

Introduction

Intermediaries, such as libraries, educational and cultural institutions, non-profits, and even for-profit corporations have been instrumental in shaping fair use in the United States. They have created platforms and utilized digital technologies in novel ways that have pushed the bounds of what constitutes fair use. They have challenged what the potential and present relationships between creators and the public can and should be.

Intermediaries have built and used digital technologies to enable the use and dissemination of copyrighted works in unprecedented ways. Digital technologies have enabled online platforms to offer Massive Open Online Courses (MOOCs), and well-known universities around the world are participating in these courses.¹ Cultural institutions like the Metropolitan Museum of Art, and the Smithsonian have made parts of their collections that are in the public domain accessible online.² Harvard University's Berkman Center's H2O project allows users to create "playlists" of recommended materials on a topic.³ Rice University's "Connexions" project provides similar tools that allows online courses to be curated and used by anyone on the internet.⁴

Projects like Wikipedia have democratized the sharing and dissemination of knowledge. People from all over the world can contribute and share information about any topic. Wikimedia

¹ The LionShare project at Penn State is "a peer-to-peer file-sharing system designed to help university users find academic content housed at other institutions in the US. MIT Courseware is another example.

² Open Access at the Met, <https://www.metmuseum.org/about-the-met/policies-and-documents/open-access>, (accessed on July 26, 2019); Copyright and Reuse - Smithsonian Libraries, <https://library.si.edu/copyright>, (accessed on July 26, 2019).

³ Harvard H2O, <https://h2o.law.harvard.edu/>, (accessed on July 26, 2019).

⁴ Open STX, <https://cnx.org/>, (accessed on July 26, 2019).

Commons allows anyone with internet access to share and reuse freely licensed and public domain images. The Creative Commons Search tool allows internet users to find and access free resources.⁵

Projects like the Internet Archive’s Open Library are testing the boundaries of fair use. The Open Library works by allowing registered users to “check out” books for a limited period of time for ‘Controlled Digital Lending’.⁶ It’s not clear whether ‘Controlled Digital Lending’ is fair use, and it has not yet been tested in courts. However, it’s being carried out based on the belief that one of the fundamental functions of a library is to provide broad access to information through lending works in their collection.⁷ An extension of that belief is that a digital library should be able to lend “digital” copies of the books in its collection. Even if there is a challenge to Controlled Digital Lending, experts argue that it should be considered fair use.⁸ This is because of the precedent set in cases like *Authors Guild v. HathiTrust*. It is also because of a core belief that libraries should be able to do online what they are doing in the physical world. The white paper on Controlled Digital Lending refers to the “vital function in society” that libraries serve, and should be able to serve through their digital collections as well.

⁵ Creative Commons, <https://ccsearch.creativecommons.org/>

⁶ Internet Archive, openlibrary.org, (accessed on July 26, 2019).

⁷ The lending is “controlled” because the library would only loan the number of copies that it has legitimately acquired. For example, if the library owns print versions of a book and digitizes one copy, it would only loan the same number of copies it had before digitization. Controlled Digital Lending would also use technical measures to prevent users from copying or retaining the copy loaned to them.

⁸ David R. Hansen & Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books*, <https://controldigitalending.org/whitepaper> (accessed on July 26, 2019).

Intermediaries are taking positions on copyright policy that will likely impact how the public engages with copyrighted works. The relationship between academic institutions and large publishers and third-party databases is likely to change in light of the University of California's recent decision to cut ties with Elsevier.⁹ It is not just the University of California, but a growing movement in the academic community to not engage with Elsevier. "In Germany, 41 professors from across the country had resigned from editorships at Elsevier journals by April 2018"¹⁰ 60 German libraries boycotted Elsevier.¹¹

Public.Resource.Org is a website that is making law and government-related literature on industry standards widely available for free.¹² In India, Carl Malamud, the founder of Public.Resource.Org, is undertaking a massive project on mining millions of academic articles.¹³ Even though this project has been initiated in India, it is likely to have far-reaching implications for copyright law and the relationship between authors, publishers, and the public around the world.

The intermediaries described above have played and are playing a central role in recalibrating what constitutes fair use. However, intermediaries are oftentimes at the center of legal disputes

⁹ UC and Elsevier: Overview, <https://osc.universityofcalifornia.edu/open-access-at-uc/publisher-negotiations/uc-and-elsevier/> (accessed on July 26, 2019).

¹⁰ Hilda Bastian, *Europe Expanded the "No Elsevier Deal" Zone & This Could Change Everything*, <https://blogs.plos.org/absolutely-maybe/2018/07/30/europe-expanded-the-no-elsevier-deal-zone-this-could-change-everything/> (July 30, 2018).

