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Reviewing the ARSC Guide: Best Practices in light of the Authors Guild decisions

Eric Harbeson

For a large part of the ARSC community, one of the most important parts of the Copyright Act comes not from knowing what is or is not permitted, but instead from understanding how infringements are penalized. For schools, libraries, and archives, copyright is, in many cases, a balancing act between the risks of acting (by using a work in a potentially infringing way, risking a lawsuit) and of not acting (possibly risking a lost educational opportunity, or a lost resource). The Copyright Act helps with this risk assessment in Sec. 504(c)(2). Though the Act provides for statutory damages in excess of $30,000 per infringed work (or $150,000 if the infringement was "willful"), it provides at the same time that actions by nonprofit educational institutions, libraries, and archives are not liable for statutory damages at all if the infringer "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use."¹

The power in this section comes from the availability of a secondary reasonable belief defense. If a use is fair, then it is fully permissible—it is neither illegal nor liable for any damages. But the Fair Use Doctrine’s power and flexibility comes with a certain amount of uncertainty, and so the law provides this second line of defense for libraries and archives, to encourage risk taking by removing one of the scariest penalties for a misstep. Without statutory damages in play, a prospective plaintiff has significantly less financial incentive to bring an action in the first place, her only relief options being injunctions (stopping the infringement) and her actual costs in lost sales.

How does one establish that a belief was reasonable? One way (though certainly not the only way) to support an argument that a use was reasonable is to point to existing community standards. Those community standards, the argument goes, point both to common situations where licenses are expected as well as to situations where they commonly aren’t. A widespread practice in a community can point to a practice that is generally fair, but even if a court later rules that practice to be unfair, the fact that the practice has been widely understood to be fair can point to a reasonable belief that it was fair. This gives use communities a certain power over their destiny: they can, to some extent, shape fair use standards in ways that might or might not be in their best interests, by following common practices.²

¹ 17 U.S.C. 504(c)(2). It also provides more narrow damage remission for public broadcasting entities.
² For discussion, see, for example, James Boyle, The Public Domain: Enclosing the Commons of the Mind. New Haven: Yale University Press, 2008, Chapter 6. "Unfortunately, these individual actions have a collective impact. One of the factors used to consider whether something is a fair use is whether or not there is a market for this particular use of a work. If there is, it is less likely to be a fair use to quote or
In 2015, the Council on Library and Information Resources published the *ARSC Guide to Audio Preservation* ("ARSC Guide"). The guide includes a report ("The Report") on best practices with respect to the fair use of audio materials in the context of common uses by the ARSC community. Drawing on the strength of the community practices, as described in interviews by community members, the Report, one in a series of similar documents by the report’s authors, attempts to assemble the established practices of the recordings preservation community and, by documenting the practices, provide support for the notion that the practices are fair.

However, the community use argument is not without its limitations. An infringer’s argument that she had reasonably believed that her use was fair based on a common understanding may work in the absence of guidance from courts, but much less so if a court has already advised otherwise. For this reason, any community understanding of fair use within its practices must necessarily evolve as the courts give us new guidance. In this comment, I will review the Report in light of a pair of important recent fair use rulings in the context of transformativeness. One of these cases, *Authors Guild, inc. v. HathiTrust*, was released prior to the publication of the ARSC Guide, and discussed briefly in the Report. The second, related case, *Authors Guild, Inc. v. Google*, was decided some months after publication of the Guide.

**Transformativeness in fair use**

Though the concept of fair use has been a part of our copyright system since its beginnings, the modern era of fair use understanding can reasonably be traced to Pierre Leval’s seminal work, "Toward a Fair Use Standard." Judge Leval, reflecting on several of the fair use cases he himself had heard, lamented that, despite more than 150 years of common law interpreting the doctrine, judges were still "uttering confident conclusions as to whether the particular taking was or was not a fair use" without a "shared consensus on the meaning of fair use." Judge Leval proceeded to outline what he believed was an already extant, yet unidentified, "cogent set of governing principles" surrounding fair use that were "soundly rooted in the objectives of the copyright law."

incorporate such a fragment. As several courts have pointed out, there is a powerful element of circularity here."

4 *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d. Cir., 2014)
5 *Authors Guild, Inc. v. Google, Inc.*, no. 13-4829 (2d. Cir., 2015)
Though he attempted a comprehensive explanation of the doctrine, Leval's principal innovation came in his discussion of the first fair use factor—the "purpose and character of the use." In the article, Leval first articulated the notion of a use's transformative nature as being critical to understanding how fair use is to be understood. The concept was groundbreaking, and became extremely influential after the Supreme Court unanimously adopted the concept four years later in *Campbell v. Acuff Rose Music.* Since *Campbell,* fair use cases where the transformative or non-transformative use is not at issue have become vanishingly rare. The court stated that transformative uses "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright," and as such the concept of transformativeness has been hotly contested ever since. In the ensuing two decades, different interests have argued for an understanding of transformativeness that is either broad or narrow enough to coincide with their understanding of the concept.

