Reclaiming Fair Use: How to Put the Balance Back in Copyright

By Patricia Aufderheide & Peter Jaszi
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Reclaiming Fair Use: How to Put the Balance Back in Copyright acts as a guide for those seeking to untangle the convoluted system of copyrights and the legal implications of using copyrighted material. Copyright exists as a looming entity in the background of creative discussions and productions whose purpose is to protect the holder from infringement on their ideas and investments. However, the darker side of copyright law is that it diminishes the market and culture for new ideas by punishing those who utilize the work of others in collaboration with individual efforts. The authors take a historical approach in demystifying copyright law in order to bolster the doctrine of fair use as a means of utilizing copyrighted material without fear of litigious copyright holders. The use of real world anecdotes combined with legal and doctrinal approaches allows the reader to more clearly understand their rights when it comes to the use of copyrighted material. The book acts not only as a guide but also as propaganda for increased education on fair use.

Author Patricia Aufderheide adds her passion for film and media arts by founding the legal discussions on her own experiences in the creative industries. Her background in social media adds depth to the discussion of fair use by giving valuable insight into the

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2 http://www.american.edu/soc/faculty/paufder.cfm.
individuals and works fighting to utilize copyrighted material while avoiding litigation or often extraordinary licensing fees.\(^3\) Author Peter Jaszi, a colleague of Aufderheide, brings his background as a copyright lawyer by breaking down the history and specifics of copyright dogma.\(^4\) The book begins by elaborating on the fear that copyright zealots have sought to instill in the creative public but soon moves on by dusting off the idea of fair use and bolstering it through anecdotal advice and guidance on how it can be effectively used.

The book opens with the authors’ discussion of the ongoing culture of fear that has kept copyright the bane of creative existence.\(^5\) They relate stories of professional and amateur individuals who, by their works or productions, have toed the line of copyright violation. Uncertainty is highlighted as one of the greatest tools the copyright holder utilizes in protecting his material. Statutory fines and litigation threats are usually enough to deter most people from the thought of taking any part of copyrighted material for their own use. Aufderheide and Jaszi offer the mission statement of their book— to provide an education on the usage of fair use as a doctrine and affirmative defense.\(^6\) Their intent is not to guide those who wish to illegally skirt copyright law and pirate material for their own personal profits.\(^7\) The target audiences of their guidance are students, teachers, filmmakers, artists and musicians who see fair use as a tool to create effectively.\(^8\)

\(^3\) *Id.*
\(^4\) [http://www.wcl.american.edu/faculty/jaszi/](http://www.wcl.american.edu/faculty/jaszi/).
\(^5\) See Aufderheide and Jaszi, *supra* note 1, at 1.
\(^6\) See Aufderheide and Jaszi, *supra* note 1, at 8.
\(^7\) See Aufderheide and Jaszi, *supra* note 1, at 8.
\(^8\) See Aufderheide and Jaszi, *supra* note 1, at 9.
Moving on from their mission statement, the authors briefly discuss the evolution of copyright law as an entity that seeks to protect holders for long periods of time. Copyright law was strengthened in order to protect individual efforts in art and science, however the authors note how this protection became a hindrance on further invention. They posit a three factor test that would allow any individual to estimate whether their usage of copyrighted material would fall under fair use. This fair use calculation consists of asking whether the use was transformative, whether the amount of material taken was appropriate, and whether it was reasonable. 9 This user-friendly test sets the stage for the rest of the book as the discussion moves towards the application of fair use as protection for creativity and education.

Presented early on and felt throughout the work is the notion that the copyright holder is the villain and the fair user is the freedom fighter seeking to liberate creativity. The authors portray copyright holders as fear mongers. 10 Rather than educate, these pro-copyrighters would use fear and threats to deter potential fair users from any use of copyrighted material. Aufderheide and Jaszi stress education but relate how efforts to educate in the past have only lead to increased confusion and more hesitation.

The focus of the book then shifts from a historical narrative on fair use to the legality of its application as an affirmative defense. Again the authors use anecdotes to allow the reader to sink their teeth into facts that are easily relatable. The absence of “legalese” in this discussion makes it interesting for the layperson and lawyer alike. Not only could this be used as an educational tool for the aspiring copyright lawyer, it also could be used as a practical guide by those who want to know the boundaries of fair use.

9 See Aufderheide and Jaszi, supra note 1, at 24.
10 See Aufderheide and Jaszi, supra note 1, at 48.
Their chapter, “Fair Use in the Courtroom,” lays out the thought processes Judges use when writing fair use opinions. The tone of the chapter is one of hope, as court decisions have historically looked kindly on fair users. Transformative practice arguments have been successfully made in fair use defenses. As a comment on what not to do, the authors chose to insert a famous case in which a video company spend extensive time and money on an expansive Elvis video biography. The company “borrowed” clips from performances and similar media for use in their production, however since the clips were used as they were originally intended, as Elvis entertainment, the transformative element was lacking. Moving out of the courtroom, the book then looks at contemporary practices in fair use education and how technological pioneers are asserting their fair use rights.

The final chapters deal with how fair use education has culminated in best practices doctrines. Documentary filmmakers were among the first groups to draft and release these best practice doctrines. Best practice doctrines are documents that act as aids and guides to those in the same field seeking to know their rights and limitations in the world of copyrights. Taking a clue from documentary filmmakers, many groups have drafted and disseminated similar best practice documents to inform those ignorant of their rights how to proceed in their creative field without worry of litigation or penalties. These documents have been the driving force behind creative practice as the authors note

11 See Aufderheide and Jaszi, supra note 1, at 70.
12 See Aufderheide and Jaszi, supra note 1, at 82.
13 See Aufderheide and Jaszi, supra note 1, at 86.
14 See Aufderheide and Jaszi, supra note 1, at 87.
how documentary filmmakers, remix artists and digital inventors have ratified best practices in order to foster the furtherance of creativity in their fields.

The penultimate chapter addresses the practical ways in which creators can leverage fair use under current law and practices. This acts a good summation of the book as a whole as it aims to be a guide on how to utilize fair use to stimulate creativity. This transitions to a final chapter discussing the implications of copyright in the international community, highlighting the differences between foreign copyright law and current U.S. practice.

The book is well organized and written in a manner that holds the readers attention. The balanced mixed of anecdote, history, and law keep the reader engaged. Curiosity drives the book forward as it logically progresses through the birth, life and application of fair use and fair users. It incorporates contemporary artists and figures to keep the issues relevant. Aufderheide and Jaszi provide an easily comprehensible education on fair use and hope that their work will encourage others to create. The authors seek to put the balance back in copyright by educating creators on how to wrest back usage power from copyright holders. It is clear throughout the book that copyrighters have sought to retain complete control over their product, leaving little room for other users. The book is a guide for those who would assert their right as a fair user and lawfully utilize those products and creations held under current copyright.