**The Fair Use Doctrine in the United States**

**— A Response to the Kernochan Report**

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# Introduction

The purpose of this submission is to assist the Australian Law Reform Commission in its study of Copyright and the Digital Economy, and in particular, to provide information about recent United States copyright law jurisprudence, policy, and practice. The authors are academics and practitioners with experience and expertise in United States intellectual property law. We volunteer these comments on the United States’ experience on this basis, and in our personal capacities.

We have read with interest the recent Discussion Paper released by the Australian Law Reform Commission and its proposals. We have also read the submission of the Kernochan Center for Law, Media and the Arts, “Copyright Exceptions in the United States for Educational Uses of Copyrighted Works” (hereafter “Kernochan Report”) and believe that some additional context would assist the Commission in understanding the fair use doctrine in the United States. Viewed against the wider backdrop of jurisprudence and the legislative history of United States copyright law, we are concerned that the Kernochan Report could be seen to present a rather selective picture of the American experience and may give rise to a misleading impression of the scope and role played by fair use in United States copyright law.

# About the authors

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Peter Jaszi is a Professor of Law at the Washington College of Law, American University, Washington, D.C., where he helped to found the Glushko-Samuelson Intellectual Property Law Clinic and has directed the Program on Information Justice and Intellectual Property. A graduate of Harvard College and Harvard Law School, Professor Jaszi served on the Librarian of Congress’ 1994 Advisory Commission on Copyright Registration. He is a Trustee of the Copyright Society of the U.S.A., and a member of the editorial board of its journal, and co-author of a standard copyright textbook, Copyright Law (9th ed., 2013). He and Martha Woodmansee edited The Construction of Authorship (1994) and Making and Unmaking Intellectual Property (2011). Among other articles, Prof. Jaszi is the author of *Copyright, Fair Use and Motion Pictures*, 2007 Utah Law Rev. 715, and *Education and Fair Use: The Way Forward*, 25 Law and Literature 339 (2013). Since 2005, Professor Jaszi has been working with Patricia Aufderheide of the American University’s Center for Social Media on projects designed to promote the understanding of fair use by documentary filmmakers, teachers, scholars, visual artists, poets, librarians and archivists, video-makers, and other creators (see<http://www.wcl.american.edu/pijip/go/fair-use>). This work is described in a 2011 book by Professors Jaszi and Aufderheide: Reclaiming Fair Use: How to Put Balance Back in Copyright. He received the American Library Association’s L. Ray Patterson Copyright Award in 2007. In 2009 the Intellectual Property Section of the District of Columbia Bar honored Professor Jaszi as the year’s Champion of Intellectual Property, and in 2011 he was recognized with an IP3 award from Public Knowledge.

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# 1. Does the American Experience of Fair Use Show that it is Unpredictable?

The Kernochan Report notes that “Fair use is not entirely unpredictable.” But the report also stresses that, in application, the doctrine is “sometimes difficult to assess - even for attorneys - and reasonable, knowledgeable people often disagree.” For a legal doctrine to be predictable does not require an absolute consensus on its application to contested facts in every individual case. Like the common law, it is helpful to think of fair use as both a mechanism for generating decisions about particular issues (i.e., as a system) and as a collection of actual decisions (i.e., as a body of case law). At a system level, the last 30 years of case law have generated a fairly coherent set of principles that lend themselves to forward-looking application. At the level of individual cases, it is true that no copyright expert agrees with every court decision on fair use, but we are not aware that such consensus exists in any other significant area of the law.

The Kernochan Report emphasizes several noteworthy cases where a district court decision was overturned by the court of appeal only to be reinstated by the Supreme Court. However, anecdotes of reversal are simply that, anecdotes. Empirical studies show that reversal rates in fair use cases are not abnormally high.[[1]](#footnote-1)

The Kernochan Report reflects the view that standards must be more uncertain than rules. The relative merits of rules as compared to standards can only be judged in application: the Australian experience reflected in the Commission’s Discussion Paper and a number of submissions to the Commission shows that copyright rules have been incredibly uncertain in Australia. Rule-based limitations and exceptions are quite vulnerable to technological rigidity and their application can hinge on arcane debates over taxonomy – these features can make rules perennially uncertain. The fair use doctrine continues to be one of the most significant sources of limitations and exceptions in the United States. In many areas, the understanding as to the scope of fair use has been quite consistent over time; in areas where technology has changed significantly, the doctrine has also evolved quite rapidly. This evolution is a feature of fair use, not a bug.

