

Fair Use of Existing Books

Can a teacher translate an English-language book into another language in order to share it with his or her students? Can an author or illustrator adapt a famous children's book to make it more multicultural? Can a nonprofit make cheap photocopies of a popular children's book to give away to low-income families? Can libraries loan digital copies of print materials to patrons? The answer depends on the nuances of copyright law in each country.

Copyright exceptions are sometimes quite specific and clearly defined; others are open-ended and subject to broad interpretation. Not every country has exceptions of the second type, but the United States is globally famous

for its doctrine of “fair use.” Section 107 of U.S. copyright law reads in part:

the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

One particularly helpful crystallization of the fair use doctrine comes from Judge Pierre Leval, whose writings were foundational in shaping modern fair use law:

Although no simple definition of fair use can be fashioned, and inevitably disagreement will arise over individual applications, recognition of the function of fair use as integral to copyright’s objectives leads to a coherent and useful set of principles. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.

Or in words the Supreme Court credited to Joseph McDonald: “Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.”

Contrary to popular belief, the fact that something is widely done is no assurance that it is legally recognized as fair use. For example, it is common to find videos on

YouTube of people reading children's books aloud. Perhaps the books' publishers view this as fair use. Perhaps they view it as copyright infringement, but tolerate it as good publicity. Behind the scenes, they might have a contractual arrangement with YouTube, getting paid some amount in return for not suing YouTube's users. It is also possible that we are seeing only those instances in which publishers are unaware of the videos, while many more have been removed as a result of publisher complaints. Fair use is not nearly as broad or as clear-cut as most Americans assume, based on simply observing what goes on around them.

A Fair Use Hypothetical

American law professors frequently educate their law students by presenting "hypotheticals." These fictitious fact patterns are designed to help the students explore the application of law to specific circumstances. Law students tend to greatly appreciate this method as providing a clearer picture of how the law actually works than a more abstract explanation. In that spirit, here is an extended hypothetical to illustrate how the fair use doctrine might apply to a potential nonprofit publishing project to address book hunger.

Let us imagine that a major public library in New York ("The Library") wants to create a collection of multilingual

picture books for immigrant children to read with their parents. It purchases a single copy of *The Last Stop on Market Street*, *The Way Home in the Night*, *I Am Human: A Book of Empathy*, *The Day You Begin*, *My Beautiful Birds*, and five other truly outstanding picture books speaking to the diverse experiences of New York's children. A librarian scans each page and uses a software tool to remove the English text from the illustrations. The Library commissions professional translations into a hundred underserved languages, such as Arabic, Bengali, Polish, Igbo, and Khmer. The translated text is then placed back onto the pages with the digital images, and the files are saved. Since ten books were translated into a hundred languages each, one thousand new multilingual titles have been created. The Library's design team is careful to credit the original author, illustrator, and publisher by name, as well as the translators and a few key funders of this effort.

The Library then makes this new multilingual book collection available to its patrons on smartphones and e-readers. Over the next twenty years, these stories are read more than a million times. After tracking digital downloads, the Library also commissions 100,000 hardcover copies of the most popular translations. Of these, 10,000 copies are divided among the local library branches of the New York Public Library and the Brooklyn and Queens

library systems. Each site receives only books in those languages that are currently deemed most relevant in its neighborhood, with some extras being stored centrally in anticipation of future requests as neighborhood demographics change. The remaining 90,000 hard copies are delivered to First Book to sell to schools, nonprofits, and libraries in other cities and towns. The resulting income to the Library is enough to fully offset the costs of undertaking the project.

Is this hypothetical project fair use?

Extensive case law establishes that parody and commentary generally qualify as “transformative” fair use. There is no similarly clear line of precedent for nonprofit educational copying. Courts would not have as detailed a road map for how to apply the factors commonly used to evaluate cases where the copier claims fair use. Most judges would concede that the library’s “nonprofit educational purpose” is a strong point in its favor. On the other hand, the use of the entire book—rather than a short excerpt—could be construed to weigh heavily against fair use. The ultimate verdict would likely depend on how the court views the potential financial harm to the book’s author and publisher. The Library should therefore argue that although a translation into a profitable market such as Spanish could be presumed to be harmful to the

copyright holders' economic rights, no such profit opportunity exists in the languages chosen for this project. A very limited potential for market harm, combined with the strong public interest in promoting early literacy, should point to a decision of fair use.

