Patry on Fair Use

2011 Edition

William F. Patry

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Mat #40921929

ISBN: 978-0-314-60119-3

Dedication

To my dear brother Hugh Laddie, *zichrono livracha*,
whose spirit inspires me daily,
and to his beloved Stecia, his שיר השירים

Preface

I began studying fair use in 1980, as a law student. Of all the topics law students encounter in a basic copyright course, fair use is usually far and away the most interesting. Parody and satire disputes appeal to our sense of humor; disputes over political speech appeal to fundamental questions of democracy; disputes over appropriation art (think Jeff Koons) raise important issues about the creative process and the role of federal courts in mediating clashes within the art world. Photocopying for classroom use or research present a conflict between education and potential economic loss to copyright owners.

My interest in fair use continued after graduation. In 1985, I published the first treatise devoted solely to fair use, and was fortunate that the treatise's first citation was by the U.S. Supreme Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*. That treatise was issued in a second edition in 1995. In the meantime, both through being a private lawyer and through government service, I gained experience in the practical issues raised by fair use. In the late 1980s, as a young associate, I worked on the test case over licensing brought by the Association of American Publishers, *American Geophysical Union v. Texaco, Inc.* As a Policy Planning Advisor to the Register of Copyrights, I testified as the lead witness before a rare joint hearing of the Congressional intellectual property subcommittees on bills to amend Section 107 to address concerns about use of unpublished letters in biographies. After becoming copyright counsel to the House of Representatives Committee on the Judiciary, I was deeply involved in the legislation that ultimately addressed (in a very modest way) those concerns.

Earlier, I had gone to Brussels to meet with European Union officials as they debated a reverse engineering provision in their first copyright directive, involving computer programs. Those debates centered wrongfully in my opinion on the alleged ill-fit between fair use as a common law doctrine shaped by judges, and the enumerated-list-of-excused-

uses approach taken by civil law, code-oriented countries. It is a debate one still encounters in international calls for more generous limitations and exceptions.

As a full-time law professor from 1995 to 2000, I had the joys and challenges of teaching the doctrine to students. The highlight for me was a course in which rather than cracking open the Copyright Act or the casebook, we spent three classes formulating what our ideal fair use provision would look like. The end result was almost identical to Section 107. Back in private practice, I litigated fair use cases, both at the district court and appellate level, winning some and losing others. Clients, who are singularly result-oriented, do not like to hear their lawyers give as an assessment of their odds of prevailing, "it depends entirely on the judge or jury." Yet, such an assessment is almost always the truth in the cases that are litigated. The unpredictability of fair use outcomes is often given by policymakers in other counties as Exhibit A in why those countries should not adopt fair use. Such a view misses critical points.

First, few cases are litigated; those that are tend to be ones where the outcome is inherently difficult to predict due to the equities on both sides. If the law, facts, and equities weigh very heavily in one direction, in the vast majority of cases, it is unlikely the case will go to trial; it will, instead settle, or negotiated before suit is brought. Second, some types of disputes are inherently fact-specific, and in copyright this includes the basic question of whether one work has taken so much from another as to be deemed substantially similar. Ad hoc determinations are simply the nature of the beast; denying this nature makes no more sense than denying the certainty of death. Civil law and common law countries alike are in the exact same position on such issues. Third, focusing on the name fair use, or its flexible nature confuses labels with reality. The reality is that all copyright laws require a mix of enumerated excused uses and flexibility. We need enumerated excused uses where it is possible to provide concrete answers to concrete problems. We need flexibility for those circumstances where we do not and cannot predict the present, much less the future.

In place of an obsession with names, we need a functional approach: what conduct do we want to permit and what conduct do we want to prohibit? The task is then to draft laws that will accomplish those goals, regardless of what we end up labeling them. To begin with labels is to get things of

to the wrong start.

Since the last version of my prior fair use treatise in 1995, the Internet and the World Wide Web have made fair use more, rather than less important, a fact I encounter in my current role as Senior Copyright Counsel to Google Inc. Given the time from my last treatise on fair use, I decided to revamp my prior work. The structure of this work is intended to facilitate easy research. After giving an overview of the origins of the doctrine, I analyze the traditional four factors separately (even the ultimate analysis is greater than the sum of its parts), and then provide detailed analyses for numerous types of uses and works. There are also appendices containing the legislative history of fair use.

William Patry
Stamford Connecticut
February 2009

Foreword

Patry on Fair Use was substantially derived from Chapter 10 of William Patry's multi-volume general treatise on copyright law, *Patry on Copyright*. As originally published it also contained new historical and international material. Further, on updating substantial new material has been added to the book that will not be found in Patry's treatise.

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