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EDUCATIONAL FAIR USE TODAY

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Abstract: Three recent appellate decisions concerning fair use should give educators and librarians greater confidence and guidance for asserting this important privilege. In all three decisions, the courts permitted extensive copying and display in the commercial context because the uses involved repurposing and recontextualization. The reasoning of these opinions could have far-reaching implications in the educational environment.

Digital technology has dramatically increased the physical ability of educational institutions in general, and research libraries in particular, to make copyrighted materials available to faculty and students. When the reproduction, display, and distribution of materials occurs without the authorization of the copyright owners, the educational institutions rely on the exceptions contained in the Copyright Act, including fair use privilege provided by 17 U.S.C. 107. Section 107 specifically lists “teaching (including multiple copies for classroom use), scholarship, or research” as examples of the purposes that could justify use without the owner’s permission. Moreover, the first fair use factor – the purpose and character of the use – explicitly contrasts “a commercial nature” with “nonprofit educational purposes.”

Notwithstanding these multiple references to education, there is a remarkable paucity of judicial decisions considering fair use by educational institutions themselves, as

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opposed to third parties such as commercial copy centers. There are, to be sure, a wide variety of guidelines that have emerged from inter-sector negotiations or the internal deliberations of associations, but these guidelines do not have the force of law.

In the absence of recent decisions applying fair use in the educational context, a strong current of fair use pessimism has developed on many college campuses. This restrictive view of fair use has a number of sources. First, consistent with their short term economic interest, copyright owners have consistently misstated the scope of the fair use privilege in a wide variety of fora. Second, certain academics have overstated the fragility of fair use in an effort to advance their theories of copyright law or their legislative proposals.¹ Third, some of the fair use guidelines mentioned above are three decades old, and thus do not reflect the expansion of fair use over time.

This paper will not offer a comprehensive analysis of the current state of fair use in the educational context.² Instead, it will discuss three recent fair use decisions by federal circuit courts. These decisions demonstrate that fair use pessimism, especially in the educational context, is ill founded. In all three cases, the courts found commercial uses to be fair. In two of the three cases, the defendants copied several of the plaintiffs' works in their entirety, and only changed them by reducing them in size. The courts nonetheless found these uses to be transformative because the defendants repurposed and

¹ "It is commonplace in modern copyright scholarship to decry the demise of the fair use doctrine." Mark A. Lemley, "Should a Licensing Market Require Licensing?," 70 *Law and Contemporary Problems* 185 (2007).

² *See, e.g.*, Madelyn Wessel and Deborah Gerhardt, "Flexing Fair Use Muscles: Electronic Course Reserves, the Use of Art, Images and Thumbnails in Teaching and Learning, Fair Use for Scholars, and Finding the Public Domain Clock," presented at the National Association of College and University Attorneys, Nov. 7 – 9, 2007. I would like to thank Madelyn Wessel for her helpful comments on an earlier draft of this paper.

recontextualized the works. Additionally, in both these cases the courts gave little weight to the plaintiffs' loss of licensing revenue.

The first case discussed, *Blanch v. Koons*, is the most "traditional" fair use decision. Koons truly transformed Blanch's photograph by placing part of the image against a new background; Koons's purpose was to criticize the high fashion genre of Blanch's photograph; Koons only used a part of Blanch's photograph; and Koons's use had no impact on the market for Blanch's work. The other two cases, *Perfect 10 v. Amazon.com* and *Bill Graham Archives v. Dorling Kindersley*, reflect more expansive applications of Section 107.