A number of comprehensive studies of fair use case law in the United States have concluded that the fair use doctrine has a set of core principles and is coherent across particular types of uses or “policy clusters”. The Kernochan Report briefly notes statistical empirical studies of fair use case law by New York University Professor Barton Beebe and Loyola University of Chicago Professor Matthew Sag.[[2]](#footnote-2) These studies are accurately reflected in the Commission’s earlier Discussion Papers, so there is no need to elaborate on them here. The Kernochan Report questions whether Beebe’s and Sag’s findings will hold for future cases – the answer is, technically, that the future is ‘out of sample’. The fact that a pattern has held true in the past does not guarantee it will hold true in the future. We would note however that when the Kernochan Report summarizes casual observations about the predictability or consistency of fair use, it is also relying on the past to predict the future. No empirical study is perfect, but the empirical studies of fair use have clear advantages over less systematic anecdotal observation of the same events.

The Kernochan Report overlooks at least two other comprehensive studies of the fair use doctrine in the United States – one by University of Pittsburgh Professor Michael Madison and another by University Of California, Berkeley, Professor Pamela Samuelson.[[3]](#footnote-3) Samuelson, one of the most respected figures in United States Copyright law, surveyed the entire landscape of fair use case law and grouped the decisions into ‘policy relevant clusters’. Samuelson concluded that “once one recognizes that fair use cases tend to fall into common patterns”, the “fair use is both more coherent and more predictable than many commentators have perceived”.[[4]](#footnote-4)

The test for predictability should be whether like cases are decided alike, and whether the law is sufficiently clear to enable those well-versed in the law to provide coherent advice on the risks and benefits of future conduct. In our experience the fair use doctrine meets this test of predictability. American lawyers routinely advise clients on how close they are to the line between infringement and fair use.

# 2. Do Recent Cases Demonstrate That Fair Use is Uncertain in Application?

The Kernochan Report devotes a subheading to “Recent Assertions of Fair Use for Complete Copies”, noting that “while such cases have occurred in the past, they were quite rare.” This might convey the impression that recent cases holding that unmodified and/or complete copying amounts to fair use are inconsistent with past practice or – at the least – controversial. In fact, these recent cases illustrate the consistency and flexibility of the fair use doctrine.

For example, copying without modification was regarded as fair use in *Savage v. Council on American-Islamic Relations, Inc.*, where the Islamic organization copied and distributed anti-Islamic statements made by radio ‘shock-jock’ Michael Savage as part of a fundraising exercise.[[5]](#footnote-5) The outcome in Savage was entirely predictable given the decision in *Hustler Magazine, Inc. v. Moral Majority, Inc.,* where the court held that “an individual in rebutting a copyrighted work containing derogatory information about himself may copy such parts of the work as are necessary to permit understandable comment.”[[6]](#footnote-6) Scholarly fair use is likewise non-controversial, as demonstrated by *Sundeman v. Seajay Society*[[7]](#footnote-7) which involved extensive quotation from an author’s unpublished manuscripts.

As the Kernochan Report notes, recontextualization without modification was seen as fair use in *Bill Graham Archives v. Dorling Kindersley Ltd*.[[8]](#footnote-8) In that case the use of reduced images of promotional posters in a rock biography was held to be “a purpose separate and distinct from the original artistic and promotional purpose for which the images were created.” Those who question the wisdom of the *Bill Graham* case dispute the conclusion that the defendant’s purpose was in fact separate and distinct from the original artistic and promotional purpose. Such differences of opinion reflect uncertainty as to facts inherent to the human condition, not uncertainty as to legal principles. Cases with clearer facts generate no such controversy. A good example is *Mattel Inc. v. Walking Mountain Prods.*,[[9]](#footnote-9) in which the court concluded that an extensive photographic portfolio parodying Barbie by depicting nude dolls juxtaposed with vintage kitchen appliances, was fair use. Another is a case identified in the Kernochan Report itself, *Nunez v. Caribbean lnt'l News Corp*.,[[10]](#footnote-10) which involved a newspaper’s reproduction of an entire photograph in connection with an article about a controversy in which that photograph figured. The photo was a useful, though not essential, illustrative example.

Digitization has created an important new issue for copyright law – the possibility of non-expressive use of expressive works.[[11]](#footnote-11) For example, when Internet search engines and plagiarism detection machines copy text, they do so to perform computational analysis and to generate metadata. These machines copy without communicating the underlying authors’ original expression, as such, their use has been recognized by several courts as transformative and as unlikely to substitute for the underlying author’s original expression.[[12]](#footnote-12) Recent cases on search engines, plagiarism detection software and library digitization are entirely consistent with the centrality of ‘transformative use’ as explained by the United States Supreme Court in *Campbell v. Acuff Rose* – although non-expressive use tends to involve complete copying, such uses are typically fundamentally different in purpose (the first fair use factor under Section 107 of the Copyright Act of 1976 ) and do not pose any threat of expressive substitution (the fourth fair use factor under Section 107).

