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Fair use in US scholarly publishing

Introduction

Fair use – the use of a limited amount of copyright material without permission – is ill-defined in law; the volume and variety of scholarly publishing is vast; publishers, editors, and authors can be informed or innocent, meticulous or careless, reticent or frank. No short article can adequately summarize this small but vital part of the publishing world. I will merely outline the range of current practice: the different lines that are drawn between reproducing copyright material with and without permission. In addition to my own experience as an author and editor, I have drawn upon conversations with author-friends, enquiries to book and journal publishers and editors, exchanges on a lawyerly copyright listserv, and web postings on copyright and permission requirements.

Section 107 of the 1976 Copyright Act, the basic law governing fair use in the USA, states:

... the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

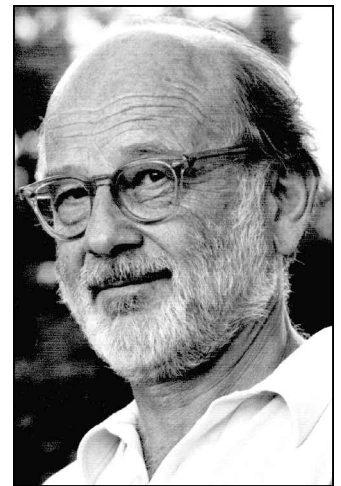
- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Congress's inability to reconcile the con-

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US law sanctions the fair use of copyright matter for scholarly purposes but defines it vaguely. The definitions employed by publishers are reviewed. In practice, restraints on fair use seem to be growing. A strong defence is warranted by its importance both to scholarship and to society.



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flicting interests of copyright owners and users produced this exasperatingly vague law. It has nourished divergent practice, a corps of copyright attorneys, and the painful, expensive, and protracted process of case-by-case judicial interpretations.

For the most part, scholarly fair use has been a peripheral issue in recent copyright debates. Central issues have involved the multiple copying of articles for classroom use, electronic transmission and copying by libraries and individuals, and the protection of access to licensed digital and electronic sources. Publishers have successfully sued to restrain unauthorized copying by commercial services and to obtain university compliance with copying rules; they have facilitated authorized copying by site licenses and royalty payments to the Copyright Clearance Center (CCC), which can now handle payments for almost 2 million copyright works of 9,000 publishers, including leading scholarly presses and journals. Scholarly fair use has evidently suffered from the consequent reduction of what faculty members (not publishers) had widely regarded as educational fair use. Neither the Association of American Publishers nor the CCC is in the business of promoting legitimate fair use for scholarly or educational purposes.

Many authorities and publishers affirm that common guidelines on scholarly fair use, especially quantitative guidelines, cannot be prepared because none are found in the law. Each case must be judged on its merit with all four factors in Section 107 considered; each publisher must set its own permission policies suited to its distinctive publications, audience, and operating conditions. That, spokesmen explain, is why neither the publishers' nor the university presses' association has issued fair use guidelines for their members.¹

Asked for any guidelines they provide their authors, many publishers replied that they had none. Perhaps they have written nothing down, but, as a practical matter, they must have rules of thumb. They cannot face each manuscript afresh, without the knowledge, experience, and expectations gained from years in the trade.

The lack of written guidelines can represent sophistication, caution, or obliviousness.

The sophisticated publisher knows the complexity of fair use, the needs of different scholars, the sensitivities of different copyright holders, the risks of stretching one or another accepted fair use boundary. He wants to handle each manuscript as the situation permits or demands, without being bound by specified rules. Christopher Scarles has described the publication by Cambridge University Press of substantial extracts from copyright work that editors judged were necessary to the author's scholarly purpose and allowable as fair use:

We really do read the author's text and think about the use of quotations . . . the two or three hours . . . this might take . . . is far better spent than the five minutes it would have taken . . . to count individual quotations and then turn, robot-like, to those damned guidelines.²

