

Expert Reflection

Two Questions on Fair Use: Interview with Mark Lemley

By · February 22, 2022



For this year's [Fair Use/Fair Dealing Week](#), MediaWell is partnering with the Association of Research Libraries to interview experts reflecting on how fair use supports research, journalism, and truth. This is the first of MediaWell's four-part series, entitled "Two Questions on Fair Use" in which we ask [Mark Lemley](#), William Neukom Professor of Law at Stanford Law School and senior fellow at the Stanford Institute for Economic Policy Research, some questions about the legal history of fair use, and how fair use supports research and teaching. The transcript has been lightly edited for clarity.

How does fair use support journalism, specifically documentary filmmaking, data-driven reporting, news content, and aggregation?

I think the answer is fair use has sort of long been integral to all kinds of journalism and reporting. You can go back decades; you can go back almost a century to some remarkable cases. For example, there was a case in which somebody who wanted to tell the story of the Kennedy assassination broke in and got copies of stills from the Zapruder film, which was the only visual evidence of the Kennedy assassination. When the copyright owner sued, the court said, "that's fair use because you're taking a copyrighted work for purposes related to the public interest." I think that has been true across a wide array of news and media communications. There are often circumstances in which there is one key source: somebody took a video of a beating or a shooting, for example, or the key source is itself an official document.

Fair use covers information that a corporation has written that it wants to keep secret, or information that the government has written that it wants to keep secret. I think in all of these cases, the Fair use doctrine allows journalists, allows documentary filmmakers, and allows private citizens to communicate this information to the public, that they have a right to know, despite the effort of organizations and institutions to hold it back.

How have legal interpretations of fair use changed over time?

It's very interesting, I'll go back even further to give you a kind of counter example. In the 1930s, a young man named Alan Cranston, who later became a United States Senator from California, bought and translated into English *Mein Kampf*, Hitler's book. At the time, Hitler had published an expurgated English version in the United States that toned down the antisemitism. Cranston translated the whole book to show exactly what Hitler was talking about. Hitler's publishers sued him and won and they actually shut down that translation, saying, "you can't do it. This is copyright infringement." The fair use Doctrine circa 1939, I think, wasn't capacious enough to protect what seems to me obviously something in the public interest. We see things starting to change through the 1960s and the 1970s, broadening the conception of public interest. One of the things that we see, I think, in the last 25 years or so, 30 years, that there's been a really dramatic shift in the court's focus on transformation and transformative use.

In the 1980s, the Supreme Court decided a case involving Gerald Ford's memoirs in which *The Nation* magazine had gotten a purloined copy of the draft of the memoirs and scooped the official release by releasing information about his pardon of Nixon. The US Supreme Court said five to four that this was not fair use because it interfered with the market, the book was just about to be released. I think the courts probably would look at that differently today. We have less emphasis now on, "do I have a right to keep it secret, keep it private and be the first to publish it?" than we did in the 1980s.

Courts are much more willing to permit uses that the copyright owner doesn't like if those uses are not merely copying the original, and are instead transforming it, adding new communications and information. A journalist's story, a documentary film that takes underlying material and weaves it into a story, are likely to be held fair use. The limiting cases, I think, are the ones where a person has created a tool that allows others to search or find information from someone else without a lot of commentary about it; there the courts are still more reluctant to find fair use.

So fair use would cover a journalist's reporting, but an independent database would be less of a fair use case?

Yes. I think also if a journalist writes a story that uses an internal memo that they've gotten access to from a corporation, this is likely to be fair use. A news source that basically just takes a document in its entirety and reprints it and says, "I am reporting this," is less likely to be fair use because the court would say, "Well, that's not transformation."

How does the concept of transformation affect scholarship?

I think it gives a lot of protection for scholarship. Again, if you copied somebody's scholarship, it's not going to protect you if all you did was take somebody's article and put your own name on it. But scholarship, like journalism, if it's done right, is all about taking a work and adding critique, analysis, and discussion associated with that work. And here too, we've seen copyright owners try to use copyright to keep information from the hands of scholars. The James Joyce estate, for instance, tries to prevent his private letters from being published. The Salinger estate doesn't want his private letters to be published. If you just publish the letters, I think the courts might say, "Well, that's the copyright owner's prerogative

to decide whether or not to do it.” But if you want to write an analysis of “Here’s what this private correspondence shows about what James Joyce was thinking at the time he wrote *Ulysses*,” even though the Joyce estate doesn’t want you to publish those letters, wants to keep them private, the courts say “no, that’s permissible,” because what the author is doing is giving the world not just the copyrighted work, but also giving the world all of their original creativity, thought, and analysis. That new, original material is the transformation and it’s bound up with the copyrighted work that they’re using.