¹¹ Cory Doctorow, *Germany-wide consortium of research libraries announce boycott of Elsevier journals over open access*, <https://boingboing.net/2016/12/15/germany-wide-consortium-of-res.html> (Dec 15, 2016, 9:53 am)

¹² Making Government Information More Accessible, <https://public.resource.org/> (accessed on July 26, 2019).

¹³ Glyn Moody, *Why Carl Malamud's Latest Brilliant Project to Mine World's Research Papers is Based in India*, <https://www.techdirt.com/articles/20190718/02430642607/why-carl-malamuds-latest-brilliant-project-to-mine-worlds-research-papers-is-based-india.shtml>, (Jul 19th 2019 1:33pm).

with regard to their use of copyrighted works. Sometimes, these intermediaries are commercial entities who have to construct complex arguments to justify their use under copyright law. These commercial uses would probably be considered fair if an individual were using them, and with less scrutiny if the use was non-commercial. However, since the use is made by a commercial entity, the conclusions for whether there its market effect and incentives for creators holds significant weight.

Oftentimes intermediaries inadvertently influence fair use interpretations that in turn affects the way the public accesses copyrighted materials. A critical case with such an impact was *Authors Guild v. Google, Inc.*¹⁴ This case is an example of a court taking a nuanced approach to the question of commerciality where an intermediary was facilitating educational uses by end users. Fair use analysis usually involves a consideration of four factors. The first factor, “the purpose and character of the use”, includes a determination of whether the use is “of a commercial nature or is for nonprofit educational purposes.”¹⁵ Courts have expanded on the meaning of this factor to develop the concept of transformative use. When there is transformative use, a commercial use can be considered fair. This part of the fair use analysis is crucial especially for commercial uses of copyrighted works.

The plaintiffs in *Authors Guild v. Google, Inc.* argued that the copying of entire books and creating a platform for users to read snippets was not transformative use. The Plaintiffs tried to highlight the fact that even though Google was providing public access to search and snippet

¹⁴ *Authors Guild v. Google Inc.*, 804 F.3d 202 (2015)

¹⁵ 17 U.S.C. § 107(1) (2012).

views without charge and without advertising, it was still driven by a “commercial profit motivation”. Google’s aim, according to the Authors Guild, was the “derivation of revenue from its dominance of the world-wide Internet search market to which the books project contributes”¹⁶ and this should not be construed as fair use.¹⁷

The Second Circuit rejected the Plaintiffs’ arguments and sustained Google's fair use defense. The court found that the finding of fair use because of the ultimate impact on the public. The court said that Google Books “augments public knowledge by making available information about Plaintiffs' books without providing the public with a substantial substitute for matter protected by the Plaintiffs' copyright interests in the original works or derivatives of them.”¹⁸

The transformative nature of Google Books weighed heavier than its commercial connection. The court recognized that “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.”¹⁹

With regards to Google’s commercial motivation, the court noted that the Supreme Court has said that a for-profit purpose should not necessarily be construed as unfair. The court stated that

¹⁶ *Authors Guild v. Google Inc.* 804 F.3d 202 (2015)

¹⁷ *Id.*

¹⁸ *Id.* at 207

¹⁹ *Authors guild* at 215; See *Campbell v. Acuff-Rose* 510 U.S. at 591, 114 S.Ct. 1164 “noting that, when the secondary use is transformative, “market substitution is at least less certain, and market harm may not be so readily inferred.”

“Google's overall profit motivation” should not prevail over its “highly convincing transformative purpose.”²⁰

Google Books was found to be transformative use because according to the court, a “a full-text searchable database is a quintessentially transformative use ... [as] the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn.”²¹ The court in this case took into account both the features of the technology built by Google, and the impact it had on the public. It highlighted the transformative nature of Google Books, despite the profit motivation that Google had.

This was a positive outcome for both Google and the public. However, a problem arises when the standard set in *Authors Guild v. Google, Inc.* is not easily replicable by other intermediaries, and especially not the general public. It is not the norm for a member of the public to build tools that can carry out a purpose that would be transformative like Google Books. It also raises questions about the standard set for the public to fulfill in order to have their use considered transformative, even if it is commercial.

The court acknowledged that “many of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit.”²² The court

²⁰ 804 F.3d 202 (2015), *See also*, In *Campbell v. Acuff-Rose*, the Supreme Court said that “Congress could not have intended” a broad presumption against commercial fair use.” the courts also should consider the absence of “significant substitutive competition with the original.”