The cautious publisher recognizes little or no fair use and obtains written permission for almost all quotations or their replacement by paraphrasing. A choice example is *America in the Sixties* by Ronald Berman, later director of the National Endowment for the Humanities, who obtained permission for quotations of 15, 12, and 6 words.³ An article on Lawrence of Arabia in the January 1999 *National Geographic*, quoting 285 words from scattered parts of *Seven Pillars of Wisdom*, shows a cautious publisher voluntarily paying for needless permission. Published by the non-profit National Geographic Society, the magazine has a worldwide circulation of many millions. The article could only spur, not hurt, sales of *Seven Pillars*. The quotations clearly meet every fair use provision of the law. Yet the Society obtained and paid for permission to obviate the minuscule, but not totally impossible, risk of suit.⁴

Paraphrasing is a second route taken by the cautious publisher and economical scholar. The conflict between excessive paraphrasing, which is poor scholarship, and excessive permission payments, which make the scholar poorer, permeates many permission decisions. '[Q]uote only as much as is absolutely necessary to get your point across', a copyright manual advises. 'After all, most long quotes can be paraphrased.'⁵

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That advice runs counter to careful scholarly practice, but may nonetheless be accepted by the scholar who must pay for the permissions an overcautious editor directs him to get.

Oblivious publishers and authors give little attention to quotations. Publication may pose few dangers of infringement; possible infringements may never be noted or acted upon by copyright owners. Oblivious, overbusy, or careless persons inhabit both scholarly and trade publishing. Prominent writers relate their surprise and frequent helplessness at finding themselves plagiarized. Robert Massie's *Nicholas and Alexander* was plagiarized in a book issued by his own English publisher, Pan Books.⁶ I have twice seen my own work used by a prominent but careless scholar-publisher, once without ascription and once without permission. You cannot sue for every infringement. That knowledge and simple ignorance can perpetuate slapdash practice.

Despite the declarations of publishers and copyright authorities, all sorts of permission guidelines – perfunctory and comprehensive, qualitative and quantitative – have been prepared for editors and authors. Case-by-case judgment is viable for seasoned editors, but it is time consuming and can require diplomacy, patience, and resolution. Intelligent guidelines can ease the burden of an experienced editor contending with ill-informed authors and copyright holders who operate by rote. Crude guidelines can help inexperienced and harried editors push manuscripts along, albeit imposing needless changes or charges on hapless authors.

Responsibility for permissions

The typical publication contract assigns legal responsibility for obtaining copyright permissions to the author in such words as,

The Author warrants . . . that the Work is not a violation of any copyright [and] . . . agrees to hold harmless and indemnify . . . [the] Publisher against any claim . . . or other expense . . . arising from any . . . infringement . . .

American Historical Review authors must

'warrant that the Article . . . infringes' no copyright.

You shall . . . hold the Journal, the . . . [American Historical Association], and any . . . licensees harmless against any loss . . . or expenses . . . arising in connection with any suit, claim, or . . . settlement . . . based on a breach of the above . . . warranties.

A similar warranty may be required even of the author of a brief book review in an academic journal.

To be sure, thrusting responsibility upon an author who is irresponsible, ignorant of the law, and, worst of all, penniless will relieve the publisher of little liability. Lawyers go after money as bird dogs go after pheasants; the publisher will certainly be implicated in a suit. Did he not read, accept, publish, advertise, distribute, and sell the offensive publication? To hold the author contractually responsible for procuring permissions is not enough. He must be advised, instructed, cajoled, if necessary compelled, to get them, especially those which may make the publisher vulnerable to suit. The stubborn author who rejects serious advice may have his contract cancelled or the press may distance itself from prospective litigation. Guidelines are merely one line of defence.

A publisher's posture on borderline quotations is revealing. Should doubt be resolved by requesting permission or assuming fair use? Trade publishers tend to seek permission; university presses to rely more on fair use, but the latter's issuance of broader 'midlist' titles may move them closer to the trade publisher's outlook.