Thinking more broadly, how is fair use an important principle for academic research and teaching, including studies of the impact of social media companies on society and use of media content and analysis?

One kind of everyday way that we use fair use in teaching is we want to actually show people the underlying content. It’s one thing to sort of talk about something, it’s another thing to show you a clip, whether it’s a clip of Martin Luther King’s speech in a history class or me teaching about intellectual property and wanting to show students two examples, and they can decide whether or not they are too similar or not. I think the fair use doctrine in teaching and scholarship absolutely gives people the freedom to hand out things in class, to show things in a PowerPoint presentation and so forth.

It’s become even more significant in the pandemic because suddenly a bunch of our teaching went online and so communicating things in a classroom now means communicating things over Zoom. We have a specific statutory exception that allows you to put something up on a PowerPoint slide, face-to-face in classroom instruction. That exception just wasn’t written with Zoom in mind because it was written in 1976 and nobody had any idea that we’d be doing distance learning as our primary mode of teaching. Fair use becomes very important there to ensure that a professor’s still going to be able to engage in the same kinds of instruction they could do face-to-face, even though they’re sharing something across a computer network.

Have there been any legal challenges involving teachers or professors using copyrighted materials over Zoom?

We’ve seen a lot of discussion, among library groups and others, though I haven’t seen any suits filed in the pandemic. It may be that this isn’t where the publishers want to stake their case. However, the Internet Archive started making available material in the pandemic that it had not made available previously, because people couldn’t get to libraries, couldn’t have access to this material and it said, “This is an emergency and we’re going to make sure people still have access to culture and learning in an emergency.” They have been sued and there is an ongoing lawsuit there against the Internet Archive.

Some scholars who study social media have a lot of difficulty trying to get access to data, and also to share the data with other people who want to review research and validate it. These are typical social science research activities that are very stymied by the fact that researchers can’t widely share the data, so they’re running into limitations on fair use.

This is an interesting problem and I think it's only partially a copyright problem. My colleague, Nate Persily, at Stanford has been in a similar situation. A lot of scholarship might once have had access to the material—not to publish the material, not because I want to share your Facebook posts—but because I want to do content analysis of millions or billions of Facebook posts. I think fair use would support that use because it is transformational. Bryan Casey and I actually have a paper called Fair Learning in which we argue that the AI systems that ingest large amounts of copyrighted data ought to be viewed as engaging in fair use in the cases where they're not designed to generate copyright outputs. Instead, they're doing something like reading every book in the English language to try to understand syntax and sentence structure in order to design an AI system that can construct sentences more naturally.

I think researchers ought to have that same prerogative, when they're doing analysis, meta-analysis of the documents, rather than sharing the underlying posts. That seems like the sort of thing fair use would protect. Two caveats to note about that though. One is, there's an unfortunate case from the Second Circuit called TVEyes from several years ago and this involved a site that would basically record all of Fox News and make it searchable. I could do a search if I wanted to find particular things, and the court held that that was copyright infringement, it was not fair use. I think that decision's problematic, but it puts at least some limit on the tools that you might use.

The other caveat is not a copyright caveat, but I think a lot of the ways that Facebook and other social media companies have limited access to their data don't use copyright law, they use their terms of use or their technical ability to just kind of kick you off the site and prevent site scraping. There, we might need a "fair use plus." We might need not only a legal recognition that scholars or journalists have a right to use or transform the information they get, but we also need some way to make sure that they actually get access to that information in the first place.

Do you have any other thoughts or comments about fair use that you think our audience would be interested in?

The Supreme Court returned after almost 30 years to fair use last year in the Google vs. Oracle case and actually wrote, I think, a very strong pro fair use opinion. It was to some extent specific to the nature of the thing you want to use and the fact that the use was software. That the code was software and ought to be entitled to less protection played into that decision, but it's also a pretty strong endorsement of openness and interoperability, of the idea that I should be able to take something that you've written in order to make my thing work with yours. That might open the door to the kinds of access arguments that we just talked about with respect to social media, that if I wrote something that allowed me to scan and parse Facebook posts or Instagram posts and not copy them, but to build something that worked with it, that read from it and so forth, I think you have a stronger argument now than you did a year ago that copyright laws, fair use doctrine, might protect them.