Fortunately, courts have provided quite a bit of clarity as they have refined fair use in the post-*Campbell* era. As the Court explained in *Campbell,* a "transformative" use is one that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Since *Campbell,* Courts have provided extensive (some extrapolation required) guidance on what it means to be a transformative use. They have distinguished transformative uses from derivative works (which are the exclusive domain of the copyright holder), and have defined by example some of the boundaries of transformative use in appropriation art, sculpture photographs, critical commentary, and others.

Understanding transformativeness is crucial to many community practices and their associated documentation of best practices. As our understanding of transformativeness evolves, so must many of our practices.

**The Authors Guild rulings**
Two recently decided cases involving the Authors Guild provide very useful clarification on the matter of transformativeness. Both cases surround different

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7 17. USC 107
8 510 U.S. 569 (1994)
9 As an example, the Court in *Kienitz v. Sconnie Nation* largely downplayed transformativeness as a context, and instead focused on economic principles at play. *Kienitz v. Sconnie Nation, LLC,* no. 13-3004 (7th Cir., 2014)
10 *Campbell* at 579
11 Id.
12 *Castle Rock Entertainment, Inc. v. Carol Publishing Group,* 150 F.3d 132 (2d Cir., 1998)
13 *Cariou v Prince,* 714 F.3d 694 (2d Cir., 2013)
14 *Gaylord v. United States,* 595 F.3d 1364 (Fed. Cir., 2015)
aspects of Google’s decade-old (and still remarkably audacious) goal of scanning and indexing all of the world’s published books through cooperation with libraries.

The project involves Google’s making complete scans of books from participating libraries. Optical character recognition is then applied to the scans, creating full-text searchable versions of the books. As the court documents state, more than twenty million such copies of books have been made since the project started in 2004.\(^\text{16}\) Google has indexed these scans and made those indexes available through a web interface, effectively allowing users to do full-text searches of vast amounts of library holdings, most of which are not otherwise searchable without physically paging through the book. Upon entering a search, the user is presented with book-level metadata, as well as a small number of "snippets" of text, allowing her to see the context within which her search terms appear in the book.

In return for its participation in the project, each library receives a copy of the scans it contributed to the project, which they retain under an agreement with Google that permits the libraries to make a variety of (presumably, non-competitive) uses of their scans, and which helps libraries to preserve the information stored within their stacks. Many of the participating libraries have pooled their scans, to create the HathiTrust Digital Library (HDL), which provides, among other things, another search portal for the collections of the HathiTrust libraries. The key difference between HathiTrust and the Google Book Search is that the former does not display any context, but rather provides only book-level metadata and word counts, allowing the searcher to discover how many times the search terms appeared in a work.

The Authors Guild, acting essentially on behalf of all authors, sued both Google and HathiTrust over their respective indexes and search services, and each defended their respective projects as fair uses. Each case was decided at the district court level in favor of the search organization, and was subsequently appealed to the Second Circuit Court of Appeals. The appeals court ruled in favor of the search organizations in both cases, both times delivering strong, unanimous support for the challenged activities as fair uses. The Supreme Court denied further appeals earlier this year, effectively ending the litigation.

From the perspective of transformativeness the most significant piece of the HathiTrust ruling was where the court drew a boundary around the term. Specifically, though they found the search function of HDL to be transformative, they found that services for the blind and disabled were not. The court found that the search function was "quintessentially transformative," but where the district court had also found the services for print-disabled persons transformative, the appeals court overruled, clarifying that the "transformation" that occurs when creating works for print-disabled patrons was actually the creation of a derivative work, fully

\(^{16}\) See Google at 6
capable of superseding the purpose of the original creation. They nonetheless found that the first factor favored fair use on other, non-transformative grounds.

Both rulings noted, with approval, several precautionary measures that Google and Hathitrust have put in place to mitigate the potential harm. For the most part, the rulings did not opine as to whether the safety measures were necessary in order to conclude that the uses were fair, so neither of these rulings established an upper limit as to what is fair under the law. However, the rulings, and Google in particular, did signal close cognizance that fair use is not unlimited. In the Google ruling, Judge Leval cautioned that, though the Supreme Court has said that, though transformativeness "lies at the heart of ... fair use," the ruling does not give leave to "make wholesale takings of the original author's expression merely because of how well the original author's expression would convey the secondary author's different message."  

For transformativeness to weigh in favor of fair use, the court emphasized, the user not only needs to establish transformativeness, but to justify the taking from the copyrighted work within the transformative use.