Blanch v. Koons

Jeff Koons is a visual artist who specializes in "appropriations art" – that is, he incorporates images from popular media and advertising into his paintings and other artwork. In previous copyright infringement cases against him, courts have rejected his fair use defense. *See, e.g., Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992). This case concerns his painting "Niagara," commissioned by Deutsch Bank for display in the Deutsche Guggenheim Berlin art space. "Niagara" depicts four pairs of women's feet and lower legs dangling over images of various desserts, with a grassy field and Niagara Falls in the background. Koons derived one of the pairs of legs from "Silk Sandals," an advertisement for Gucci sandals created by fashion photographer Andrea Blanch and published in the magazine "Allure." In the advertisement, the model's legs are resting on a man's lap in what appears to be a first class airline cabin. In an affidavit, Koons explained that by juxtaposing the

women's legs against a backdrop of food and landscape, he intended to "comment on the ways in which some of our most basic appetites – for food, play, and sex – are mediated by popular images." *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006). By recontextualizing fragments of advertisements in this manner, he "tr[ies] to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media." *Id.*

Blanch sued for copyright infringement, and the district court granted Koons summary judgment based on fair use. Blanch appealed to the Second Circuit, which affirmed on October 26, 2006. The Second Circuit repeated the Supreme Court's definition of transformative use in *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994): whether the use "merely supersedes the objects of the original creation, or instead adds something new, with a further purpose of different character, altering the first with new expression, meaning, or message."

The court found that this test

almost perfectly describes Koons's adaptation of 'Silk Sandals': the use of a fashion photograph created for publication in a glossy American 'lifestyles' magazine – with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictures, the objects' details, and crucially, their entirely different purpose and meaning – as part of a massive painting commissioned for exhibition in a German art-gallery space.

Id. at 253. The court underscored that "[t]he sharply different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals' confirms the transformative nature of the use." *Id.* at 252.

The court acknowledged that Koons made a substantial profit from the sale of "Niagara," but stated that when a new use is substantially transformative, "the

significance of other factors, including commercialism, are of less significance.”

Id. at 254. Accordingly, the judges here “discount the secondary commercial nature of the use.” *Id.*

The court also examined “whether Koons had a genuine creative rationale for borrowing Blanch’s image, rather than using it merely to get attention or to avoid the drudgery in working up something fresh.” *Id.* at 255. The court accepted Koons’s uncontradicted testimony that he needed to use an existing fashion photograph:

To me, the legs depicted in the Allure photograph are a fact in the world, something that everyone experiences constantly.... By using a fragment of the Allure photograph in my painting, I thus comment upon the culture and attitude promoted and embodies in Allure Magazine. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary – it is the difference between quoting and paraphrasing – and ensure that the viewer will understand what I am referring to.

Id.

The court considered the three other fair use factors relatively briefly. The court stated that “the second fair-use factor has limited weight in our analysis because Koons used Blanch’s work in a transformative manner to comment on her image’s social and aesthetic meaning rather than to exploit its creative virtues.”

Id. at 257. With respect to the third factor, the court found persuasive Koons’s statement that “he copied only that portion of the image necessary to evoke ‘a certain style of mass communication....’” *Id.* at 258. Turning to the fourth factor, the court found that Blanch had never licensed the image subsequent to its appearance in Allure, had no plans to license or reuse the image, and had offered no evidence that Koons’s use harmed her in any way.

Judge Katzmann wrote a short concurring opinion in which he agreed with the court's ultimate conclusion of fair use, but disagreed with some of the court's sweeping language. In particular, Judge Katzmann felt that the commercial nature of a use should not be "discounted" where the use, while transformative, "is not one of the archetypal purposes specifically contemplated by Congress" *Id.* at 262. Rather, in such cases the transformative quality of the use should simply be balanced against its commercial nature.