# 3. What is the Role of Fair Use Guidelines in the United States?

We note that the Discussion Paper envisages that, to the extent that there is concern about uncertainty of the scope of fair use, one way that certainty might be achieved is via “industry guidelines and codes of practice” (¶ 4.183), and that guidance in interpreting fair use may be found “in any industry guidelines that are developed” (¶4.176).

The United States experience under the Copyright Act of 1976 indicates voluntary guidance documents can be a means by which to achieve greater levels of certainty, and provide predictability and normative guidance to users. In our experience, such voluntary guidance documents have proven most useful when they have (i) evolved organically (rather than being developed in the context of a legislative reference or government facilitation), (ii) been perceived as being balanced (rather than, for instance, reflective of only one side of the copyright balance), (iii) been widely accepted by the copyright user community, and (iv) been widely adopted in that communities’ actual practice.

The United States experience also shows that guidelines “negotiated” between users and rights holders often fail, and that quasi-official negotiated guidelines that have been compelled or coerced by government action always do. This is in part because rights holders typically dominate both the negotiation process and the dissemination and interpretation of its results.  By contrast, statements and codes of Best Practices created by and for various communities (including libraries and educators) have shown considerable potential as a tool to promote both understanding and relative predictive certainty.  In our experience, the most widely used Best Practices documents were developed without explicit ‘buy-in’ by representatives of rights holder communities. We derive from this the lesson that requiring rights holder groups’ endorsement of such voluntarily-developed community best practice initiatives would in many cases undermine the information gathering and evidentiary functions of such documents.

In this context, we believe that the Kernochan Report's discussion of various guidelines negotiated in the United States in the 1970s and 1980s and their subsequent reception is potentially misleading. While the report goes to great lengths to identify United States universities and colleges that appear to have adopted policies based on the classroom photocopy guidelines, often without much deliberation, it fails to mention the alternative approaches taken by schools that have devoted significant resources to devising policies that more accurately reflect the true state of the law.[[13]](#footnote-13) Moreover, there is no apparent methodology to the selection of institutions whose policies the Kernochan Report chose to summarize.

No discussion of the United States Guidelines is complete without reference to Columbia University Copyright Advisory Office’s own Professor Kenneth D. Crews’ seminal article, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*,[[14]](#footnote-14) which discusses both the dubious nature of the authority claimed for these documents and the distorting effects that they have had on fair use decision-making in United States higher education. We find the Kernochan Report’s failure to note the extensive critique to which these guidance documents have been subject from their inception remarkable. The guidelines were controversial at the time that they were negotiated and not accepted by all affected stakeholders. The Kernochan Report emphasizes that some of the Guidelines had the “imprimatur of Congress”, but it overlooks the recorded objections of educators in the statutory report where the guidelines were published. The American Association of University Professors and the Association of American Law Schools strongly criticized the guidelines.[[15]](#footnote-15)

Moreover, it is possible to confirm a detail which the Report delicately states “has been reported,” pointing to the declining significance of the various negotiated fair use guidelines: In 2012, the Consortium of College and University Media Centers (“CCUMC”), a national organization of college and university media and technology professionals, did indeed “retire” the guidelines it had promulgated in 1998 after the so-called CONFU process. In their place, the organization endorsed the new Association of Research Libraries’ “Code of Best Practices in Fair Use for Academic and Research Libraries,”[[16]](#footnote-16) stating that “while our Guidelines served for many years to provide direction for our members and others in the field, the new Code, as well as recent court cases and legislation that it reflects, all supersede the CCUMC Fair Use Guidelines in the prevailing networked online environment.” Considering its dismissive treatment of “Best Practices” (discussed in the following section), the Report may have been remiss in failing to assess further the importance of this development.

The Kernochan Report also can be read to suggest that the somewhat restrictive special statutory exceptions for education in Section 110 of the Copyright Act of 1976 and the 2002 TEACH Act’s extension of that provision for distance education, somehow diminish the significance of fair use in schools, colleges and universities. The Kernochan Report’s discussion of these provisions fails to account for the important role the fair use serves in supporting educational practice in the United States. Experience suggests that most educators rely on fair use and not these specific statutory exceptions, which are commonly perceived as being too narrow to useful, and in the case of the TEACH Act, as being too complex and burdened with institutional obligations. More importantly, however, Section 110 and the TEACH Act are excellent examples of how specific statutory exemptions for education can coexist with and actively compliment a general fair use doctrine. Thus, for example, many innovative forms of teaching with technology that are not literally covered by the provisions of the TEACH Act proceed routinely and without controversy under the general rubric of fair use.[[17]](#footnote-17) This complementarity has sustained the usefulness of specific exceptions in United States law in times of rapid technological change.[[18]](#footnote-18)

# 4. What is the Role of Various “Best Practices” Guidelines in the United States?

# If the specific exceptions provided in United States law for educational uses are – and are likely to remain – over-restrictive, and decades-old “guidelines” no longer can be relied upon for guidance, educators in the United States, like other users, turn more and more frequently to so-called Best Practices statements and codes.

