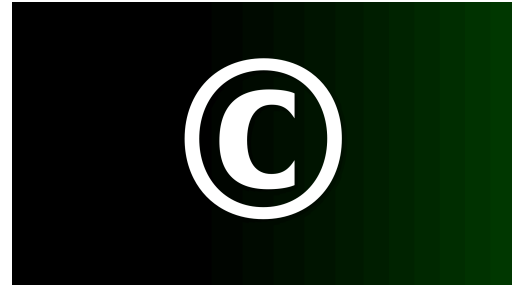




The Fair Use Publication of Deleted Articles

Peaceful Science

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Fair Use (“fair use”) is one of the most significant ways the US Copyright Act allows persons, other than the copyright owner and its licensees, to use a copyrighted work without authorization. It is applicable in the situation of an academic debate where certain papers have been buried to obscure the academic record and avoid critique. To attempt to use copyright law as a shield against academic critique is contrary to the very purpose of copyright law.

As the Court said in the recent Google Books case:

Among the best recognized justifications for copying from another’s work is to provide comment on it or criticism of it. A taking from another author’s work for the purpose of making points that have no bearing on the original may well be fair use, but the taker would need to show a justification.¹

As long as *Peaceful Science*’s points have bearing, they do not even need a justification, according to one court at least. But this memo will attempt to establish that there are many justifications, and many other courts (if not all), that would likely rule in *Peaceful Science*’s favor.

The concept that persons other than a work’s copyright owner should have the right to make certain non-infringing uses of that work that do not require the copyright owner’s authorization has its roots in the constitutional purpose of copyright law. As expressed in what is known as the Copyright Clause, that purpose is to “promote the Progress of Science and useful Arts...”²

Thus, it can be said that fair use sits at the very heart of the copyright grant itself. Since the early 1800s, courts have recognized that this purpose may be furthered if a person were permitted to take a copyrighted work and “really and truly to use the passages for the purposes of fair and reasonable criticism.”³

Peaceful Science mission is to encourage conversation around the grand question of what it means to be human. To support this mission, [we plan](#) to republish academically and historically important articles that have been deleted by other organizations. We asked our legal counsel to determine if copyright law prohibits us from republishing deleted articles *without* the original authors’ authorization. This is their response to us. They found that republishing deleted articles is “fair use,” closely aligned with the constitutional purpose of copyright law.

The exclusive rights afforded by copyright can often seem to run counter to the rights of free expression under the First Amendment. When they do, the First Amendment invariably wins. That is, it wins whenever it is a true free expression case and not an attempt to profit off the sweat of the copyright owner’s brow. Courts have recognized that fair use is the main means of resolving the tension between copyright and free expression and making sure that both concepts remain intact and vibrant.⁴

The fair use analysis is, at its root, an “equitable rule of reason”.⁵ Section 107 of the Copyright Act⁶ sets out four factors intended to guide courts in determining whether a use is fair:⁷

1. The purpose and character of the use
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
4. The effect of the use on the potential market for or value of the copyrighted work

A proper fair use analysis must weigh each factor but should also take into account any other relevant considerations.

The preamble of Section 107 sets out a list of purposes for which a use of a copyrighted work is likely to be fair:

- Criticism.
- Teaching.
- Comment.
- Scholarship.
- News reporting.
- Research.

The current case of *Peaceful Science* is unique in that it checks not just one or two, but all of the boxes of the preamble’s list. This is because what *Peaceful Science* is doing has a flavor of critique, education and news. It is news, in the sense of being timely information related to an issue of public interest and concern. But the list, by its own terms, is non-exhaustive. One other consideration might be the public interest in unmasking academic dishonesty.

1. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015).

2. (U.S. Const. art. I, § 8, cl. 8).

3. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

4. see 17 U.S.C.A. § 107; *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Iowa State Univ. Research Found. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980); and *Nat’l Rifle Ass’n of Am. v. Handgun Control Fed’n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994)).

5. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 448 (1984)

6. 17 U.S.C.A. § 107

7. 17 U.S.C § 107.

Weighing the Four Factors

The Purpose and Character of Use

The following items are noted concerning the legal analysis of the purpose and character of *Peaceful Science*'s use of the copyrighted work.

- *Peaceful Science* attributes the author's work to the author. Most copyright infringers do not acknowledge the author and try to conceal.⁸
- The use by *Peaceful Science* is not of a commercial nature. It is making no money off of the use.
- A finding that the public may benefit from the use weighs in favor of a finding of fair use.⁹ The public may benefit by learning the truth about the nature of the academic debate about creation and evolution.¹⁰

This is not an illegal downloading case such as the famous Napster case wherein users are saved the expense of purchasing authorized copies.¹¹ Authors are not even making copies of the original works available. This is the nub of why *Peaceful Science* has seen fit to publish them under fair use: because there are not even authorized copies for sale.

Non-commercial uses of a copyrighted work are, in general, more likely to qualify as fair use than commercial uses.¹² *Peaceful Science*'s use is largely non-commercial. It is not selling the original works. Any commercial benefit is nothing more than the normal benefit in reputation, fame and opportunities that accrues to academics.

Even if *Peaceful Science*'s purpose was found to be partially commercial, the "Transformative use" doctrine would override any commerciality. In general, the more transformative the new use, the less that other factors, including that the use is commercial, may weigh against a finding of fair use.¹³ So it behooves us to consider the transformative character of *Peaceful Science*'s use before we consider the other three fair use factors.

The most commonly-used test for whether a use of a work is "transformative" is whether the work itself is modified. Here, *Peaceful Science* is not modifying the work, admittedly. However, courts have also found that transformation can occur, even where a work is copied in toto, where the context provides the transformative effect. Here, the context is critical commentary. The purpose of the

publication of the original work was to edify. The purpose now of republishing the work unauthorizedly is to critique that edification.