Perfect 10 v. Amazon.com

Perfect 10 published erotic photographs in a magazine and a website. It claimed that other websites copied and displayed its photographs without permission. In the course of its search engine operations, Google automatically scanned the photographs on the infringing websites, stored them in its search database, displayed low-resolution thumbnails of these infringing images in response to search queries, and provided links to the infringing sites. Additionally, Google provided the AdSense service. If a website was an AdSense partner, Google served ads to the website. Although AdSense and Google Search are distinct services, Google Search could lead a user to a website that was an AdSense partner. Perfect 10 alleged that some of the infringing sites to which Google linked were AdSense partners. A final fact: a company called Fonestarz licenses photos and makes them available for download on cell-phones. Perfect 10 alleged that it had licensed its images to Fonestarz for download onto cell-phones. It further alleged that cell-phone users could download thumbnail Perfect 10 images from Google's site rather than from Fonestarz.

Perfect 10 sued Google both for displaying thumbnail images of Perfect 10

photographs in response to search queries and for linking to sites where infringing images were displayed. Perfect 10 filed a motion for preliminary injunction, which the district court granted. *Perfect 10 v. Google*, 416 F. Supp 2d 828 (D. Cal. 2006), *aff'd in part, rev'd in part*, 487 F.3d 701 (9th Cir. 2007). The district court's rulings on the linking to the infringing sites touched on issues other than fair use, and thus are not relevant to this discussion. In contrast, the district court's ruling on the display of the thumbnail images in the search results is directly relevant here. The district court distinguished *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003), where the Ninth Circuit held that a search engine's display of thumbnail images was a fair use, and found that Google's display was not a fair use.

The district court identified two features that differentiated this case from *Kelly v. Arriba Soft*: AdSense and Fonestarz. In *Kelly*, Arriba Soft received no financial benefit from the display of the Kelly's photograph. Here, by contrast, Google received a financial benefit from the display of the Perfect 10 thumbnails because the thumbnails led users to infringing sites from which Google profited via the AdSense program. The court concluded that this made Google's use "more commercial" than Arriba Soft's. Perfect 10 at 847.

Moreover, the *Kelly* court found that Arriba Soft's display of thumbnails did not harm the market for Kelly's work, in part because there was no market for the licensing of thumbnail images of Western scenery, the subject of Kelly's photos. But the district court here found that there was an emerging market for thumbnail images of naked women. Fonestarz licenses photos and makes them available for download on cell-phones, where

they are the same size as the thumbnails Google displays. The district court found that it was possible that Google's display of the thumbnails would interfere with the success of the Fonestarz service because cell-phone users could see the thumbnails through Google image search for free. Because of these factors, the district court concluded that Google was unlikely to prevail on its fair use defense.

On May 16, 2007, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's rejection of Google's fair use defense. *Perfect 10 v. Amazon.com*, 487 F.3d 701 (9th Cir. 2007).³ The Ninth Circuit rejected the district court's distinguishing of *Kelly* on the basis of the AdSense program and the cell phone downloads. The Ninth Circuit found that there was no evidence that the Google thumbnails superseded the Fonestarz cell-phone downloads. Further, the court found no evidence that AdSense revenue derived from infringing sites was commercially significant. At the same time, the court held that Google's use of the thumbnails was "highly transformative." *Amazon.com* at 721. In fact, the court went so far as to say that "a search engine may be more transformative than a parody," the quintessential fair use, "because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work." *Id.*

Accordingly, the Ninth Circuit "conclude[d] that the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case." *Id.* at 723.

³ The case name is styled *Perfect 10 v. Amazon.com* because an appeal in a related case involving Amazon was consolidated with Google's appeal. The Ninth Circuit made a variety of other copyright rulings not relevant to this discussion.

The Ninth Circuit stated that in reaching this conclusion, it was mindful that the Supreme Court had stressed “the importance of analyzing fair use flexibly in light of new circumstances[,] ... especially during a period of rapid technological change.” *Id.*, quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984), quoting H.R. Rep. No. 94-1476, p. 65-66 (1976), U.S. Code Cong. & Admin. News 1976, p. 5680.