In addition to reminding us that transformative use still needs to be justified, Judge Leval also repeatedly paired transformativeness of a use with the "absence of significant substitutive competition with the original." The court found that the reproductions being made were essential to the project; however, the court also emphasized the limitations on access the Google Book Search places within its snippet view, and strongly hinted that, though the Google had not exceeded its boundaries, this was only true because of the many precautions Google takes to prevent its service from being used to create a substitute for the copyrighted works on its servers.  

**Implications for Best Practices**

The Authors Guild opinions were an enormous win for Google and libraries. In addition to allowing these very important projects to move forward, the rulings provided valuable additional guidance for evaluating fair use, and especially transformativeness, in other contexts. For the most part, the rulings followed the fair use narrative that has been promoted by the library and archives community. The rulings also support the narrative that is described in the ARSC Best Practices Report, though it does carry some cautionary notes, which should be considered when consulting the document. As the Report states, "any meaningful exercise in institutional risk management should begin with a clear understanding of the

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17 *Google* at 18

18 "Even if the *purpose* of the copying is for a valuably transformative purpose, such copying might nonetheless harm the value of the copyrighted original if done in a manner that results in widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute. The question for us is whether snippet view, notwithstanding its transformative purpose, does that. We conclude that, at least as snippet view is presently constructed, it does not." (emphasis in original)
applicable legal rights and responsibilities.” Just as those applicable rights evolve as the courts continue to hone in on what is and is not fair use, so the use of the Report needs to evolve to keep up with current case law.

From the point of view of the transformativeness principle, the most important lesson to be learned from the Authors Guild rulings is that, though the scenarios may in fact be fair in principle, they are not transformative within the meaning of the term the courts have adopted. The Court in Google clarified that transformativeness does not include transformation in form (the domain of derivative rights), following on the HathiTrust court’s rejection of access to sight-disabled as a transformative use. Rather, the Court’s guidance shows that actual transformation of the work itself is what the term is intended to cover.

The Report lists several common scenarios that the authors (through the voices of their interviewees) argue are, at least in principle, the kinds of things to which fair use may apply (though they are quick to remind that fair use is always case-specific). Though they may, in fact, be fair, most of the principles in the Report describe uses that are nonetheless not transformative; rather, they are uses that involve some form of “shifting.” Whether the shifting is by format, venue, or time, the result is still a non-transformative use.

The Eleventh Circuit followed a similar line of reasoning in another recent case, first reminding us that, “Even verbatim copying may be transformative so long as the copy serves a different function than the original work,” and then describing provision of electronic access to students (one of the Report’s principles) as non-transformative, since the works are being put to an identical purpose (i.e., being read). Most of the Report’s principles are similarly non-transformative, since they make works available for their original, intended purpose, in this case being listened to.

Two exceptions are notable, however. Data mining and non-consumptive research, the fifth Report principle clearly is transformative under this understanding of the term, since data mining endeavors to discover and analyze information about the works in question, a practice which tracks closely with the courts’ analyses of the HathiTrust and Google search index functions.

The sixth principle, digital exhibits and exhibits for the public, is questionable in terms of transformativeness in light of the Authors Guild rulings. It appears the courts’ rulings would cast doubt on the transformativeness of exhibits as a generality, though they also make clear that such exhibits could be transformative, depending on what role the original plays in the exhibit, and what new material is added. Furthermore, the Authors Guild rulings point to a need, not only to providing

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19 Guide at 204.

20 Cambridge v. Patton, 769 F.3d 1232 (11th Cir., 2014), citing Perfect 10, inc. v. Amazon.com, inc., 508 F.3d 1146, 1165 (9th Cir., 2007)
a new context and purpose, but also to justifying the use and avoiding creating a competitive substitute in order to establish the sort of transformativeness that favors fair use findings. Interestingly, the court drew these guidelines independently of their discussions of the third and fourth factors (respectively, the amount and substantiality of the use, and the effect on existing or potential markets).

**Conclusion**

Though the Authors Guild decisions do appear to limit the understanding of transformativeness, this should not be taken as a threat to the non-transformative principles in the ARSC best practices. As Supreme Court stated in *Campbell*, and the Court reminded us in *HathiTrust*, use of copyrighted work does not have to be transformative to be fair. Though transformativeness is highly desirable as an important way in which the law achieves its ultimate purpose, it is not the only indicator the court considers when evaluating the first factor, nor must the first factor always be determinative. The Supreme Court emphasized in *Campbell* that the four factors must be considered together. But when considering potential projects as fair uses, knowledge of the evolving landscape is important if one is to establish the reasonable belief in the fairness of the project that is so critical to the risk assessment with respect to damage remission. The *Authors Guild* rulings point to a need to be discerning when it comes to claiming a project is transformative, and perhaps more careful analysis of alternative theories under which our projects might be fair.