The US Courts of Appeals for the Second, Ninth, and Fourth Circuits have found a use to be transformative where it had a different function, character, or purpose than the original.¹⁴ For a given use to be found transformative based on it having a different purpose or function than the original copyrighted work, the given use typically must not be seen as competitive with or as supplanting the demand for the original. The original, when published accompanied by academic critique, becomes transformed.

The case that is perhaps closest to the instant case is the *Swatch case*. In this case, a party copied and published audio recordings of a company's earnings call. The Second Circuit US Court of Appeals noted the dynamic of the case:¹⁵

Moreover, Swatch Group intended to exclude members of the press and to restrict the information supplied by its executives to a relatively small group of analysts who had identified themselves to the company in advance. Bloomberg's objective in rebroadcasting the call, by contrast, was to make this information public, defeating Swatch Group's effort to restrict access. Bloomberg's purpose, in other words, was to publish this factual information to an audience from which Swatch Group's purpose was to withhold it. These differences give Bloomberg's use at least an arguably transformative character.

The court held for the fair use of the disseminators of the earnings call that was trying to be sent down the memory hole.

As in the *Perfect 10 case which concerned Google's image thumbnails*, *Peaceful Science*'s work provides a "particularly" important "benefit to the public".¹⁶ *Peaceful Science*'s use disseminates information regarding a matter of considerable "public interest."¹⁷

The Nature of the Copyrighted Work

The second factor considers the extent to which the original copyrighted work is creative or factual and whether it is published or unpublished.

Factualness. Copyright is about the creative choices an author makes in putting together a piece. The more creative a work, the closer it is to the core of the scope of copyright protection.¹⁸ By contrast, the more factual a work, the closer it is to escaping the perimeters of copyright protection because copyright does not protect ideas or facts. If it is "Just the facts ma'am", it is probably not copyrightable or is a copyright of little value when it comes to enforcement.

8. *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) ("First, El Vocero attributed the photographs to Núñez. Although acknowledgment does not excuse infringement, the failure to acknowledge counts against the infringer.").

9. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007)

10. E.G., see *Google, Inc.*, 804 F.3d 202. The US Court of Appeals for the Second Circuit held Google's unauthorized digitization of books so they could be searched electronically to be a fair use. The court found that Google's search and snippet views functions contribute substantial benefits to public knowledge by allowing the public, to conduct instantaneous full-text searches of millions of books.

11. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001)

12. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994)

13. *Campbell*, 510 U.S. at 579

14. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-19 (9th Cir. 2003); and *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009)).

15. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 85 (2d Cir. 2014).

16. *Perfect 10 v. Google, Inc.*, 508 F.3d at 1166, 1168

17. *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004)), a case involving leaked emails concerning the reliability of Diebold electronic voting machines.

18. *Stewart v. Abend*, 495 U.S. 207, 237-38 (1990)

Here, I would argue that the copyrighted work is “double factual” in that the original was an attempt to present facts, and factual (non-fanciful) conclusions from those facts, and the re-publication is *stating the fact that* the original work was printed in the form that it was (which is of course necessary for making comments on the veracity or lack thereof).

I would also argue that the factual nature of the works in question, when coupled with their short length, militates in favor of their real copyright value being small anyway.

Copyright does not protect ideas or facts. Nor does it restrict other ideas and facts in response.

The issue presented here is in essence a first amendment issue. The right to speak out on an issue of vital national interest should never be impinged by the exclusive monopoly awarded to authors known as copyright. This would be stretching the monopoly too far.

Publication. Whether a work is published or unpublished has been called a “critical” element of its nature.¹⁹ Uses of published works are more likely to qualify as fair use because the author of the original work has already exploited the commercially valuable right of first publication²⁰. “First publication” is always sacred in copyright law because it entails the “control” that seems to be part and parcel of the benefit of copyright. It is why Congress made mechanical licensing of a song a statutory requirement only after the first version of a song is released. Obviously, this factor favors *Peaceful Science* since the copyright owners had their “first crack” at publishing.

The Proportion of The Copyrighted Work Used

This does militate in favor of copyright infringement, because it is the entire work being republished. However because of the above-stated transformative effect on the work, this factor is of no moment.

The Effect of Use on Market

The fourth factor is hardly relevant because the main purpose of the re-publication was criticism, and to the extent that criticism entails a subject of the criticism which is deemed a less worthy product, it would probably also entail reduced sales. Since the work was transformed and cured of any copyright infringement in large part and possibly on a stand-alone basis, by the fact that it was criticism (see discussion above), any loss of revenue for the work would only be a necessary by-product and not used against *Peaceful Science* by any judge hearing the matter. The works republished were probably not for sale anyway and if so, only indirectly.

Conclusion

In weighing the four factors, and the preamble purposes of Section 107 of the Copyright Act, it is the opinion of this law firm that there is no copyright infringement occasioned by the republishing of the scholarly articles on the *Peaceful Science* website for the purposes of academic criticism and debate. In claiming fair use doctrine as a shield in this case, *Peaceful Science* is not utilizing an exception, or some sort of “loophole”, to copyright law. This type of use sits at the very heart of copyright law and its constitutional purpose. It is literally not a violation of any copyright the author has. The grant of exclusive rights which makes up the “right” in copyright, never extended to the right to shut down a usage for the purpose of squelching debate.

19. *Kelly*, 336 F.3d at 820

20. *Kelly*, 336 F.3d at 820; *Perfect 10*, 508 F.3d at 1167

References

U.S. Const. art. I, § 8, cl. 8.

17 U.S.C § 107.

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