

Book Review: "Reclaiming Fair Use" by Patricia Aufderheide and Peter Jaszi

Written by Patrick McKay

Monday, 15 August 2011 11:11 - Last Updated Thursday, 08 September 2011 15:30

Earlier this summer, I made the winning video for [Public Knowledge's video contest](#) to create a response to YouTube's "Copyright School" video, which made only a token mention of the crucial exception in copyright law for "fair use" and portrayed fair use as being too complicated for ordinary YouTube users to understand. Public Knowledge challenged the online video community to create a video presenting a more balanced view of fair use, and my video, "[Fair Use School: The Rest of the Copyright Story](#)," ended up winning that contest and even received a bit of news coverage, such as in this [TechDirt article](#)

Soon after my video was announced the winner of Public Knowledge's contest, I was contacted by Patricia Aufderheide of American University, who is also the director of the [Center for Social Media](#). She graciously offered to send me a copy of the new book she recently coauthored with Peter Jaszi, called *Reclaiming Fair Use*. I have spent the last few days reading the book while on vacation in Washington state and British Columbia (my family thinks I'm crazy for reading about copyright law on vacation), and enjoyed it immensely.

Overall, I found this book to be an excellent resource on the current state of fair use law in the U.S., complete with succinct analysis of changing judicial views becoming friendlier to fair use, and valuable strategic insights for those involved in the copyright reform movement. The basic thesis of *Reclaiming Fair Use* is that, far from being a dead letter or uselessly vague concept, fair use today is alive and well; and the more people insist on exercising their rights under fair use, the better they can shape the practices which will ultimately come to define fair use for their communities.

The book starts out with a brief recapitulation of the many flaws of our current copyright system, which should be familiar to most people concerned with this subject. Copyright today lasts longer than ever, is broader than ever, and actually licensing copyrighted content for new uses is more difficult than ever. This has resulted in a significant chilling effect on the creation of new cultural works, as ignorance about fair use rights and fear of copyright lawsuits have kept many from creating as freely as they might otherwise have done.

The authors then give a detailed history of the fair use doctrine, from its origin in the 1800s,

Book Review: "Reclaiming Fair Use" by Patricia Aufderheide and Peter Jaszi

Written by Patrick McKay

Monday, 15 August 2011 11:11 - Last Updated Thursday, 08 September 2011 15:30

through its codification in 1976, up through the present day. Even though fair use went through a brief period of decline in which it was marginalized by a law-and-economics approach to considering whether a new use competed with the market for the original, judges have more recently recognized "transformativeness" as the key element of fair use analysis. If copyrighted content is put to a new use that adds new meaning, message, or purpose rather than merely superseding the original, courts today are much more likely to find fair use, even if the new use could conceivably compete with *some* market for licensing the original material.

While I found the history of the fair use doctrine and current judicial interpretation enlightening (I did not previously know that courts now consider transformativeness to be more important than economic impact), the part of the book I found most fascinating was its insights on the strategy of the broader copyright reform movement. The authors argue that copyright reform advocates were far too quick to concede that fair use is too vague and nebulous a concept to be of any real use to those wishing to put copyrighted content to new and transformative uses. Instead, scholars like Lawrence Lessig and others began advocating either for radical changes to the copyright system that are unlikely to ever happen, or for alternatives to traditional copyright such as Creative Commons.

Aufderheide and Jaszi argue that it was a mistake to concede so much ground to content owners, such that many copyright reformers had effectively given up on fair use. As Peter Jenkins once wrote in response to the quick dismissal of fair use by copyright reform advocates, "with friends like these, who needs enemies?" Rather than giving up on fair use and allowing it to atrophy, we should rather be aggressive in asserting our rights to make fair use of copyrighted content.

Fair use was deliberately designed to be a flexible concept, very much tied to contemporary practice and community norms. Aufderheide and Jaszi argue that it is up to fair users themselves—not their lawyers or their gatekeepers—to define for themselves what fair use means for their community. One of the best ways to do this is by developing "codes of best practices," which set forth standards for what is believed and accepted to be fair use by a given community, be they documentary filmmakers or media studies teachers. The authors then go on to cite a number of encouraging examples of how these codes of best practices have helped empower several creative communities to throw off the shackles of unnecessary licensing and fear of copyright lawsuits and begin making fair use of copyrighted content in ways they previously considered impossible.

