. Several journalists reported that fair use around photography was so unclear to them that sometimes editors will run a story without art to avoid the issue completely.

A web producer wanted to publish a collection of photographs, captured by a man who died near Mt. Etna. "I wasn't able to get in touch with anyone to give me permission," the web producer said. "I did not end up using those photos even though I really wanted to."

In another case, a news producer wanted to show footage from the Super Bowl as part of a story on Steelers quarterback Ben Roethlisberger's car accident. "The only reason that anyone knew who he was was because he had just won the Super Bowl. If he hadn't just won the Super Bowl, we wouldn't have been doing the story," said an interviewee who worked as a news producer for television. But the legal department ruled that the producer should not use footage from the championship for the piece. "It was difficult to do a piece on the Super Bowl quarterback without showing the quarterback winning the Super Bowl."

Failure to meet mission. In some cases, work did not reach the public because of lack of clarity around rights—sometimes because of a journalist’s actions but often of gatekeepers such as editors or counsel overriding a journalist.

A well-received and evergreen radio piece, for instance, was never made available as a downloadable podcast. A radio producer was compiling footage for an hour-long special on a classic musical. "I used lots and lots of excerpts from the original cast recording and from the movie, but they were contextualized," the producer said. He was confident that the uses were justified under fair use. After finishing the piece, the company needed to determine if the special could be redistributed as a downloadable podcast. Legal counsel ruled the songs were a violation of fair use, and restricted the program to streaming audio. "I disagreed with it not being downloaded," said the interviewee. "It's not the same as an original cast recording or soundtrack that you're getting for free. It was something different." The company's lawyers thus pre-empted the journalist's legitimate exercise of fair use rights.

A blogger began a post commenting on an article in a major magazine, reprinting paragraphs from the original media article, interspersed with commentary. "They dinged us," the blogger said. "They said we posted way too much out of context." The blogger worked back and forth with the magazine publisher, paring down the copyrighted material. With each draft, the copyright owner was not satisfied, and finally threatened legal action against the blogger. "It's just easier to not deal with it, because ultimately, by the time the dispute was resolved, it was four or five days, and anyone who was gonna read the story [the original piece] already has." The blogger published the piece with a disclaimer, asserting her fair use rights while explaining the readers why the initial post changed.

Entire classes of activity may be stalled or stopped. Critical work on video or music, which involves choices to quote from the original material, is often executed using less content than they could under fair use.

Is Journalistic Culture at Risk?

One veteran journalist who now works for an online site worried about a shift in journalistic culture. "Because there is more of an awareness now about infringing on copyright for images, it's come to a point now for some of the younger people I know in journalism don't have a totally firm grasp of fair use -- and when they should just chill because it's fair use," the interviewee said. "There's not an understanding of what's fair use -- and what will stand up anywhere. I'm concerned that message has been lost. I just started to notice, I'm getting questions from folks -- 'I don't think we can use this,' and I'm like, 'Yes we can.' I'm wondering if people are just too scared."

How journalists feel about people copying their own work

The subjects of these interviews showed a sound, if often intuitive, sense of fair use in their judgments about others copying their work. Without a clear understanding of fair use, however, they (like many journalistic business owners) confused copyright issues with business issues.

With peers, and indeed with anyone whose profession or mission involved the production of culture (e.g. documentarians, book authors, musicians), they applied the Golden Rule. Yet reporters were hesitant to give competitors full credit. If they didn't score the scoop -- they were reluctant to give another media outlet the nod. Rather, the reporters sought to independently confirm the story. "If I see the news in another media outlet, I'll go to the source, and try and get them to tell me the same thing. I want things as firsthand as possible."

Interviewees accepted what legal scholar Tim Wu has called "tolerated use" (it's illegal but either acceptable to me or not worth my time to complain about it) in some cases: "When your story appears in the church bulletin, I think we just kind of shrug our shoulders at those kind of things."

The worst offenders, for interviewees, were aggregators who build upon unpaid work in ways that do not properly acknowledge the original work. They often mistakenly believed that behavior they saw as copying their work for the same purpose was exercise of fair use, when in fact fair use is justified on transformative grounds. "On legal grounds they are probably safe," said one digital editor. "On moral grounds, no. Because of their search ranking and because they know how to package, they are getting the top hit."

Their biggest concern was with the *Huffington Post*, a site described by one journalist as "brilliantly evil." Most interviewees said the *Huffington Post* seizes the core of their stories and buries the link, leaving viewers without a reason to read the original work. "If you cite enough that the reader doesn't need to read the original at all, then you are taking too much. I think you've then crossed the line when there is no longer a benefit to the creator," veteran editor Jim Brady said. (The practice is controversial even within the walls of the *Huffington Post*'s office. In 2011, Simon Dumenco, a writer for Ad Age, openly wrote about how one of his pieces was lifted and published on the *Huffington Post*. The employee who summarized Dumenco's piece was suspended, but later returned to the company.)

