Fair Use in the U.S.

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Overview of Potential Issues in U.S.:

1. Copyright is of Constitutional dimensions in U.S.
2. I. P. © is a legislative enumerated power
3. © is grounded upon Utilitarianism
4. First Amendment = Freedom of Speech is Explicit. Very Strong preference for freedom of speech in U.S.
5. Little Protection of Moral or Intellectual Rights or interest in U.S.

6. U.S. Copyright focuses almost exclusively on Economic Rights

7. Tranformativeness in Fair Use is a term with dynamic content
Limitations on exclusive rights: Fair use
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

Compare: U.S. Section 101

Derivative Works
Authors Guild, Inc. v. HathiTrust (2nd Cir. June 10, 2014)

- Court determined that digitalization of copyrighted works to permit full-text searching of works was fair use;

- It also concluded that digitalization of copyrighted works to provide print-disabled patrons with versions of all works contained in digital archive in formats accessible to them was fair use;
1. Prefers *Standards* as opposed to Rules to resolve tensions. (Cf. “Unfair Competition.”)

2. Opines that as Fair Use Factors are *flexible and adaptive*, they can be applied *without having to wait for legislative action*. It is “future-proof.”
   - Seems to prefer an “immediate response” challenges of advancing technologies.

3. States that Fair Use promotes *public interest and transformative uses*. References the Google case in U.S. as support. Includes examples such as the use of © materials to sate public curiosity.

4. Indicates that Fair Use is *not a radical departure* and Australia may call upon experience in U.S. for guidance.
5. Observes that “Fair Use may permit more unlicensed uses than the existing fair dealing exceptions, bit only . . . “transformative uses ....”
6. Preference to grant public access to new technological markets
7. Opines that Fair Use better aligns with reasonable consumer expectations.
8. States that Fair Use will protect creator markets. “If a license can be obtained for a particular use . . . then unlicensed use . . . will often be unfair.”
9. Concludes that Fair use is sufficiently certain and predictable.

10. Believe Fair Use to be compatible with “three step” treaty international test.
COPYRIGHT LAW is like a CITY Built on a GEOLOGICAL FAULT!
The Congress shall have Power . . . To promote the Progress of Science. . . , by securing for limited Times to Authors. . . the exclusive Right to their respective Writings. . . .
A Question of Enumeration and Implied *Separation of Powers in U.S.*

- Should Courts be permitted to affect decisions that may over-ride carefully negotiated arrangements between creators and users of copyrighted materials under principles of Fair Use; or

- Should Fair Use be reserved for the more unusual case that needs to be addressed immediately?
As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.

April 24, 2013 – House Judiciary Chairman, Bob Goodlatte, announced “a wide review of our nation’s copyright laws and related enforcement mechanisms is timely.” The Committee has held numerous hearings including one on Fair Use in the winter of 2014.
The U.S. Supreme Court: “As we read the Framers’ instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.”

as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.

“The economic philosophy behind the (IP) clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”

Object: To Stimulate Creators to Enrich the Future Public Domain

“The immediate effect of our copyright law is to secure a fair return for an ‘author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ‘The sole interest of the United States and the primary object in conferring the monopoly,’ this Court has said, ‘lie in the general benefits derived by the public from the labors of authors.”

The U.S. Supreme Court: “(T)he limited grant is a means by which an important public purpose may be achieved. *It is intended to motivate the creative activity* of authors and inventors by the provision of a special reward, and to *allow the public access to the products of their genius after the limited period of exclusive control has expired.*”

The U.S. Supreme Court: “The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”
The U.S. Supreme Court: “If every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading.”
“It seems almost every player — publishers, search engines, libraries, pirates and even some scholars — is vying for position at authors’ expense. The value of copyrights is being quickly depreciated.”

I don’t have the time or money to seek a license.

Comment by a writer of Fan Fiction before Congress.
The *Genuine Question* – What is that “culture” to be valued?

- Does one capitulate to current demands for access through Fair Use in order to stimulate derivative creativity; or

- Does one resist broadening immediate access in order to enrich the public domain after expiration of the limited monopoly?
Risks of Granting Liberal Access through Fair Use

1. Impoverishing the Public Domain – Creators are Dis-incentivized

2. Innovators rely upon technological means rather than Law in order to protect their creative expression
Court in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) concluded: 1. Commercial use was not to be dispositive of fair use; 2. Commercial uses can be fair uses; 3. A court must evaluate all of the factors in Section 107 of the Copyright Act; 4. Within the 1st factor, whether the infringing use is “transformative” is an important consideration.
What is a Transformative Use?

To determine whether a use is transformative, a court should consider whether “the allegedly infringing work “merely supersede[s]” the original work “or instead add[s] something new, with a further purpose or a different character, altering the first with new expression, meaning or message.”
Post–Campbell cases began to interpret “transformative” in two significantly expansive ways.

First, to encompass not only changes to the substance of a work, but also changes to how the work is used, referring to this repurposing in a new work as “functional transformation.”

See, Brief of Jon Baumgarten, Stuart Brotman, Raymond T. Nimmer, Mark Schultz, and John Simson as Amici Curiae in Support of Plaintiffs–Appellants the Authors Guild, et al.
New Works vs. New Uses without New Work

- Second, and more radically, courts began to apply the “transformative” and “functional transformation” labels not only to new works incorporating unaltered copies of preexisting works, but also to new uses that exploited the prior work without creating a new work.

- "Transformative" thus became uprooted from its original context of “new works” to become applied to a much broader context of “new purposes.”

- Id.
District court: Google's use was “highly transformative” – Google converted the books' text into digital form – creating a full text search capability that made existing works more accessible to users, and enabling new forms of research.

Google also provided each library with a digital copy of all of the books in that library's collection.

The court accorded little weight to the commercial benefit that Google derived from the digital copies of 20 million works that it acquired through this process (without payment to right holders) and retained for its own use.
Neither factor two nor factor three had any significant influence on the fair use determination, but on factor four the court found that Google's activities had little likely effect on the authors' actual or potential markets for their works.

The court failed to consider the market impact that could ensue if the use were to become widespread and other commercial or noncommercial enterprises followed Google's lead in mass digitizing collections of works.

The decision below exacerbates the recent trend of citing “transformative purpose” to excuse the taking of © works

Id.
The Google Court did not assess all Factors as required.

- Google's transformative purpose seems to drive factors one and four to favor fair use; factors two and three are largely irrelevant. *Approximately 7% of the works at issue are fiction.*
- The court *ignored the substantial commercial benefit to Google*, and fixed primarily on the social benefits from Google's and the libraries' activities. Social benefit does not provide a carte blanche for unauthorized copying of copyright-protected works.
- Id.
The court's interpretation of the fair use doctrine, 17 U.S.C. §107, is inconsistent with the rest of Title 17, and specifically with sections 108 (exceptions for libraries and archives) and 121 (exception to copy and distribute works for the blind or otherwise disabled). Both of those provisions reflect a careful balancing of interests and have conditions that protect right holders.

In interpreting fair use so expansively that it creates, in effect, a broad new exception to copyright without the conditions and limitations in sections 108 and 121, the court below violated the cardinal rules of statutory construction.

Id.