# The Kernochan Report expresses some reservations about the Best Practice statements that have been developed over the past decades in relation to classroom teaching, documentary filmmaking, online video, open courseware, media and communications studies, librarianship, poetry, and many more. The Kernochan Report, at page 25, states that since these were “developed without right holder input, they have a doubtful legal effect.” and because these Best Practices lack the Congressional imprimatur given to the classroom photocopying, music and off-air taping guidelines, the Report asserts, at page 33, “they are of doubtful validity as evidence of custom and practice.” These are slightly perplexing statements: the purpose of these community statements guidelines is to provide an accurate statement of widely-accepted practice developed by consensus within the relevant user community, not to come up with a legal conclusion acceptable to rights holders about what they would agree is “fair use”. As noted above, the Kernochan Report’s denigration of Best Practice statements also elides the controversy and discord that surrounded the prior guidelines that were published in Congressional reports.

The Kernochan Report relies extensively (at footnote 170) on criticism of the Best Practices approach by one outlying academic, Prof. Jennifer Rothman, without acknowledging (1) the approach has been widely praised by other commentators,[[19]](#footnote-19) (2) that Prof. Rothman’s most important critique of the Best Practices is that they may, in fact, not go far enough in promoting fair use, and (3) that her understanding of the process by which Best Practices come into being is flawed. The Report itself may reflect a similar misunderstanding as to the purposes and goals of Best Practices. Just as these community-based documents do not reflect negotiations with rightholders, neither do they reflect simple expressions of preference by user communities(Prof. Rothman’s characterization notwithstanding). Instead, the B~~e~~st Practices statements seek to identify points of strong and general agreement within such communities themselves about what circumstances exist in which the unauthorized use of copyrighted material is crucial to the fulfillment of that community’s shared artistic or informational mission. The underlying theory, of course, is that judicial fair use decision-making is ultimately significantly influenced by whether a particular use was important and appropriate to the user’s positive and legitimate cultural goals in making a film, writing a poem, teaching a class, or providing on-line materials to support education.[[20]](#footnote-20)

Thus, it is no criticism of any of the Best Practices documents to suggest, as the Kernochan Report does, that representatives of copyright owners generally will have played no role in devising it.  Nor is it either surprising or significant that these statements provide no legal guarantees. The Best Practices are an important way for creative and other cultural communities to educate themselves, bring together disparate sources of information, and state a common position. They also enable these communities to educate important third party stakeholders as the experience of documentary filmmakers indicates. For example, following the development of the Documentary Filmmakers Statement of Best Practices in Fair Use in November 2005, every United States insurer that provides coverage against “errors and omissions” was willing to offer coverage for films that followed the Best Practices, which in turn, meant that films that had not been able to obtain copyright clearance but relied on fair use were able to be picked up for theatrical showing, DVD distribution, and television broadcasting – something that was not possible before the Best Practices.[[21]](#footnote-21)

There is ample evidence that filmmakers rely both extensively and successfully on their own Statement of Best Practices, and the same is true of other creative communities that have created such documents for their own collective use.[[22]](#footnote-22) Moreover, Best Practices appear to function as a prophylactic against unnecessary litigation. In the last decade, United States federal courts have been asked to decide only one case involving a defendant whose conduct had been covered by a community-based Best Practices statement or code.[[23]](#footnote-23) We are not aware of any reason to think that a similar community-based best practices approach would not work in the Australian context.

As noted above, the United States experience demonstrates that the most useful codes of practice have been those developed voluntarily by communities of users, not by negotiations with large industry rightsholder groups held as part of a legislative mandate, nor under the threat of legislative action.

# 5. What Does Fair Use Mean to the Education Sector in the United States?

We have seen that in the United States, the importance of education as a purpose deserving of recognition in fair use analysis is well established, and that this fact has enabled a wide range of time-honored educational practices to flourish, and facilitated others to emerge. That said, it is important to emphasize that educational fair use has not eclipsed or displaced the sale and licensing of educational materials in the United States. Textbook publishing, in both hard-copy and digital formats, continues to thrive. And schools at all levels continue to license other content for class use and teaching support,[[24]](#footnote-24) as well as to purchase monographs and periodicals for digital libraries.

