

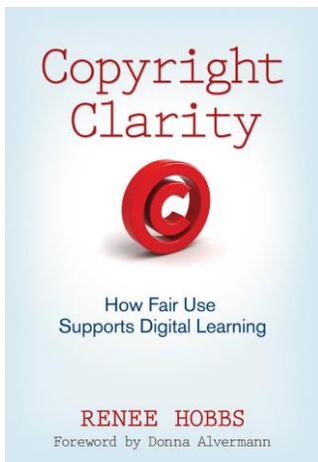
## Perspectives on Copyright in Education: A Review of Selected Works Pertaining to Copyright and Fair Use in the Educational Setting

Renee Hobbs (foreword by Donna Alvermann), **Copyright Clarity: How Fair Use Supports Digital Learning**, Thousand Oaks, CA: Corwin, 2010, 144 pp., \$15.63 (Kindle), \$28.95 (paperback).

Patricia Aufderheide & Peter Jaszi, **Reclaiming Fair Use: How to Put Balance Back in Copyright**, Chicago, IL: University of Chicago Press, 2011, 216 pp., \$9.99 (Kindle), \$17.00 (paperback).

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### Rene Hobbs: *Copyright Clarity*



Copyright law is an area of concern for many, if not all, educators, from those working in K–12 up to the university level and beyond. In the book **Copyright Clarity: How Fair Use Supports Digital Learning**, author Renee Hobbs attempts to convey basic rules and guidelines of copyright law and fair use analysis in a manner that is clear and easy for educators to understand regardless of their level of familiarity with copyright law. This book was chosen for review because it pertains to copyright law in digital education, which is of particular interest to me as an instructional technology PhD student with a background in law.

The book is divided into five chapters and two resource sections. The chapters discuss background information and provide exposition on how to handle copyright issues in practice. The author also provides a commentary on the future of copyright law in the United States. The two resource sections outline how to formally present information on copyright in the academic setting with peers as well as relevant portions of the copyright code and resources for further reading. The chapters examine major concerns and questions that educators would likely have about copyright law as it applies in the educational context. Along with the main purpose of educating readers on copyright issues and clarifying surrounding misinformation on the subject, through this book Hobbs seeks to combat attempts to limit copyright user protections by industry lobbyists and well-meaning but misguided educational organizations seeking bright-line rules about what is and is not appropriate use of copyrighted materials. These ever-present attempts by those trying to limit fair use in all areas of life, including in educational settings, are clearly a key factor that led Hobbs to write the book. After discussing the state of copyright law and how to properly analyze fair use, Hobbs closes by examining possible landscapes for copyright law in the not-too-distant future, depending on whose view of copyright law prevails.

As noted in the introduction, the information in this book is presented in a manner intended to be general enough to be applicable for educators at all levels of instruction. The book begins by laying the foundation for why copyright issues are important to educators at all levels by providing a brief synopsis of how educational use of media has evolved throughout the last thirty plus years, with a focus on media literacy. Hobbs then expands beyond media literacy to explain why educators of all types should be concerned with copyright by going through a list of interests that she believes all educators share. Hobbs also identifies three incorrect positions commonly taken by educators as a result of the extensive uncertainty about what is permissible use of copyrighted materials. Some use copyrighted material inappropriately because they believe that any use is allowable as long as it is educational, or that use and alteration of copyrighted materials is appropriate as long as it is kept exclusively within the classroom, while others refuse to use any copyrighted materials except in very limited circumstances. As Hobbs explains throughout the book, educators can determine what appropriate use of copyrighted materials entails by working through the four-part conceptual framework for fair use set forth in the United States copyright code.

Building on that conceptual framework, throughout the book Hobbs periodically discusses the concept of transformative use, the presence of which is vital for a fair use finding for user-altered copyrighted works. Hobbs provides detailed analysis of both the four-part framework as well as the transformativeness concept through the case *Bill Graham Archives v. Dorling Kindersley (DK)*. The case illustrates how use that at first blush appears to violate copyright in fact satisfies the fair use doctrine through transformation. This concept of transformative use is a vital though hard to define aspect of the framework for determining fair use when determining whether a copyrighted work altered by a user will likely be protected under the fair use framework. While Hobbs acknowledges that the *Bill Graham* case does not directly involve fair use in educational settings, it still provided the relevant framework to address user-altered copyrighted works, fair use, and transformativeness.

In the book Hobbs also provides real world examples of appropriate fair use concepts in the classroom (in both online and face-to-face settings). One such example is that of an online photo assignment designed for students in the K-12 system in which students analyze photographs taken by two different well-known photographers and discuss the differences and similarities of the photographers' work via an online slide show. After presenting this example, Hobbs walks the reader through a four-part fair use analysis of the example to aid in understanding how to apply the framework in a scenario equivalent to what the average educator might encounter in practice. Hobbs also touches on the unique constraints related to the digital use of copyrighted material in purely online courses under the TEACH Act, a section of the copyright code that Hobbs contends ". . . put[s] artificial limits on what can be shared, requiring that the use of copyrighted content must be 'directly related' to the teaching content" (Hobbs, 2010, Copyright, fair use, and online learning, para. 4). Such moves to limit fair use for educators leads to some of the main reasons the author wrote this book: to dispel incorrect notions about what appropriate use of copyrighted materials for educators under the copyright code is, as well as to clarify the rights of users and the positive policy reasons behind those user rights.