The Ninth Circuit made another important fair use holding. The district court's found that the cache copy made by a user's browser whenever he viewed a webpage is a fair use. The issue only arose because to prove secondary liability for Google, Perfect 10 needed to show that there was an underlying direct infringement by a third person. Among other possible direct infringements, Perfect 10 argued that users infringed its copyright in its images when they made temporary copies of these images in the random access memory (RAM) of their computers while viewing these sites that posted these images without authorization. The Ninth Circuit agreed with the district court that the RAM copies were a fair use. It stated:

The copying function performed automatically by a user's computer to assist in accessing the Internet is a transformative use. Moreover, ... a cache copies no more than is necessary to assist the user in Internet use. It is designed to enhance an individual's computer use, not to supersede the copyright holders' exploitation of their works. Such automatic background copying has no more than a minimal effect on Perfect 10's rights, but a considerable public benefit.

Id. at 726.

Bill Graham Archives v. Dorling Kindersley

Dorling Kindersley (DK) published a coffee table biography of the Grateful Dead with over 2000 different images. Among these were seven posters whose copyright was owned by Bill Graham Archives (BGA). BGA sued for infringement, but the District

Court found that DK's use was fair. The Second Circuit affirmed on May 9, 2006. *Bill Graham Archives v. Dorling Kindersley*, 448 F.3d 605 (2d Cir. 2006).

In its analysis of the first factor, the Second Circuit held that DK's inclusion of reduced images of the posters in a new work was transformative. The court noted that DK's

purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created. Originally, each of BGA's images fulfilled the dual purpose of artistic expression and promotion. [...] In contrast, DK used each of BGA's images as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on [its] timeline.

Id. at 609. The court found that "DK's image display enhances the reader's understanding of the biographical text." *Id.* at 609-10. Thus, the Second Circuit, like the Ninth Circuit in *Amazon.com*, focused on the repurposing of the original work, rather than on changes to the work itself.

Further strengthening the transformational nature of DK's use was "the manner in which DK displayed the images." *Id.* at 611. The court noted that DK reduced the size of the reproductions, and cited *Kelly* as authority for the transformational nature of reductions. The court stressed that DK's layout – combining the images with a timeline, textual material, and original graphical artwork, "ensures that the images at issue are employed only to enrich the presentation of the cultural history of the Grateful Dead, not to exploit copyrighted artwork for commercial gain." *Id.* The court further noted that the images "constitute an inconsequential portion" of the book, suggesting that DK contributed significant original expression. *Id.*

With respect to the second fair use factor, the nature of the copyrighted work, the

court acknowledged the creative nature of the artwork at issue. However, it found that in cases involving transformative uses, the second factor should be given “limited weight.” *Id.* at 612. The Second Circuit ruled that the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, did not weigh against fair use when “copying the entirety of a work is ... necessary to make a fair use of the image.” *Id.* at 613. Here, DK “displayed the minimal image size and quality necessary to ensure the reader’s recognition of the images as historical artifacts of the Grateful Dead concert events.” *Id.*

BGA conceded that DK’s use did not affect its primary market, the sale of poster images. BGA nonetheless argued that DK interfered with the market for licensing its images for use in books. The Second Circuit acknowledged that the impact of a use on potential licensing revenue is a proper subject for consideration in assessing the fourth fair use factor. The court hastened to add, however, that “were a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary use did not pay a fee for the right to engage in the use, the fair use factor would *always* favor the copyright holder.” *Id.* at 614.

Instead, courts should look only at the impact on potential revenues for “traditional, reasonable, or likely to be developed markets.” *Id.* The Second Circuit held that a “transformative market” does not fall into one of these three categories. The court stated:

[W]e hold that DK’s use of BGA’s images is transformatively different from their original expressive purpose. In a case such as this, a copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational, or other transformative uses of its own creative work. Copyright owners

may not preempt exploitation of transformative markets. [...] Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.

Id. at 615. The Second Circuit took care to distinguish DK's use from the photocopying of scientific journal articles by Texaco's researchers in *Am.*

Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994): "Here, unlike in *Texaco*, we hold that DK's use of BGA's images is transformatively different from their original expressive purpose." 448 F.3d at 615.