This is true, in part, because even decisions like the recent *Cambridge University Press v.* *Becker[[25]](#footnote-25)* allow a relatively narrow scope for unlicensed illustrative quotation in teaching materials; in other words, educational fair use in the United States provides some room for innovation in teaching but none for wholesale appropriation of copyrighted content.

At the same time, a variety of different education-related professions (teachers, librarians, courseware providers) have taken steps to devise clarifying codes of statements of fair use Best Practices. These have created some level of practical security for educators, while not depriving rights holders of their ability to pursue cases against any and all identified infringers. This legal condition supports a burgeoning education sector in which many teachers and educational administrators rely on real-world information to answer the question “What is Fair Use?”, rather than being forced to rely on outmoded “guidelines” that were unsatisfactory when written decades ago, and have steadily lost relevance since then.

# 6. Would Australian Fair Use Rulings Diverge From United States’ Precedent Over Time?

We expect that even if Australia adopts the United States fair use jurisprudence as its starting point, differences of opinion will emerge over time. We believe that Australian cases should be adjudicated according to Australian legal principles and standards. Federal Court and High Court justices routinely consider leading United States cases in the process of deciding Australian law according to Australian standards.[[26]](#footnote-26) In areas where standards of fairness are relatively similar, we would expect divergence to be minimal. It would be very surprising, for example, if Australian courts did not adopt the well established American position that software reverse engineering to discover the non-copyrightable features of a program is fair use. However, it would not be surprising if Australian courts diverged from American ones in cases that pitted moral rights against freedom of expression.

If Australia chose to adopt a fair use doctrine, it would be adopting a system that allows decisions to be made in terms of principles that track the fundamental policy objectives of copyright law. Australia would not necessarily be adopting the outcome of every United States court case. Australian courts will no doubt continue to benefit from seeing how their American counterparts have dealt with similar questions in the past. However, United States jurisprudence will only persuade to the extent it is persuasive.

# 7. Would Adopting a Fair Use Doctrine Lead to More Litigation? Would Fair use be Useful Without Substantial Litigation?

Given the size of the United States economy and its general reputation for litigiousness, the amount of fair use litigation under the Copyright Act of 1976 actually appears to be quite modest. It is difficult to compare litigation in Australia to the United States. Litigation may be more expensive in the United States because of the high cost of discovery. Also, plaintiffs in United States may be more aggressive because of the availability of class actions and statutory damages.

Turning to the education sector specifically, we note that until recently, there have been relatively few cases dealing with educational fair use in United States courts. At the same time, there is a fairly widespread understanding that educators rely on fair use every day in producing course material and teaching classes.[[27]](#footnote-27) Some legal commentators have surmised that the lack of litigation may reflect acceptance by large publishers that the type and level of non-commercial copying customarily done by individuals for educational and research purposes is reasonable.[[28]](#footnote-28)

Recent educational fair use cases have focused on digital copyright concerns. The recent case of *The Authors Guild Inc. v. HathiTrust* addresses the issue of library digitization.[[29]](#footnote-29) *Cambridge University Press v. Becker* addresses the issue of electronic course reserves.[[30]](#footnote-30) In both cases the defendant successfully argued that the challenged activity was protected by fair use. In both cases the University defendants were able to rely on their understandings of the fair use doctrine in order to pursue activities with great social benefits. And in each decision the court gave significant weight to the importance of education in a free society in explaining its conclusion. The same can be said of the Fourth Circuit Court of Appeals’ decision in *A.V. v. iParadigms, LLC*.[[31]](#footnote-31) Taken together, these clarifying decisions underline what is perhaps an obvious proposition: In a mode of fair use analysis that is increasingly dominated by considerations of the user’s social or cultural purpose, courts have recognized that legitimate educational uses promote the diffusion of knowledge and promotion of learning that have been central to copyright since the Statute of Anne of 1710. It is worth noting that these recent cases involving educational fair use, the first in several decades, hardly represent a litigation explosion in themselves – and there is no sign of one on the horizon. In the education sector, all actors (rightholders and teachers alike) tend to adapt their practices to the law as they understand it, rather than to endlessly relitigate its finest points. We appreciate that some may regard litigation as an imperfect way of dealing with these new issues of the digital age, but it is manifestly better than a system in which all innovations are forbidden unless and until the Copyright Act is rewritten.

