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P U B L I C A T I O N S

From Pirates to Patriots: Fair Use for Digital Media

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From Pirates to Patriots: Fair Use for Digital Media

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Technologies, laws, and policies developed in recent years make it impractical and even illegal to use media in ways that have been the right of private citizens, the press, and academics for more than 200 years. Copyright laws, such as the Digital Millennium Copyright Act passed by the US Congress in 1998, have imperiled the professional activities of computer scientists who merely wish to publish articles that analyze technical protection measures and countermeasures for digital media copyright.[1]

As researchers working in the field of digital media technology, we have a keen interest in ensuring our freedom to conduct research without being blindsided and hamstrung by developments in intellectual property law and policy. Further, we need to be aware that our own research and development—especially in areas concerning digital media copyright protection—may in fact limit our freedom to research and develop these and other digital media technologies.

The dangers of current and proposed legislation to our freedom to research, develop, and publish about digital media technologies requires a fundamental shift in our research focus. We need to invent technologies that aren't designed to protect copyright in a way that makes the exercise of fair use rights impossible—for private, noncommercial purposes; educational and research purposes; and, in certain cases, public and commercial purposes.

To navigate the potential minefield of copyright and fair use for digital media, I'd like to discuss three areas that help shape our discourse and practice:

- law and policy,
- technology, and
- media use.

Law and policy

I'm not a lawyer. However, I've been reading and talking with lawyers in the US who are working to maintain our fair use rights for copyrighted digital media. Their work will hopefully ensure that we can do our jobs as researchers and developers of media technology and maintain a vibrant public discourse that values freedom of expression. For the rest of us, to be better informed about and participate in the legal and policy debates surrounding fair use for digital media, it's important to become familiar with the core concepts of copyright and fair use. (See the "Fair Use on the Web" sidebar, which offers additional pointers to the background and current issues that inform the practice of intellectual property lawyers and policy makers.)

Copyright

The US Constitution (in Article I, Section 8, Clause 8) sets forth the framework for subsequent copyright (and patent) law by authorizing Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Copyright law addresses the writings of authors and, as stated in the US Code (Title 17, Chapter 1, Section 102), copyright protection applies to "original works of authorship fixed in any tangible medium of expression [...]." Unlike patent protection, the code states that

> ... in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

In addition, copyright law has long been consis-

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tent with the values of freedom of speech and expression articulated in the First Amendment to the US Constitution.

Copyright law has been designed as a trade-off between two potentially competing goals—protecting the writings of authors long enough so that they can obtain financial reward for their work and the unimpeded access to writings so as to support public discourse and "promote the progress of science and the useful arts." Courts have repeatedly stated that the primary goal of copyright is to promote public access to knowledge and that protecting the financial interest of authors is a means chosen to achieve this end. The time-limited nature of copyright is a key component of its design so that copyrighted works enter the public domain after the expiration of copyright protection.

Fair use

An additional and essential mechanism to promote the public good of access to and use of copyrighted works is the Fair Use Doctrine, described in the US Code (Title 17, Chapter 1, Section 107). As this doctrine notes, fair use pertains to the legitimate use of copyrighted materials without license or permission "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." The case law has extended fair use in a variety of ways including time-shifting (for example, using a VCR to time-shift viewing of TV programs), space- and format-shifting (for example, making an MP3-format version of an audio CD that you already own), and reverse-engineering software to create interoperable programs.

The determination of whether a use of copyrighted materials is a fair use has been made by the courts on a case-by-case basis according to an analysis of four factors described in the US Code (Title 17, Chapter 1, Section 107):

(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.

Determining fair use is even more complex because of the differing interpretations various legal scholars have of it. The difference of interpretation hinges on whether fair use is an *affirmative* right that allows copying in specific circumstances versus merely a *defense* used in cases of copyright infringement. When understood as an affirmative right, fair use is a necessary and integral part of copyright law that protects the constitutionally guaranteed rights of

Fair Use on the Web

Here are a few resources for educating yourself about digital media copyright issues. These resources include organizations and private individuals.

- Chilling Effects (http://www.chillingeffects.org/) is a joint project of the Electronic Frontier Foundation and the Harvard, Stanford, Berkeley, University of San Francisco, and University of Maine law school clinics that aims to help users understand the protections that the First Amendment and intellectual property laws give to their online activities.

- The Copyright and Fair Use Web Site of the Stanford University Libraries (http://fairuse.stanford.edu/) provides an overview of the Fair Use Doctrine and copyright law; primary materials; current legislation, cases, and issues; and additional Internet resources.

- DigitalConsumer.org (http://www.digitalconsumer.org/) is protecting fair use rights in the digital world. Their goal is to restore the balance of copyright law so that artists and creators can prosper while citizens have reasonable flexibility to use content in fair and legal ways. They're a consumer-advocacy group working to preserve consumers' personal-use media rights.

- The Electronic Frontier Foundation (http://www.eff.org/) is the leading civil liberties organization working to protect rights in the digital world. Founded in 1990, EFF actively encourages and challenges industry and government to support free expression and privacy online. EFF has launched the Campaign for Audiovisual Free Expression (see http://www.eff.org/cafe/) to empower the creative community in the digital age by protecting the public's access to and use of audiovisual technologies.