In fair use, however, there are not guaranteed outcomes, and thus there are no entirely certain predictions. As someone who teaches copyright law regularly, and has studied hundreds of copyright precedents, my professional opinion is that this is the only correct answer for a court to reach, given both the letter and the spirit of copyright law. But other copyright experts might disagree, including perhaps the lawyers representing the authors or publishers of the books chosen for the project. The Library could very reasonably stand on principle to assert fair use, but it would need to be prepared to defend that claim publicly and perhaps even in court. If a publisher or author brought suit, it would likely result in a legal precedent more clearly establishing the mass translation method of addressing book hunger in neglected languages to be fair use. As a bonus, the court might well exercise its discretion to order the losing party to pay the fees of the Library's lawyers. Because of this possibility, as well as the legal and social significance of this case, the Library could probably secure free legal representation.

Since fair use is never certain, though, there would remain a risk, however slight, of an unfavorable decision. In this worst-case scenario, how much financial risk would the Library be exposed to? So long as only ten titles were used, the likely statutory damages range of \$750 to \$30,000 can be multiplied only ten times. (It is irrelevant whether one hundred or one million copies were made; the statutory damages range is multiplied based on the number of copyrighted titles affected.) This would point to a potential upper limit of \$300,000. An award of \$7,500 seems much more probable, however, given the sympathetic nature of the Library's activities. Alternatively, the publishers could ask the court to award a fair value for the unauthorized copies. In this case, a court might order the library to pay the same price it normally pays for those titles in English. Since the Library is a nonprofit with a reasonable claim to fair use, the court would probably not award legal fees if the Library ended up on the losing side of the case. Perhaps a charitable foundation would be willing to serve as the Library's insurer for up to the maximum amount of potential damages, to limit the risk to the Library. It would be at the trial judge's discretion whether to enjoin the Library from future efforts along the same lines, or to decline to issue an injunction based on the public interests at stake.

Given that the Library's case for a fair use argument is so strong, children's publishers may well prove willing to grant express permission at no charge. This would allow them to take public credit and earn goodwill for a voluntary contribution to a groundbreaking charitable project. This approach is preferable, from the Library's point of view, because it would completely avoid legal risk. Since the Library only needs ten books and there are many publishers in the country, it could easily wait to see which publishers agree to grant permission before selecting which books to honor in this way. A voluntary partnership would also save the Library the trouble of scanning the book images, since the publishers could provide high-resolution files. The primary benefit of selecting titles without a publisher's collaboration would be if the Library felt it was important to establish the legal precedent that mass translation to alleviate book hunger is fair use. Even without litigation, a voluntary partnership would establish an industry precedent in favor of free licensing. This might ultimately ripen into a clear statutory exception, as with the Chafee Amendment.

Applying this type of analysis internationally is much more complicated. Copyright protection is mandated by international treaties, but exceptions remain optional and vary widely. Not all countries have flexible exceptions like

fair use, though interest in adopting them is on the rise. In other countries, mass translation of children's stories into neglected languages could fall under specific exceptions for educational activities. China and Vietnam interpret their educational exceptions very broadly to promote student access to otherwise unaffordable works. India's courts recently deemed university photocopying to be fair in terms more sweeping than would be imaginable in U.S. law. Even Germany, which makes libraries pay for the privilege of loaning out books to blind readers, has recently broadened its educational exceptions, possibly creating room for a project like this. Again, the answer need not be certain to open the door to a friendly negotiation with a publisher for a global charitable license.

Searching for Clarity

The open-endedness of the American fair use exception is both its greatest strength and its greatest weakness. On one hand, having such a general and vague provision allows for flexibility and innovation. Fair use has been successfully invoked to protect parody, political criticism, home VCR recordings, and Internet search engines. The flip side of this flexibility, however, is that the boundaries are unclear. Because the legal test for fair use is so complex, special expertise and careful research are essential to

offer a well-grounded opinion on any particular situation. A small change to the hypothetical presented above—such as including Mandarin among the chosen languages for translation—might well lead to a different outcome.

