

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

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# 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

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Preview

Next

parts of southeastern santa clara area. morgen hi! if you are not seeing it, you will hear over the next few minutes, over the last 24 hours nearly one and three-quarter inches. take a look at your screen. here are your totals, pretty impressive rainfalls. right now current temperatures outside are on your screen. a live look at the golden gate. satellite shows the rain will soon be tapering off and the ridge of high pressure will build back in. we will host of the storm track and see more sunshine. by 9 pm, scattered showers and

into the morning commute a few lingering showers, we dry out for the second half of monday and start to warm up. wednesday night now like breezy out there. 20 mile-per-hour winds in napa. we do have some higher gusts upwards of 25 miles per hour through the evening. saturated soil and gusty winds could mean even more downed trees and power lines. for the high country winter storm warning in effect, we could see another 15 to 17 inches by tomorrow. in terms of what to expect over the next few days, softer showers tapering off tomorrow drying and warming into the work week temperatures tomorrow in the low 60s, warming as we head into the work week 60 tuesday 70s as we get toward the end of the week.

Hide Timeline



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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

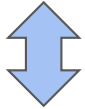


Closer examination of this relationship to determine...

## 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

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- 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

## *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)

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

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