An editor at a publisher who issues both serious scholarly work and books that aim at a broader public says, 'I always stress that no matter how brief the quote, [authors] . . . should check with the copyright holder to see what he/she considers fair use . . .' An editor at a similar firm is more emphatic. Her policy is, '*always* request permission, *never* take fair use for granted; even if it's just one line, you want written permission'. The editor of several technical journals published by a major corporation writes, 'all copyrighted material is expected to be dealt

Intelligent guidelines can ease the burden of an experienced editor

'an interpretation of fair use that provides sufficient economic protection to publishers and copyright holders . . . but . . . allows scholars sufficient latitude to conduct their . . . research'

with through permission'. The American Chemical Society warns contributors to its journals, 'When there is doubt [about fair use], it is prudent to obtain permission. . . . Do not interpret . . . "fair use" too broadly.'⁷ Citing celebrated court cases whose circumstances do not match those of most humdrum scholarship, an Association of American Publishers official argues against scholarly fair use.⁸ The Authors Guild takes a similar position:

If you intend to quote or even paraphrasing [sic] the words of another author, you should obtain that author's permission. . . . We generally advise against . . . "fair use". . . . The best course . . . is . . . to seek permission . . . for all copied material. . . .⁹

Use it or lose it

Contrariwise, a number of universities and university presses stress the 'use it or lose it' doctrine that the scholar and scholarly press should judge for themselves whether their use of copyright material is fair use under the law. Copyright holders are no better qualified to do so and merely approaching them can weaken any subsequent fair use claim. A common error, one university informs faculty, is 'a request for permission to use material when no request is needed'.¹⁰ 'Unnecessarily requesting permission endangers the principle of fair use', the University Press of Virginia tells authors.¹¹ The widely used *Chicago Manual of Style* declares:

The right of fair use is a valuable one to scholarship, and it should not be allowed to decay through the failure of scholars to employ it boldly. . . . Far from establishing good faith and protecting the author from suit or unreasonable demands, a permission request may have just the opposite effect. The act of seeking permission establishes that the author feels permission is needed, and the tacit admission may be damaging to the author's defense.¹²

Copyright holders 'have no better leg up on fair use judgments than authors or editors', a university press permissions editor writes; '. . . they are more likely to attempt

to block usage that is in fact fair use'. Contributors to University of California Press journals are advised,

If, in light of these guidelines, you are confident that your proposed use of an excerpt is fair use, it is best *not* to ask for permission. Scholars should exercise the right of fair use when it applies; otherwise it could be eroded. Also, by asking . . . you would be tacitly admitting that permission is needed, thus undermining your claim that the fair use exception applies.¹³

The author who consults some authorities will come away perplexed by their 'yes, but then again, no' presentation. Thus, *A Handbook for Scholars* states,

In general, you do not need permission to quote for scholarly purposes from published material. . . . A manuscript that lacks permissions may be rejected out of hand because it's too much of a headache to contemplate all the negotiations that would be necessary to publish it.¹⁴

Bridging the publishing and academic worlds, the Association of American University Presses strives to balance their respective and, at times, conflicting interests. It endorses 'an interpretation of fair use that provides sufficient economic protection to publishers and copyright holders . . . but . . . allows scholars sufficient latitude to conduct their . . . research'. Although one might like a fuller explication of its position, AAUP appears, like trade publishers, to oppose most royalty-free educational copying;¹⁵ unlike them, it firmly recognizes the need for fair use in serious scholarly work:

Too liberal an interpretation of fair use would undermine the entire system of scholarly publishing by reducing publishers' ability to collect appropriate compensation for the value they add during the publishing process. Without adequate means of recouping costs, university presses would be jeopardized. . . . Conversely . . . [r]esearch and writing in the arts, humanities, and other disciplines depend upon scholars' ability to cite and incorporate others' work according to present fair use principles; this kind of fair

use is essential to the preservation of . . . cultures and to our increased understanding of the world . . .¹⁶

Fair use quantities

Universities and publishers have endorsed quantitative guidelines restricting free educational copying, but no comparable guidelines for scholarly fair use have gained wide acceptance. Both copyright users and owners evidently fear that, no matter how carefully qualified, putting a number of words alongside 'fair use' would become prescriptive. Nonetheless, quantitative rules abound. Authorities disdain them – 'Fair use is impossible to quantify';¹⁷ the statute is innumerate. Experts call for judgement but their judgements disagree; novice editors, publishers, writers, and scholars lack the experience needed for good judgement; many experienced persons also lack good judgement. Hence, the emergence of numerical guidelines.