Personally, I found the authors' insights into the strategy of the copyright reform very enlightening, and was encouraged by the work they have been doing promoting codes of best

Book Review: "Reclaiming Fair Use" by Patricia Aufderheide and Peter Jaszi

Written by Patrick McKay

Monday, 15 August 2011 11:11 - Last Updated Thursday, 08 September 2011 15:30

practices in fair use. I too have previously noted how easily many copyright reformists have given up on fair use as having any practical value. One of the most important things I learned through competing in policy debate in high school and college was the concept of "ground" in a debate, where the side that most aggressively seizes ground in the early stages of a debate and successfully holds onto it usually wins.

When viewed in this way, it was indeed a grave tactical error for the copyright reform community to concede fair use early on, as it has only made it much more difficult for us to retake that ground and begin restoring utility to the fair use doctrine. I was glad to read of the many successes the Center for Social Media has had promoting its codes of best practices in several key creative communities. I wholeheartedly agree with the authors that the best way to fight against overly restrictive copyright laws is by boldly asserting our rights under fair use whenever possible.

One thing I disagree with the book on, however, is that I don't think codes of best practices will always necessarily be the best way to do this. While codes of best practices may work great in professional communities such as documentary filmmakers and media teachers, they are much less useful in creative communities that do not have any well-defined structure or representative organizations. This is particularly true in the amateur online video community. While I admire the Center for Social Media's effort to create a [Code of Best Practices for Fair Use in Online Video](#), I don't see how it could ever reach enough people to have a meaningful impact. I run a website called [fairusetube.org](#), in which I provide tutorials on fair use and guides for dealing with copyright issues on YouTube. I get messages from YouTube users facing copyright takedowns several times a week, and do my best to help them by giving general pointers about fair use and the YouTube copyright dispute process (without crossing the line into giving legal advice of course).

From my experience, most YouTube users know virtually nothing about fair use, and even when informed about their right to dispute copyright claims against their videos, they are too terrified of drawing the ire of copyright owners to risk filing a DMCA counter-notice. Add to this the fact that YouTube's dual systems of copyright enforcement (both the automated Content ID system and the DMCA takedown process) are hopelessly confusing and leaves gaps in which videos can be blocked with truly no recourse, and copyright continues to be a huge obstacle to online video creators, regardless of the existence of a code of best practices (which most online video creators do not even know exists). Ultimately, as I argued in my [forthcoming student note](#) (to be published in the fall 2011 Regent Law Review), I think it will take clear legislative protections for noncommercial, transformative works and real penalties for abuse of the DMCA to solve this problem.

Book Review: "Reclaiming Fair Use" by Patricia Aufderheide and Peter Jaszi

Written by Patrick McKay

Monday, 15 August 2011 11:11 - Last Updated Thursday, 08 September 2011 15:30

And while this criticism goes beyond the book itself, I also don't think the Center for Social Media's code goes far enough to cover the majority of what online video creators actually do. It strongly implies that any use of a complete piece of music in a video cannot be transformative, and therefore is unlikely to be fair use. Coming from my perspective as a vidder who has made several highly popular anime music videos, I would disagree with this. Even though my vids use complete copyrighted songs, I (like other AMV creators) deliberately craft my videos so that the music and video are inseparable parts of a new work of art, where both mutually reflect upon the other and add new meaning and message that would not be present with either the music or the video alone. If this isn't transformative, I don't know what is. The fact that these songs would be impossible for amateur creators to license any other way should only add to the case for fair use in these situations. Personally, I would love to see a more expansive code of best practices for online video that recognizes things like vidding—even where complete songs are involved—as fair use.

These minor criticisms aside, I found this book a highly informative and insightful read on the current state of fair use law, with lots of valuable suggestions on how to reclaim and expand fair use rights in the face of long and strong copyright restrictions. It is a must-read for anyone interested in issues of copyright reform, and I hope it will lead to more and more people standing up and exercising their rights under fair use as one concrete step we can all take to fight against overly burdensome copyright laws.