Even experts may reach different opinions on the same set of facts, or have to admit that the outcome is uncertain. David Nimmer, editor of the most authoritative reference work on copyright law, complains that the modern fair use test is “malleable enough to be crafted to fit either point of view.” He points out that judges routinely disagree with each other both on individual steps of the test and on the ultimate result. His point is countered by Barton Beebe, a professor at New York University, who has studied hundreds of fair use opinions. Beebe points out that the cases that end up in court naturally tend to be the most difficult ones, which really could go either way. If a use is very likely fair, plaintiffs tend not to sue. If a use is very likely unfair, defendants generally agree to pay rather than press the issue in court.

Other scholars, notably Pam Samuelson, have identified consistent patterns in fair use decisions. Samuelson notes, however, that copying for educational uses remains particularly unclear. The Supreme Court once accepted a case for appeal in which the National Institutes of Health had photocopied scientific articles for researchers to read.

The Court was unable to reach a majority decision, one justice having recused himself and the others evenly split. Few other cases have ever been decided involving scholarly or educational copying. My own impression of these cases is that U.S. courts tend to find educational copying unfair only if the copier is a commercial entity or otherwise in competition with the original author. Samuelson suggests there are few cases brought against nonprofit educational copying either because publishers accept this as fair use, or because such copying is simply difficult to detect.

My theory is that publishers have long avoided bringing these cases because they dared not take the significant risk of losing. Universities and schools proved willing to pay low licensing fees that collectively have added up to significant income for certain publishers. If courts ever did clearly establish that nonprofit educational photocopying is fair use, this income stream might disappear. Recent developments have forced the issue, however. As universities shifted from paper photocopying to digital course packs, some decided to stop paying the licensing fees. Georgia State University was sued by Cambridge University Press, Oxford University Press, and Sage Publications. Funding to bring the case was provided by the Association of American Publishers and the Copyright

Clearance Center, which clearly understood the importance of the precedent the case would set. After several years and several hundred pages of trial and appeals court opinions in *Cambridge University Press v. Patton*, the university's course packets were held to be mostly fair. The university was awarded more than \$3 million in legal fees, at the publishers' expense. The court ordered the university only to further encourage faculty compliance with fair use guidelines.

Risk Mitigation

Organizations focused on global book hunger should give greater attention to the possibility of adapting existing titles to their purposes. Translation into neglected languages for educational purposes is likely fair use, with no permission or payment required. To stay on the right side of the law, nonprofits should be sure to demonstrate good faith by retaining the book's copyright notice, the names of the author and illustrator, and the original publisher. Recoloring a well-known picture book's images to "diversify" its white characters would likely also be deemed fair use. So would altering the text of an outdated children's book to retell the story from another perspective. All of these strategies remain to be tried. For most nonprofits in the literacy space, however, copyright litigation is

neither on brand nor on mission. It may take a library, a law school, or a specially created nonprofit to push the legal envelope.

Another route is for book nonprofits to work on establishing voluntary fair use guidelines specific to their field. Scholars Patricia Aufderheide and Peter Jazsi first innovated this approach by helping to produce the Documentary Filmmakers' Statement About Best Practices in Fair Use. This document was developed by documentary filmmakers and copyright lawyers, without the participation of third parties. Once the best practices guidelines were released, insurance companies became much more willing to offer litigation insurance to documentary filmmakers. Aufderheide and Jazsi's book, *Reclaiming Fair Use: How to Put Balance Back in Copyright*, also details how seven other creative communities worked to develop similar codes of conduct. These voluntary codes help to establish consensus over appropriate boundaries for fair use in each particular context. An even more recent example, the Position Statement on Controlled Digital Lending, seeks to define restrictions for libraries lending digital materials online.

As publishers ultimately weigh whether to give or withhold permission in response to translation requests, or possibly even file suit, I would urge them to take a

historical perspective. In the 1980s, the U.S. film industry fought to block home video recording equipment, which it viewed as a threat to its copyrights. After the Supreme Court deemed these technologies protected by fair use, however, home video became extremely profitable for the film industry. Similarly, without the innovative efforts of George Kerscher and others to develop digital audio formats for blind readers, commercial publishers might never have discovered the profit potential of audio books. Billions of potential future consumers currently cannot buy books. Empowering nonprofits to experiment and find solutions for hard-to-reach readers is very much in the long-term interest of commercial publishing.