Those I have seen range from 50 words of text or less to a widespread ceiling of 500, often with exceptions which require written permission.

A firm which publishes many scholarly journals requires contributors to obtain permission for any quotation, 'even 50 words'. Alert, a Chicago publisher of newsletters with legal, business, and research information, asks no permission 'to reprint 50 words or less of an article or review' but implores, 'Please honor our copyright; do not reproduce . . . [over 50 words] without prior permission. . . . We are pretty liberal with granting permission for educational purposes and in-house copies.'¹⁸ Plenum considers quoting up to 90 words from one of its books and journals fair use but asks its authors to get permission 'for all material to be re-printed with the exception of a few words'. Associated University Presses requires permission for 'any single quotation in excess of 150 words' or 'numerous brief quotations' totalling 500 words or more from one work.¹⁹ University Press of America requires written permission to quote more than 250 words from one scholarly source.²⁰ A small historical journal and Beacon Press also use 250 words

as their fair use cut-off; the journal editor calls this 'the old requirement'. Sage²¹ and Greenwood use 300. A handbook says that 300 words from the same work, either in one quote or cumulatively, is many publishers' 'benchmark';²² it may derive from the one-time notice accompanying review copies of books that passages up to 300 words could be quoted. Transaction Publishers says 400 words; Erlbaum, Lang, the American Historical Association, the American Psychological Association, and the *American Journal of Psychiatry* generally draw the line at 500 words, 'thought to be the upper limit of fair use'.²³ Nonetheless, one press allows 800 words and another 1,000.

Broad phrases often replace a specific word count in guidelines. They state that 'brief extracts', 'small amounts', 'a few sentences or a paragraph', 'a substantial paragraph', or 'a few successive paragraphs' may be used without permission. One bars 'long passages'; another allows 'a total of less than one page from a book.' UMI, the Michigan dissertation microfilm and publication service, questions quotations longer 'than one and one-half single-spaced pages'.²⁴ Such diverse guidance confounds the search for a common path through the fair use wilderness.

As the law speaks of the 'substantiality of the portion used' – the *proportion* as well as the absolute *amount* – guidelines often state that the percentage of a work is a significant or decisive factor in assessing fair use. Thus, the American Psychological Association permits 500 words to be quoted from all its journals except *Contemporary Psychology*, where a 100-word limit applies 'as the articles are shorter'.

Because they are commonly brief (and for other reasons), severe restrictions are usually placed on the fair use of extracts from newspaper stories, poems, lyrics, short stories, letters, tables, and other short works. *The Chicago Manual* observes that 'proportion is more important than the absolute length of a quotation'; quoting 500 words from a 5,000-word article is 'bound to be more serious' than quoting 500 from a 50,000-word work.²⁵ The University Press of

Experts call for judgement but their judgements disagree

Virginia paraphrases this passage in its instruction and asks authors to

List each text portion of your MS . . . written by someone other than yourself [aside from brief 'prose quotations' that are clearly fair use] . . . indicate the percentage of the total work (such as chapter, essay, novel, short story, diary, letter, interview) that you reproduce . . .²⁶

Associated University Presses requires permission for 'any quotation, regardless of length, in excess of 10% of the entire work'.²⁷ Ten per cent is the sticking point at several presses, though a colleague says that his British publisher allowed 33% of a newspaper story as fair use. One publisher confines extracts from tables to 300 words – 'one numeral equals one word'!

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A publisher's insistence on limiting the portion of a work quoted without permission and the classification of a letter, editorial, news story, obituary, op-ed piece, column, or headline as a 'work' can shock even senior scholars. When, a few years ago, I edited an issue of a social science journal, written permission was demanded for 'anything, even a phrase, quoted from a newspaper article, poem, or song'. The publisher's guidelines explained that 'even a phrase may be a large enough percentage of such a work to require permission' but not what 'large enough' meant. The journal's regular editor (K) and I protested. One contributor, a prominent professor who had edited a journal utilizing many newspaper sources, wrote, 'No. I have published over 20 books & 400 articles . . . short quotes . . . do not need permission, especially from newspapers. . . . I have never requested permission for quotes like these.' The editors of four major disciplinary journals, whom K consulted, termed the policy 'bizarre, outrageous, unheard of'; the journal's lawyer stated that case law permitted 'a much freer use of short quotations . . . by scholarly journals'.²⁸ In response, the publisher changed 'a phrase' to 'anything over a couple or so sentences (depending on their length) . . .' Neither the number nor proportion of words permitted was specified nor did the publisher ever ask about the proportion quoted. As the issue was going into production, an