- Henry Jenkins (http://web.mit.edu/21fms/www/faculty/henry3/) is a leading expert in the study of consumers' use and reuse of popular media.

- Pamela Samuelson (http://www.sims.berkeley.edu/~pam/) is a leading expert in intellectual property law and has written and spoken extensively about the challenges that new information technologies are posing for public policy and traditional legal regimes.

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individuals to free speech and free expression.

If fair use is understood as a defense, then copyright owners, and technologies that empower them, can control our access to digital media so that fair use will simply no longer be an option available to the public. Copyright owners would then dictate access to and use of digital media. Imagine not being able to browse through, excerpt, share, or make private noncommercial copies of copyrighted works without explicit permission from copyright holders. Recent and pending legislation, and their supporting technological infrastructure, may make it impossible for us to exercise our fair use rights (for example, to send a newspaper article to a friend, use a movie clip in a classroom lecture, or even play our audio CDs on our computers). To avoid that scenario, the legal and policy communities need input from technologists to help make sound laws and policies.

Technology

Digital media technology has brought about profound changes in the production and distribution of information that have far-reaching consequences for copyright law and policy.[2] As Dittman observed in a prior *IEEE MultiMedia* Media Impact column, "This is the deeper impact of digital media—that media can be easily redefined either in form or meaning."[3] While Dittman saw this transformative aspect of digital media as a threat to copyright and technological protection measures, it's the transformative nature of digital media that holds the greatest promise for preserving our fair use rights. Writing for the unanimous opinion of the Supreme Court in Campbell v. Acuff-Rose Music (the fair use of 2 Live Crew's rap parody of Roy Orbison's popular song "Oh, Pretty Woman"), Justice Souter stated,

> The central purpose of this investigation [as to determination of fair use] is to see [...] whether the new work [...] adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."

Our duty as media technologists is to envision and invent the future of digital media in ways that inform intellectual property law and policy so as to support our fair use rights and freedom of expression. In short, the digital rights our technologies should be striving to protect are those of users, not those of data. To work toward that goal, we can develop technologies that support and enhance the transformative aspects of digital media by making them more accessible more accessible and reusable through the creation and use of media metadata.[4-7]

Most mainstream and envisioned popular applications for digital media have focused on recording, transmitting, or finding entire works (for example, TiVo, Napster, or video on demand), rather than transforming works to make new ones. Applications that could easily recombine personal media with elements from popular and public media offer new vistas for copyright law and policy to explore. Imagine a video holiday card featuring your family inserted into a scene from your favorite TV show, or your postings to a newsgroup automatically illustrated with images and video clips from wire services. These are just a few of the many examples that we as media technologists can invent that can help shape a better future for the fair use of digital media. To better imagine that future, let's revisit some fundamentals of the communicative process and investigate how users of copyrighted media are transforming it today.

Media use

A fundamental process in human communication is the way we use the elements of language and culture for purposes other than those for which they were originally intended. The Russian literary theorist Mikhail Bakhtin describes this bricolage of language as follows:

> The word in language is half someone else's. It becomes 'one's own' only when the speaker populates it with his own intention, his own accent, when he appropriates the word, adapting it with his own intention, his own semantic and expressive intention. Prior to this moment of appropriation, the word does not exist in a neutral and impersonal language (it is not, after all, out of a dictionary that the speaker gets his words!), but rather it exists

> in other people's mouths, in other people's intentions: it is from there that one must take the word, and make it one's own.[8]

Imagine this fundamental dialogism of language colonized by current copyright law: we could barely speak to one another for fear of infringing the copyright of other people's words. Such a state of affairs is the antithesis of promoting the progress of science and useful arts and freedom of speech and expression, but today's digital copyright protection laws, policies, and technologies are leading us to this silent desert. However, we have an alternative. We can help create a future in which digital media are the rich soil for cultural production aided by policies and technologies that let authors receive protection and remuneration for their works and at the same time promote their fair use. We can discern one vision of what that future might resemble by looking at how current users of popular media appropriate copyrighted materials for their own purposes.

Fans of popular media have been transforming their favorite TV shows into personally meaningful new works for many years. Henry Jenkins of the Massachusetts Institute of Technology Comparative Media Studies Program studies and analyzes fan cultural production. He's observed that all across America, housewives, nurses, librarians, and others create new cultural artifacts by critiquing, extending, and personalizing works of popular media (for example, making a music video from episode clips to reveal the homoerotic subtext of the relationship between *Star Trek's* Captain Kirk and Mister Spock).[9] What some copyright holders see as mere piracy, we can understand as a transformative and fair use of copyrighted media.

Fan (re)use of popular media is a provocative and important example of how digital media could serve as a resource for new forms of private and public discourse that (re)use the most important and abundant materials of our culture—motion pictures, TV, video, and audio.

The future

The challenge for digital media researchers is to

- develop technologies and applications that protect and support the fair use of copyrighted materials, and
- inform public policy and legal debate about media technology and fair use for digital media.

If we aren't proactive in this regard, we may find that by blithely developing copyright protection technology, we not only lose fair use, but our freedom to conduct research in digital media as well. **MM**

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