²¹ 804 F.3d 202 (2015)

²² *Id.*

looked favorably upon Google Books in this case, and commercial uses in general. However, Google, Inc. had the resources to build Google Books that the public does not have. Other intermediaries, such as the ones described above, also do not have such resources. Furthermore, courts have not always characterized commercial uses as transformative despite the connection they have with the public's ability to engage in fair uses like critique and commentary. *Fox News v. TVEyes* is one such example.²³

In *Fox News v. TVEyes*, the Second Circuit found that TVEyes' searchable database of video is not fair use and infringes Fox's copyright. Although the court acknowledged that the "Watch" function on TVEyes was "somewhat transformative", it does nothing to change the "content" or "purpose" of the videos, and that is why the transformativeness of it does not weigh in favor of TVEyes. The issue here is how the court characterized the "purpose" of the use and its transformativeness. It did not distinguish between the purpose TVEyes used the content for, and the purpose for which the customers of the platform use TVEyes. The result of this is that users are unable to access news for the publicly beneficial purposes such as critique, reporting and research.

Like Google Books, the court should have realized that the public cannot access or use Fox News clips for uncensored comment and critique without TVEyes. Just as there was no full-text searchable database of millions of books before Google Books, TVEyes also built a tool that enabled the public to make fair uses of copyrighted material. This is an important realization

²³ *Fox News v. TVEyes*, No. 15-3885 (2d Cir. 2018)

because it highlights the distinctive role that intermediaries have in creating and enabling the means for the public to engage in fair uses.

There is an implicit assumption in fair use analysis that each individual is equally capable of making fair uses of copyrighted works. This assumption does not differentiate between the role of a facilitating intermediary and the capabilities of end users. These intermediaries, sometimes commercial entities, play a crucial role in enabling the beneficial use to reach the public. This notion needs to be incorporated in fair use analysis because of the way various intermediaries are using and disseminating copyrighted works, especially in the digital realm.

This paper proposes a tiered approach for fair use analysis. It proposes dissecting the three sets of actors involved in any given case: the copyright owner, an intermediary user, and the end users. By deconstructing the “who” in a given case, a fair use analysis can and should involve an examination of the factors in two-tiers: the first tier would be a consideration the fairness of a use vis a vis those directly engaging with the copyrighted work, i.e. the intermediary user (commercial or non-commercial entity). The second tier would be a consideration of the actual and potential uses by people accessing these platforms, i.e. the end users. These two tiers should enable the court to examine the critical relationship between the intermediary and the end user.

Through recent cases and examples, this paper will argue that both intermediary and end users may have different yet converging “purpose and character of use”, “nature of use”, “amount and

substantiality of use” and “effect on the market.” The overall fair use analysis should take into account this relationship in determining whether a use should be consider fair or not.

It is an expansive understanding of fair use that has facilitated access to a wide range of knowledge and cultural works in the United States. Many cases have often involved intermediaries who have commercial objectives but also function to protect user rights. The intermediaries, both commercial and non-commercial, are not outliers threatening copyright holders, but an essential part of preserving a balance within the copyright system.

Although the Supreme Court held that the mere fact that a use is commercial does not mean it is not fair use, in the interest of avoiding conclusions like the one in *TVEyes*, there is still a need for a more consistently applicable fair use analysis.²⁴ There is a need to reframe the role of intermediating entities, whether commercial or non-commercial, and how they facilitate fair uses that promote access to knowledge.

Projects like the ones described above are examples of the potential that digital technologies have to transform fair use. They also show “both the promise and the problems that the copyright system presents.” There is a kind of fair use environment and intermediaries that have enabled such projects to flourish, but there are challenges posed to this environment, as the cases like *TVEyes* have shown.

²⁴ See *Campbell*. See also *Sony Corporation of America v. Universal City Studios, Inc*, 464 U.S. 417, 451, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

These projects also force us to reconsider “who”, “why”, and “how” a copyrighted work is being used. They are forcing us to reconsider what fair use is, what purpose is it serving, and whom it is serving. At a practical level, we need to ask whether these uses would be possible if a “commercial” actor had not got involved. Would the public be able to benefit from searchable databases and Controlled Digital Lending?

Some of these intermediaries have the resources and technology to embark on massive commercial projects that benefit the public. The role of intermediaries needs more critical attention as they are now empowering users with ways to create, use, publish, remix, and disseminate copyrighted works. A fair use analysis that consistently tracks and takes into account the role and impact of intermediaries as separate but connected to end users is a necessary step to achieving greater clarity.

Ultimately, the question in assessing a use is “whether the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.”²⁵ Based on an expansive idea of fair use already established in US law, this paper will illustrate that many commercial entities have undertaken projects that have tested and are continuing to test the boundaries of the flexibility of the fair use standard. The approach proposed in this paper would allow the inherent flexibility in fair use to be applicable to commercial and non-commercial intermediaries alike. It would also lend stability and certainty to the various projects outlined above and others like it. A tiered approach to fair use analysis

²⁵ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006).

provide clearer answers to the question of “who”, “what”, and “why” that the four factors of fair use already ask.