Australian educators are copyright-savvy and technologically sophisticated. There is no reason to think that Australian educators would not similarly be able to apply an Australian fair use doctrine appropriately, and that like the United States, there would not be an explosion of fair use cases in Australian courts. Similarly, we believe that the interpretive tasks required of judges under a fair use doctrine are well within the capability of the Australian judiciary.

# 8. How Does Educational Fair Use Relate to the Anti-Circumvention Provisions Under United States Law?

A sound policy on educational fair use would enable the creation of effective exceptions to legal measures regulating the use of technologies that can circumvent technological protection measures (TPMs) in appropriate cases.

The 1996 WIPO Copyright Treaty and Performances and Phonograms Treaty gave signatory countries considerable flexibility as to the implementation of the obligation to provide legal protection for copyright owner TPMs. In particular, the WIPO Internet Treaties do not preclude signatory countries from enacting exceptions to their TPM legal regimes for non-copyright infringing purposes. Nor do the Internet Treaties preclude signatories from creating an administrative process to grant periodical exemptions for particular classes or uses of technologically protected works in order to foster important domestic public policy priorities like education.

The Kernochan Report notes that United States law does not contain a blanket exemption to the prohibitions on circumventing technological protection measures in 17 U.S.C. §1201 for use of copyrighted material for educational purposes as a reason for casting doubt on the need for Australia to create a new exception to its TPM provisions for educational uses, apparently in response to other submissions made to the ALRC consultation. Our comments are limited to describing the impact of the United States’ TPM provisions on educational uses in the United States educational sector, as we recognize that the Attorney General’s Department is currently undertaking a separate review of the effectiveness of the exceptions to Australia’s TPM provisions.

Focusing on the absence of a blanket exemption for educational purposes does not convey the full breadth of the United States TPM regime’s accommodations for educational fair use. As the Kernochan Report also notes, the United States TPM provisions provide for a triennial rule-making process by which the Librarian of Congress can grant exemptions to the TPM circumvention ban when the TPM provisions have had (or are likely to have in the succeeding 3 year period) a substantial adverse impact on particular lawful and non-infringing uses.[[32]](#footnote-32)

Using that process, the Librarian of Congress has repeatedly granted exemptions permitting United States educators to circumvent TPMs to make fair use excerpts of videos released on DVDs for educational purposes in the last three successive triennial DMCA rule-makings (in 2012, 2010, and 2006).[[33]](#footnote-33) Indeed, the scope of the exemption granted in respect of educational purposes has actually widened in the more recent rulemakings, in recognition of the fact that the use of TPMs, backed by the legal prohibitions in section 1201 of the United States Copyright Act, have had a substantial impact on lawful uses of copyrighted material for educational purposes.

The United States experience with the triennial rulemaking indicates that legal regimes can be structured to provide legally effective and adequate protection for copyright holders, while also permitting the co-existence of fair use to serve the important public policy goals of education. Although the United States DMCA rulemaking process has been criticized for its costs and procedural burdens, particularly for parties that have had to participate in successive rulemakings due to the limited duration of exemptions, the educational exemptions that have been granted by the Librarian seem to be functioning quite well, and have allowed the fair use doctrine to continue to meet the evolving needs of educators and students from kindergartens to universities.

# 9. Is the Fair Use Doctrine Compatible with the International Obligations of the United States?

The Kernochan Report did not raise this issue, however we believe that is an important consideration in any assessment of the fair use doctrine in the United States.

Although it is occasionally raised for rhetorical flair, the compatibility of fair use with its international obligations is not matter of serious concern in United States for at least three reasons.

First, the drafting history of the Berne Convention makes it quite apparent that Berne Article 9(2) – the origin of the famous “three-step test” – was not intended to be a rigid prohibition on limitations and exceptions to copyright. The three-step test was, and remains, an abstract open formula capable of encompassing a wide range of exceptions.[[34]](#footnote-34)

Second, subsequent international agreements and state practice confirm this understanding. Versions of the three step test have been incorporated into international agreements such as TRIPs, the WIPO Copyright treaty, NAFTA and United States Free Trade Agreements with Australia, Bahrain, Chile, Jordan, Morocco, Singapore, and South Korea. In 1996, the signatories to the WIPO Copyright Treaty released the following ‘Agreed Statement Concerning Article 10 WIPO Copyright Treaty’:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.[[35]](#footnote-35)

Third, the current position of the United States regarding the three-step test is quite clear. In meetings in September 2012, officials from the Office of the United States Trade Representative, the Executive Branch entity that negotiates international agreements on behalf of the U.S. government, confirmed that the United States takes the position that nothing in existing United States copyright law, as interpreted by the federal courts of appeals, would be inconsistent with the three-step test.[[36]](#footnote-36)

The United States made a number of changes to its law when it joined the Berne Convention in 1989. However, the fair use doctrine does not appear to have been considered as an obstacle to Berne compliance at that time. It is hard to imagine that the United States would have agreed to accede to the Berne Convention if it believed that such a central aspect of its copyright law was not Berne compatible. It is inconceivable that the United States would actively promote the incorporation of a three step test into TRIPs in 1994, the WCT in 1996 and FTAs with Australia, Bahrain, Chile, Jordan, Morocco, Singapore, and South Korea (among others) if the fair use doctrine presented a fundamental conflict with that test.