editor phoned. I must, she said, get written permission for 65 words quoted from a *New York Times* story, drop the quote, or paraphrase it. I got permission for \$10. Today, *The New York Times* charges any scholar who asks for permission a minimum of \$100.

Poems and lyrics are tightly controlled. According to one academic press,

Quoting more than three lines of poetry . . . is inadvisable . . . if the poem is only ten lines long, quoting even one full line would likely exceed fair use . . .²⁹

A textbook publisher permits at most two lines of a poem or lyric as fair use. 'John Wiley . . . requires permission for any portion of a poem or song . . .'³⁰ The fair use of *anything* from a 17-syllable Japanese haiku is hotly debated by copyright lawyers. Lyrics are even more sacrosanct. 'The music publishing industry insists that lyrics cannot be quoted, even briefly, even in scholarly works, without permission – and the industry has the will and the means to enforce its position. *Always obtain permission to use song lyrics . . .*'

In one farcical case, a publisher insisted that a Washington scholar get written permission to quote from a Hong Kong handbill whose source was unidentifiable.

Science, the *Journal of the American Medical Association*, and other scientific journals require written permission for personal communications, which may appear to serve as an endorsement. Publishers have been exceptionally severe on the use of unpublished sources: diaries, letters, manuscripts, and other private documents. The policy, bolstered by 1986 and 1990 court decisions, hit historians and biographers hard. Their lobbying led Congress, in 1992, to add a sentence to the 1976 Copyright Act: 'The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors' – the four factors noted at the beginning of this paper.

The amendment did not throw archival sluice-gates wide open. The 1993 edition of *The Chicago Manual* states, 'Caution, but not excessive caution, should now be the watchword',³¹ yet it is hard to discern a

marked liberalization in the fair use of unpublished sources. Indeed, in 1997, a leading archivist held that 'the courts have been increasingly more restrictive in the application of . . . "fair use" to unpublished material'.³² The Association of American Publishers insists that 'Permission should be requested for a quotation of any length from unpublished sources',³³ and numerous scholarly presses and journals agree.³⁴

The fair use of a whole 'work' is virtually precluded. 'Use of anything in its entirety . . . is hardly ever acceptable' to *The Chicago Manual* – tables, charts, maps, art, photographs, other illustrations, and, of course, poems, letters, short stories, articles, and so forth.³⁵ The American Medical Association's requirement of written permission 'to adapt a part of or reprint an entire table or illustration' is characteristic of scientific and medical journal policy. 'Photographs and works of art may not be reproduced, enhanced, or altered without permission of the copyright owner . . .'³⁶ The author must get the subject's permission to use a photograph of, or to 'report sensitive . . . information' about, an identifiable person.³⁷

A bold view might accept the fair use of one factual graph or chart, *The Chicago Manual* suggests, adding that a conservative view sees no fair use of a graph or picture.³⁸ With certain exceptions, the conservative view seems to dominate scholarly publishing. The American Psychological Association is relatively liberal in allowing the fair use of one but not two tables from its journals.³⁹ The black-and-white reproduction of all or part of a painting may occasionally be tolerated, but not a colour reproduction of the whole work. The more complete, accurate, and prominent the reproduction, the less likely is it to be fair. Where the work is out of copyright, a photograph or colour slide is usually owned by a museum, archive, or photographer from whom permission must be sought.⁴⁰

Biomedical abstracts, accepted as 'a fair use . . . that does not diminish the market value of the original article', have been an exception to the rule against reproducing whole works. However, their compilation and provision by commercial publishers and

internet services threatens their fair use status.⁴¹

Rule versus practice

The foregoing rules about using copyright material with and without permission do not necessarily correspond to the actual practice of a press or publication. Rule and practice may be identical or diverge. It would be simple to survey the practices of a sample of editors and authors and simple, if more tedious, to examine those of given publications, yet that kind of empirical study has evidently not been conducted.

