Testing the Boundaries of Fair Use: Commercial Endeavors for Public Interest

Mehtab Khan
JSD Candidate
University of California, Berkeley School of Law
Introduction

“Intermediaries” have been key to harnessing the potential of the Internet to disseminate works of culture and knowledge.

“Intermediaries” are sometimes commercial entities driven by profit motivation.
These activities have pushed the boundaries of Fair Use

And put pressure on aspects of the doctrine that had been established in the pre-Internet era

In particular, the doctrine’s focus on the “commercial” nature of the user
On the Internet and through digital technologies, fair use disputes that involve commercial intermediaries whose activities ultimately serve non-commercial public interests of individual users who get new access to knowledge, education, etc.

How does the law treat such uses?

- Who can create mass databases?
- Is commercial photocopying allowed?
Tiered Approach to Fair Use Analysis

This paper proposes a tiered approach to fair use that is designed to adequately consider not just the characteristics and purpose of an intermediary accused of infringement, but also the characteristics and purpose of end users.
Role of Intermediaries in Pushing Boundaries

- Open Access
  - Creative Commons
- Controlled Digital Lending
  - Internet Archive
- Mass Digitization
  - Google Books and HathiTrust
What’s the Issue?

- Although “commercial” nature of an entity does not automatically mean there is no fair use, the law is not certain enough for activities currently taking place/future activities
- Assumption that everyone is equally capable of making “fair” uses

- **Example: Fox News v. TVEyes**
  - Transformativeness did not weigh in favor of TVEyes
  - Users of TVEyes left without an alternative
  - Fox News can apply speech restrictive conditions to its licenses
Application of Tiered Approach

Present Analysis: Infringement analysis> first of four fair use factors includes consideration of whether the alleged infringer is making the use for "commercial" or "non-commercial" purposes.

Proposed Analysis: Look at the "intermediary" and the "end-user" separately

Intermediary

Closer examination of this relationship to determine...

End-User
Application of Tiered Approach

**Intermediary**

Closer examination of this relationship to determine...

**End-User**

- Alignment of different but connected “purposes”
- End-user *unable* to make certain uses without intermediaries
- Consider end-user’s lack of alternatives and resources
- Puts scale of use in context
Alleged Infringing use:
- Arguably Transformative: compile and critique factual information
- “Success of the business model” does not mean it’s exploitative

Effect on end-users:
- Lack of alternatives
- Fox News actively prevents this purpose through licensing
Supporting Cases


The goals of copyright law "to stimulate the creation and publication of edifying matter," are not best served by “automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.” ... “there may be a strong public interest in the publication of the secondary work” (510 U.S. at 578 n. 10)

Authors Guild v. Google, Inc. (804 F.3d 202)

“The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives, shrinking the protected market opportunities of the copyrighted work.” (804 F.3d, 214)

Great Minds v. FedEx

“The concept of an agency relationship is a sine qua non in the world of entities like corporations and public school districts, which have no concrete existence. As the New York Court of Appeals has commented, “Of necessity, [such entities] must act solely through the instrumentality of their officers or other duly authorized agents.” (886 F.3d, at 95)
Implications Beyond the United States

India: The Chancellor, Masters & Scholars of University of Oxford & ors v. Rameshwari Photocopy Services & ors
Attitudes Towards Fair Use

- Need for reform
- An explanation for the Delhi High Court decision
- A tiered approach would work well in a context where commercial/non-commercial boundaries are being pushed and even surpassed, specifically in the context of education.
Remaining Questions

- How can Fair Use be expanded/reformed?
- Do we need a specific exception for educational purposes that take into account the role of commercial intermediaries?
- Building momentum to change relationship between publishers and institutions, especially nonprofits/universities. What does that mean for the role of fair use?
Thank You

mehtabk@berkeley.edu

@mehtabkn