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1. Barton Beebe, *An Empirical Study of United States Copyright Fair Use Opinions*, 1978- 2005, 156 U. Pa. L. Rev. 549, 574-5 (2008); Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2541 (2009). [↑](#footnote-ref-1)
2. Beebe, *id.*; Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47 (2012). [↑](#footnote-ref-2)
3. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525 (2004); Samuelson, *supra* note 1. [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. Savage v. Council on American-Islamic Rels., Inc., 2008 U.S. Dist. LEXIS 60545 (N.D. Cal. 2008). [↑](#footnote-ref-5)
6. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1153 (9th Cir. 1986). [↑](#footnote-ref-6)
7. 142 F.3d 194, (4th Cir. 1998). [↑](#footnote-ref-7)
8. 448 F.3d 605 (2d Cir. 2006). [↑](#footnote-ref-8)
9. 353 F.3d 792 (9th Cir. 2003). [↑](#footnote-ref-9)
10. 235 F.3d 18 (1st Cir. 2000). [↑](#footnote-ref-10)
11. Such use is sometimes referred to as ‘non-consumptive use’, however the term ‘non-expressive’ is probably more accurate. The term ‘non-consumptive use’ should also be set aside to avoid confusion between general legal propositions and defined terms in the Google Book Search Settlement of 2008 and the Amended Google Book Search Settlement of 2009. See Authors Guild v. Google 770 F.Supp.2d 666 (S.D.N.Y. 2011) (rejecting the proposed settlement under Rule 23 of the Federal Rules of Civil Procedure which requires class action settlements to be fair, adequate, and reasonable). For an extensive discussion of non-expressive use, *see* Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 Nw. U. L. Rev. 1607 (2009); Matthew Sag, *Orphan Works as Grist for the Data Mill,* 27 Berkeley Tech. L.J. 1503 (2012). [↑](#footnote-ref-11)
12. Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) (thumbnail pictures for a visual search engine); Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006) (search engine caching); Perfect 10, Inc. v. Amazon, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) (thumbnail pictures for a visual search engine); A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009) (plagiarism detection software); The Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y.2012) (library digitization for book search and computational analysis). [↑](#footnote-ref-12)
13. An important leader in the field here is the University of Texas. *See* “Building on Others’ Creative Expression: Fair Use of Copyright Materials,” at <http://copyright.lib.utexas.edu/copypol2.html>. [↑](#footnote-ref-13)
14. 62 Ohio St. L.J. 599 (2001). [↑](#footnote-ref-14)
15. See H.R. Rep. No. 94-1476 at 72 at<http://www.copyright.gov/history/law/clrev_94-1476.pdf>. [↑](#footnote-ref-15)
16. *See* <http://www.ccumc.org/fucodeadopted>. [↑](#footnote-ref-16)
17. *See* Peter Jaszi, Patricia Aufderheide and Renee Hobbes, The Cost of Copyright Confusion for Media Literacy (2007), at <http://www.centerforsocialmedia.org/sites/default/files/Final_CSM_copyright_report_0.pdf> (documenting the actual daily practices of K-12 teachers who engage regularly in fair use activities despite a lack of clear institutional or other guidance). [↑](#footnote-ref-17)
18. For a useful discussion of how fair use complements the specific exceptions for libraries provided in Sec. 108 of the United States Copyright Act, see Authors Guild, Inc. v. Hathitrust, 902 F. Supp. 2d 445, 456-57 (S.D.N.Y. 2012). [↑](#footnote-ref-18)
19. See, e.g., *Note: Designing the Public Domain*, 122 Harv. L. Rev. 1489 (2009); Jennifer Urban & Anthony Falzone, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 J. of the Copyright Soc’y of the U.S.A. 337 (2010). [↑](#footnote-ref-19)
20. *See generally,* Madison, *supra* note 3. [↑](#footnote-ref-20)
21. Patricia Aufderheide and Peter Jaszi, Reclaiming Fair Use: How To Put Balance Back in Copyright 105 (University of Chicago Press, 2011) (hereafter, “*Reclaiming Fair Use”*). [↑](#footnote-ref-21)
22. *See generally*, *Reclaiming Fair Use*, where this evidence is collected. It is curious, to say the least, that the Kernochan Report does not even mention the existence of this volume, which represents the most complete presentation to date of information relating to fair use Best Practices. [↑](#footnote-ref-22)
23. This arguable exception is Lennon v. Premise Media Corp., L.P., 556 F. Supp. 2d 310 (S.D.N.Y. 2008), a case in which the plaintiffs may have been motivated primarily by non-financial concerns; in any event, the defendants’ assertion of fair use was, quite predictably, wholly successful. [↑](#footnote-ref-23)
24. *See* the testimonials collected at the website of the Copyright Clearance Center, the primary licensing intermediary between owners of copyright in texts and educational institutions, at <http://www.copyright.com/content/cc3/en/toolbar/aboutUs/testimonials.html>. [↑](#footnote-ref-24)
25. 863 F. Supp. 2d 1190 (N.D. Ga. 2012). [↑](#footnote-ref-25)
26. See, e.g., Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 (20 April 2012); IceTV Pty Limited v Nine Network Australia Pty Limited [2009] HCA 14 (22 April 2009). [↑](#footnote-ref-26)
27. *See* Jaszi, Aufderheide and Hobbes, supra note 17. [↑](#footnote-ref-27)
28. *See* Peter Jaszi, *Education and Fair Use: The Way Forward*, 25 Law and Literature 33, 38 (2013). [↑](#footnote-ref-28)
29. 902 F. Supp. 2d 445 (S.D.N.Y. 2012). [↑](#footnote-ref-29)
30. 863 F. Supp. 2d 1190 (N.D. Ga. 2012). [↑](#footnote-ref-30)
31. 562 F.3d 630 (4th Cir. 2009)(digital reproduction of student papers to promote functioning of an anti-plagiarism detection service used by teachers and schools). [↑](#footnote-ref-31)
32. 17 U.S.C. §1201(a)(1)(C). [↑](#footnote-ref-32)
33. 37 CFR Part 201, Docket No. 2011-7, published in Fed. Register, Vol. 77, No. 208, October 26, 2012 at 65260 (Motion pictures, as defined in 17 U.S.C. 101, on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System, where the circumvention, if any, is undertaken using screen capture technology that is reasonably represented and offered to the public as enabling the reproduction of motion picture content after such content has been lawfully decrypted, when such representations have been reasonably relied upon by the user of such technology, when the person engaging in the circumvention believes and has reasonable grounds for believing that the circumvention is necessary to achieve the desired criticism or comment, and where the circumvention is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment in the following instances:

    (A) In noncommercial videos;

    (B) In documentary films;

    (C) In nonfiction multimedia ebooks offering film analysis; and

    (D) For educational purposes by college and university faculty, college and university students, and kindergarten through twelfth grade educators.)

    at: http://www.copyright.gov/fedreg/2012/77fr65260.pdf; (2010) at: http://www.copyright.gov/1201/2010/ (Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:

    (i) Educational uses by college and university professors and by college and university film and media studies students;

    (ii) Documentary filmmaking;

    (iii) Noncommercial videos.);

    37 CFR Part 201 Docket No. RM 2005-11, published in Fed. Reg. Nov. 27, 2006 (Volume 71, Number 227 at 68472-68480) (Audiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors) at: <http://www.copyright.gov/fedreg/2006/71fr68472.html>. [↑](#footnote-ref-33)
34. The literature on this topic is extensive. For the leading account, see, Martin Senftleben, Copyright, Limitations, and the Three-Step Test: Analysis of the Three-Step Test in International and EC Copyright Law, Kluwer Law International, 2004; see also *Declaration on a Balanced Interpretation of the “Three Step Test”* *in Copyright Law* released by leading legal scholars from the Max Planck Institute and other leading institutions, July 2008, at: http://www.ip.mpg.de/files/pdf2/declaration\_three\_step\_test\_final\_english1.pdf [↑](#footnote-ref-34)
35. Agreed Statements Concerning the WIPO Copyright Treaty, Statement Concerning Article 10, WIPO Diplomatic Conference, WIPO Doc. No. CRNR/DC/96 (1996). [↑](#footnote-ref-35)
36. See, Letter of Peter Jaszi, Michael Carroll and Sean Flynn to United States Trade Representative, Ambassador Ronald Kirk, September 8, 2012. Available at http://infojustice.org/wp-content/uploads/2012/09/PIJIP-letter-to-Kirk-September-8-2012.pdf. [↑](#footnote-ref-36)