Interviewees were concerned about the financial viability of their organizations and their own jobs, and also out of journalistic pride. A sports writer said, "We don't even want personal credit. We want credit for the company that employs us...every time I write a story that's of some national value and it says Yahoo! Sports on the ESPN ticker that's a point of pride," said Yahoo! Sports writer Jeff Passan. "It's incredibly frustrating, because now I'm forced to think of the business model," one journalist said. "When I started 20, 21 years ago, I never thought about making money for my company. In

today's environment, it's not enough to have a good story. It has to be a good story that people click on."

Even with this concern, however, interviewees rarely pursued infringers on their organization's copyright—because it was not core to mission in a hard-pressed work environment. "We're too busy to really pursue these kind of things. If it was a major offense, that'd be different. But we probably wouldn't really sweat it if our media outlet was not blatantly abused. We're just short-staffed," said another print journalist. Virtually all journalists interviewed have a Google Alert set for their bylines, and contact an editor on egregious cases. But their first priority is meeting deadlines and producing news.

CONCLUSION

Interviewees showed remarkably sound judgment on fair use decisions, on an intuitive basis—even though, in many cases, they were not aware that they were employing fair use. They routinely asked themselves if they were merely appropriating information in order to avoid work, or whether they were repurposing that information in a way matched to their mission to inform the public. They regularly asked themselves how much was needed in order to match that mission, and took care to use the appropriate amount. They did so with a close eye to their professional training, values and goals. For instance, their training strongly stressed attribution, and they understood in a specific and a general sense the importance of recognizing the work of others as theirs.

But when needing explicitly to apply fair use, often in practices at the innovative edge of digital journalism, interviewees were often unable to make a timely decision or justify it to a gatekeeper. They operated from risk analysis, without knowledge of actual risk or of their actual rights. As a result, they produced work that was impaired, took longer to get it done, incurred needless expense, or even failed to get the work to the public. Sometimes they also inadvertently took needless risks.

RECOMMENDATIONS

Better understanding of fair use can happen with better education, construing fair use as a free speech right and core to mission. However, **there is a low ceiling on all such endeavors at the moment.** All such education in today's journalistic environment will run up against the serious limitation that journalists have not yet articulated how fair use is best and most reasonably employed in typical situations that journalists face.

In other fields, such as academic and research libraries, documentary film, media literacy education and the scholarly disciplines of communication and film studies, creating codes of best practices in fair use has transformed the ability of those professionals to use their fair use rights. This is because they were able to know what was expectable and appropriate in their own professional practice in this area. They were able to identify the most common situations in which fair use choices came up, and to articulate the reasoning needed to make a judgment call that would squarely fall within today's judicial

reasoning. They were able to make reasonable risk assessment and employ their free speech rights under copyright, knowledgeable about what the best practices of the field were.

Finding the safe-harbor areas of fair use, for their particular profession, meant not only that professionals could identify the best practices but also that they knew that these best practices were available to all, including copyright holders and judges. With everyone holding the same knowledge, the risk of lawsuit sank to vanishingly low. In the case of documentary filmmakers, who need to take out insurance against any errors such as copyright infringement, insurers shifted from a decades-old refusal to insure for fair use claims to routinely accepting them without incremental charges.

Journalists themselves can jointly create a set of principles on the employment of fair use to meet the mission of journalism. These principles can reach beyond any single business, and indeed any single kind of journalistic practice. They can cross the increasingly porous boundaries between institutional and informal journalistic practice. Such a set of principles would not have a sole institutional author, and it would be led by associations and nonprofit/academic institutions, not individual journalistic enterprises.

With such a set of principles in hand, education about fair use could proceed, leveraging the many points of trust for journalists. For instance:

- **For academics:** developing fair use teaching modules in journalism school, for active training in fair use logic and exercises in case-by-case decision-making; restructuring copyright policies.
- **For field-building organizations:** developing workshops in journalistic workplaces; providing online curriculum; conducting webinars for journalists.
- **For journalistic organizations:** developing in-house materials that provide journalists with the ability to perform fair-use reasoning consonant with mission, rather than rigid guidelines or unduly alarmist precautions.

However, until journalists establish their own best practices in fair use, journalists and their institutions and gatekeepers will continue to be haunted by fear, letting unfounded risk-management calculations substitute for a clear understanding of what is normal and appropriate in employment of fair use. As new opportunities develop with the evolution of digital culture, the very mission of journalism is at stake. ▼

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