Many factors can lead a publisher to modify his general rules in a specific case – so many that he may prefer to function with (or to circulate) no rules at all. Some will be briefly mentioned here. They derive from copyright law, court cases, and a swath of knowledge and experience.

- The fair use of creative work – novels, poetry, plays, films, radio and television scripts, art – is more limited than that of factual work.
- The right merely to reproduce work is more limited than reproducing it in order to comment on, criticize it, or use it as a point of departure for additional, original work. '[W]e need to judge whether the material is to be used for its own sake, or to demonstrate, explain, or describe the user's ideas. It is the *context* and *purpose* of longer quotes, rather than their length, that will decide . . .'
- The use of a well-known writer's work is more limited than that of a less well-known writer.
- Use of 'the heart' of a work or 'a particularly powerful, interesting, or juicy part' is less acceptable than use of other parts.⁴²
- Both the content and context of an extract should be accurately reported; a use that misrepresents the original text is unfair.
- The degree to which a use hurts the market for the original is important to assessing its fairness; the university press association contends that this should be the major factor in determining fair use.⁴³

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Discussion

The scope of fair use in scholarly publishing seems to be shrinking like a melting glacier (though this cannot be firmly established without a study of earlier usage). Doubtless, fair use continues intact, untroubled, and unnoted in many large traditional and small specialized areas of scholarship. Publishers and scholars are too numerous and variegated to know and follow identical rules and procedures. Yet large trends, impelled by large forces, by inflated notions of intellectual 'property', intellectual 'assets', and a 'knowledge-based' society, serve to reduce its domain. The strongest countervailing forces, perhaps, are the anarchy and technological abundance of the American scene.

The 1998 Digital Millennium Copyright Act limits universities' financial liability as internet service providers of infringing copyright material posted by users if they take prescribed actions, including informing all users about how to comply with copyright laws. Accordingly, they have instituted programs to inform faculty, students, and employees about copyright law, especially educational copying provisions. What might be viewed, in part, as a counter-educational campaign emphasizing the rights of copyright owners and the restriction of free copying has been conducted by the CCC. The CCC is also conducting a vigorous campaign to survey the copying practices of university hospitals and libraries and induce them to buy a license authorizing unrestricted copying for a substantial annual fee. The high cost of scientific journals had already led some universities, librarians, and scholars to question the assignment of copyright and reprint rights to the publisher as a condition of journal publication. Could not professors at least reserve the right to distribute their own work on their campus? Might their work even be construed as 'work for hire' and hence be *owned* by the university?⁴⁴ Free spirits see in the internet a means to bypass the entire copyright system. These developments have focused attention on 'intellectual property' issues; university bodies have been established to study and formulate institutional policies regarding them.

Despite – and because of – this surge of interest in the ownership, marketability, cost, and use of intellectual wares, their fair use in scholarly publishing has been neglected. Total permission payments for using copyright sources in scholarly publications are usually small compared to those for reprinting entire works – articles, chapters, stories, poems – in handouts, compilations, and anthologies for student use. Scholars continue to quote varying amounts without permission, as they have long done, until an editor, alerted by a lawyer or the brouhaha about educational copying rightly or wrongly requires it.

Little has been done to rally support for the legitimate scholarly use of copyright sources. Universities have been so busy setting their educational copying in order and so preoccupied with library issues and costs that scholarly fair use has been of small concern. If a strong national voice in defence of scholarly fair use has been sounded I have not heard it. Some points that a defence might embrace are:

- Overly broad copyright declarations, such as 'All rights reserved', should be amended to 'beyond those of fair use'.
- Commercial interests should be educated to recognize the legitimacy of fair use,⁴⁵ and, insofar as such education is futile, scholarly publishers should disregard them when the law clearly sanctions fair use. One editor attributes the shrinkage of scholarly fair use to the aggressive stance of entertainment moguls.⁴⁶ If they cannot be placated by diplomacy, they must be fought in and out of court.
- Carefully vetted exemplary publications should be undertaken with extensive, but necessary, fair use of copyright sources for impeccably scholarly purposes.⁴⁷
- Balanced studies should be conducted to determine the frequency with which unnecessary permissions are, and necessary permissions are not, obtained.
- An effort should be made to prepare fair use guidelines acceptable to publishers and scholars.⁴⁸ Failing that, separate guidelines would clarify the current understanding of each party. Some judicious authorities prefer obscurity to any clarif-

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entire copyright
system*

ication of fair use principles, because it gives them greater discretion. But it leaves many scholars at the mercy of publishers whose first concern is safety, not scholarship.

- Above all, scholarly fair use should be defended on its merit. Without it, scholarship grows slovenly, and knowledge, supposedly essential to the economy and society, uncertain. The defence of scholarly fair use is the defence of something more important and enduring than marginal permission payments.

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38. *Chicago Manual* (1993), p. 148.

The defence of scholarly fair use is the defence of something more important and enduring than marginal permission payments

39. *Publication Manual*, 4th edition. Washington, DC: American Psychological Association, 1994, p. 299.
40. *Chicago Manual* (1993), p. 147. I am also indebted to Robert A. Baron for information on the reproduction of images.
41. American Medical Association. *Manual of Style*, p. 125.
42. Jassin and Schechter (n. 5), p. 33.
43. 'The AAUP maintains that assessments of whether a use is fair should . . . focus primarily on . . . market impact . . .' (note 16), a disputable position.
44. Sanford Thatcher, Chairman of the Association of American University Presses' Copyright Committee, writes, 'It is not certain . . . that a university could not successfully argue for having the scholarly publications of its faculty . . . construed as work made for hire' (letter, *Chronicle of Higher Education* 5 August 1992). More moderately, a committee of the California and New York state and New York City university systems reasons, 'Rather than assign all rights to . . . publishers . . . the university could support the professor in the effort to retain rights to reproduce and distribute . . . [his] work for educational and research purposes throughout at least . . . [his] home campus' (Consortium for Educational Technology for University Systems. *Ownership of New Works at the University*. Seal Beach, CA: California State University Trustees, 1997, p. 20). Responding to such suggestions, the Association of American University Professors upholds the rights of faculty 'as the copyright owner of works . . . created . . . at the faculty member's own initiative for traditional academic purposes'. New ownership forms that may develop in distance learning, videotaping, and other new types of instruction, should be detailed in written agreements ('Distance education and intellectual property'. *Academe* May/June 1999: 43-5).
45. For some copyright owners, such as Coca-Cola, Disney, and film studios, an editor writes, 'there simply is no such thing as fair use. . . . It's scholarly suicide to ask those types of multinationals for permission; nonprofit scholarly use does not exist in their world.'
46. Suits by 'the big guns' have 'had a ripple effect among publishers, particularly scholarly publishers', this editor said.
47. A good example is 'Readin' country music', a special issue of *South Atlantic Quarterly* Winter 1995, later converted into a book (Ticchi, C., ed. *Reading Country Music*. Durham, NC: Duke University Press, 1998). The song lyrics quoted in these publications were closely examined by editors and the Duke University counsel to determine that each was fair use. Ticchi wrote: '. . . music publishers are notoriously unwilling to grant permission for quotation of lyrics without . . . prohibitively expensive fees. . . . Yet free speech is abrogated when scholarly interpretive arguments must . . . exclude the primary evidence on which they are based, or . . . reduce [it to] . . . paraphrase. . . . [T]he principle of fair use is being upheld here' (*South Atlantic Quarterly*, *ibid.*, p. 5). Kay Alexander of Duke University Press, who recounts this episode, states that no copyright holder has complained about either the journal or the book.
48. At present, there are no US guidelines comparable to those agreed upon by the Society of Authors and the Publishers Association; to my knowledge, no group of universities, publishers, scholars, or writers has issued any.

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Letters to the Editor

The Editor would welcome your views or comments on any item in the journal, or on related matters. Please write to the Editor:

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