Significance of Decisions in the Educational Context

Fair use decisions are highly fact specific. Nonetheless, courts rely on precedent when applying the fair use factors. Thus, these three recent circuit court opinions will guide lower courts as they weigh defendants' assertions of fair use in future copyright infringement cases. This means that these opinions should inform fair use analyses performed by educational institutions. The following principles can be derived from these opinions.

1. All three cases arose in commercial settings, yet the courts found fair use. This suggests that similar types of uses in a nonprofit educational context are *a fortiori* fair.

2. The transformative nature of the use increasingly appears to be the most important criterion, swallowing the other factors. However, the notion of the kind of use that a court will consider transformative is far broader than the term "transformative" suggests. While the term "transformative" implies that the work itself has been changed, *i.e.*, the user has made what would be considered to some extent a derivative work, both *Amazon.com* and *BGA* make clear that repurposing

a work or placing it in a new context may be sufficient to render a use transformative.

3. The amount and substantiality of the portion used has less relevance, particularly if the use is transformative. In both *Amazon.com* and *BGA*, the user used entire works. Indeed, in *Amazon.com*, Google allegedly used the entirety of thousands of images (albeit in compressed form).

4. The existence of a licensing market for a work does not defeat fair use, provided that the use is transformative. The *BGA* court gave little weight to the fact that BGA derived significant revenue from licensing the use of its images.

One cannot predict with any certainty how a court will apply these principles to the wide variety of uses made in the educational context. Nonetheless, these principles could reasonably be interpreted to support a more confident application of the fair use doctrine to certain uses in the educational environment. What follows is one possible analysis of the implications of these principles.

If repurposing a work renders its use transformative, then arguably an educational use of a work created for a different market also is transformative. In other words, an educational institution could reasonably take the position that an educational use of an entertainment product is transformative because the work is being repurposed. Under this view of fair use, when a teacher reproduces a poem, a sound recording, or a photograph so that his students can study the work, his use is transformative.

These three cases suggest that the transformative nature of the repurposing for educational use can be further enhanced if the work is recontextualized. That is, the more integrated a work is with other material, the stronger the claim of fair use. Tools like Blackboard permit an instructor to create an online anthology for a class, including copyrighted works, commentary, lecture notes, and student reactions. This recontextualization appears to provide a stronger fair use defense than would library-run e-reserves containing just the plain text of works.

The judicial decisions discussed above thus imply that teachers, scholars, educational institutions and libraries can be more confident in their assertion of the fair use privilege when they repurpose and recontextualize works. The limitations of brevity, spontaneity, and cumulative effect contained in the 1976 Classroom Use Guidelines appear to have little relevance with respect to uses of this sort.

Of course, this reasoning can be taken too far. While it might be transformative for an English Literature professor to scan the full text of Joseph Heller's *Catch-22* onto the website for his 20th Century American Literature class, it still might not be a fair use. A court could well decide that the reproduction has too direct and negative an effect on the market for *Catch-22*, a novel still in print. In this transformative context, a court could draw a distinction between the effect on the market for copies already in existence and the market for a license to make a different kind of use. In the case of copies in existence, a court could decide that fairness dictates that the publisher have the ability to recoup its investment in producing the copies – a consideration not present in the case of a license for a different use.

In any event, these cases indicate that educators should take great care to insure that their repurposing and recontextualization cannot be misused. In both *Amazon.com* and *BGA*, the reduced size and low resolution of the images weighed in favor of fair use because they prevented non-transformative uses. In *Amazon.com*, for example, a thumbnail image would lose resolution if it were enlarged, thereby preventing it from “superseded[ing] the objects of the original creation.” If the public could access an American Studies course website containing stories, photographs, and sound recordings, the public could make entertainment use of this content, notwithstanding the professor’s educational objective in making the content available to her students. The professor could avoid this potential misuse by employing appropriate technological measures to permit access only to those who would make educational uses of the content – her students.⁴

Significantly, the repurposing argument provides less protection with respect to works that target the education market. Including a chapter of a statistics textbook in a statistics course website likely would not constitute repurposing. This does not mean that such a use necessarily is unfair; rather, the instructor would simply have to rely on more traditional fair use arguments.

At the same time, it is important to recognize that the education market contains many sub-markets; a court may view as repurposing the use in one sub-market of a work created for a different sub-market. Articles published in scholarly journals are directed at other scholars in the field, with the objective of

⁴ It should also be noted that the *Amazon.com* court considered transformative the high-resolution, full-sized cache copies made by users’ browsers. 487 F.3d at 726.

advancing knowledge in that field. Because undergraduates are not the target audience of journal articles, inclusion of such articles in e-reserves or a course website might well be treated as a form of repurposing.

In between the extremes of text books and journal articles lie academic books. Many are aimed at scholars, some at students, and still others at both scholars and students. Accordingly, the repurposing nature of the inclusion of chapters from such books in e-reserves and course websites depends on the specific book. But even if the book is aimed to some extent at the student market, a course website could recontextualize the book.

Without doubt, many copyright owners will not agree with this analysis of the possible implications of the three decisions. Indeed, many rightsholders might not agree with the decisions themselves; trade associations representing the major content providers filed *amicus* briefs advocating positions ultimately rejected by the *Amazon.com* court.⁵ Nonetheless, these decisions represent the current state of fair use jurisprudence, and they demonstrate strong judicial support for the doctrine.⁶

⁵ *Amicus* briefs supporting positions advocated by Perfect 10 were filed by the Motion Picture Association of America, the National Music Publishers' Association, the Recording Industry Association of America, the American Society of Media Photographers, the Picture Archive Council of America, the British Association of Picture Libraries and Agencies, Stock Artists Alliance, the Graphic Artists Guild, American Society of Picture Professionals, and National Press Photographers.

⁶ In September, 2007, in a case concerning the constitutionality of the Uruguay Round Agreements Act, the Tenth Circuit made the following expansive statement about fair use:
[A]lthough Ralph Ellison's estate may retain the copyright to his classic novel *Invisible Man*, the fair use defense permits scholars and teachers to quote extensively from the book and even reproduce entire sections for the purpose of commenting on (say) the parallels between the narrator's literal and figurative vision. Because the purpose of the fair use defense is to

Conclusion

Three recent appellate decisions concerning fair use should give educators and librarians greater confidence and guidance for asserting this important privilege. All three courts found fair use notwithstanding the commercial context in which the use occurred. The defendants in two of the cases used entire works, and changed them only by compressing them. The courts nonetheless found these uses fair because the defendants repurposed and recontextualized the works.

The principles articulated in these opinions could reasonably be interpreted to support a more confident application of the fair use doctrine to certain uses in the educational environment. For example, educational uses of entertainment products could be viewed as constituting repurposing; as could the display to students of works targeted at scholars. These cases further suggest that educators could buttress their fair use claim by recontextualizing works on course websites through selection and arrangement and the addition of commentary, criticism, annotation, and student reactions. In short, these decisions should engender fair use optimism in the education milieu.

"afford[] considerable latitude for scholarship and comment," the [Supreme] Court has described it as a "guarantee of breathing space within the confines of copyright."
Golan v. Gonzales, 501 F.3d 1170 (10th Cir. 2007)(citations omitted). In June, 2007, the Sixth Circuit in *Zomba Enterprises v. Panorama Records*, 491 F.3d 574 (6th Cir. 2007), rejected a frivolous fair use defense asserted by a company that recorded musical compositions without authorization onto karaoke CDs. The court affirmed the district court's finding of willful infringement and award of over \$800,000 in statutory damages.