Hobbs' concern about the prevalence of "negotiated agreements on fair use" (2010, Negotiated agreements on fair use) for educators that are promulgated by industry lobbyists and well-meaning

educational organizations ostensibly to achieve some level of clarity for the average educator is a theme that runs throughout the book. However, these proposed standards, such as those put forth by the Conference on Fair Use and the Consortium of College and University Media Centers, have instead led educators to believe that the standards carry the force of law. They do not, however, and would, if followed, narrow fair use protections for copyright users while falsely expanding copyright protection for owners. Hobbs follows this discussion by illustrating the commonly proposed "guidelines" that are likely to mislead educators into believing that acceptable uses of copyrighted materials is a violation of copyright law, taking advantage of the prevalence of misinformation on this topic.

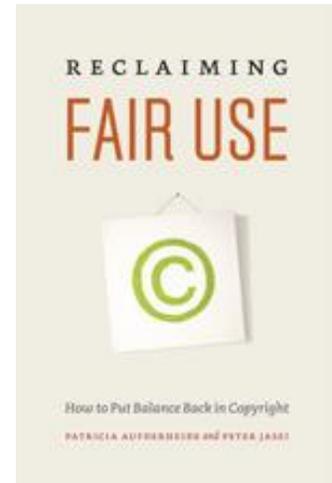
Throughout the book, Hobbs does an admirable job of relating and acknowledging the likely discomfort many readers have with the idea that they should make individual assessments themselves regarding the appropriateness of desired uses of copyrighted materials in their classes. Hobbs recognizes that many educators rely on "experts" at their institutions when they have questions relating to copyright issues—people who may potentially advise them against appropriate use of materials due to an overly cautious desire to protect against litigation. Further, being put in the position of making an individual assessment of fair use can be intimidating when the potential for threatening behavior and lawsuits from copyright owners could be the result—even when the use is protected. This leads to the heart of Hobbs' desire to spread awareness of copyright law among educators and to encourage them in turn to educate their students about appropriate use of copyrighted material. It is obvious that Hobbs believes that raising awareness in the educational community of user rights in copyright law will help to curb the tide of industry special interest groups chipping away at fair use and general copyright user protection.

Overall, this book provides a clear and understandable discussion of the basic aspects of copyright law that educators will likely need to understand to make informed decisions about what types of use of copyrighted content is acceptable within their classrooms—whether those classrooms are in person or online. Further, explanations of relevant terms and concepts are interspersed throughout the entire book to help prevent readers from getting confused about unknown concepts. While Hobbs makes a very logical and sincere argument for the position that educators are being unfairly discouraged from appropriate fair use because of overarching industry pressure along with educators' understandable reticence about running afoul of the law, Hobbs does get a bit heavy-handed with the language used, which causes the book's tone to seem a bit self-righteous at times. This relatively minor issue aside, the book, despite its age, serves to provide educators with a plainly worded, easy-to-read guide on how to determine appropriate use of copyrighted material in the classroom. Further, while this book is not as detailed and nuanced as an academic treatise on the topic, it serves its intended purpose well and provides educators with a quickly digested tool set with which to handle academic copyright concerns.

#### **Patricia Aufderheide and Peter Jaszi: *Reclaiming Fair Use***

Another stakeholder who has made great efforts in attempting to aid educators in discerning how to handle fair use issues is Patricia Aufderheide, a professor of communications at American University (Aufderheide & Jaszi, 2011). Aufderheide has worked extensively in helping various scholarly communities develop codes of best practice regarding appropriate fair use within their fields.

In the 2011 book ***Reclaiming Fair Use: How to Put Balance Back in Copyright***, Aufderheide and coauthor Jaszi provide an excellent and detailed history of fair use in the United States generally and within the education field, and, specifically, visual education fields. Unlike Hobbs' book, the majority of Aufderheide and Jaszi's book reads more like an overview of the treatment of fair use within the law and academia and less like a handbook for instructors in using fair use in their own practice. In transitioning from the more academic tone to a more practical approach, Aufderheide and Jaszi discuss their work in helping documentary filmmakers develop the *Documentary Filmmakers' Statement of Best Practices in Fair Use*. From there they relay their experiences helping develop other codes of fair use as well as the efforts of others, such as Hobbs, to construct such codes for their own fields. They also examine the differences in the problems being addressed in those fields as opposed to those of the filmmakers. From this discussion of their efforts, the authors take an even more practical turn, providing readers with guidance on how they themselves can view fair use in copyright. The appendices at the end of the book offer advice and a number of useful resources, including a discussion about how to go about developing a code of best practice in the reader's own field, a list of already existing codes of best practice in fair use, a best practice template, and common myths and related reality about fair use, as well as answers to the fair use problems examined throughout the book.



### **Recent Efforts**

Since their 2011 book, Aufderheide and Jaszi have continued their work, and with the College Art Association they have developed a *Code of Best Practices in the Visual Arts*, which attempts to clearly explain how and when the visual arts community should apply the code as well as delineating when it is not applicable (College Art Association, 2015). There are five principles discussed in the code: art creation, art education, analytic writings on art, museum use of art, and "online access to archival and special collections" (College Art Association, 2015, p. 3). The code then goes on to clearly describe each principle, the scenario in which the principle applies, and any relevant limitations (College Art Association, 2015).

Most recently, Aufderheide conducted research with Sinnreich that reviewed the level of awareness among communication scholars of the rights that exist under copyright law as a result of the promulgation of the *Code of Best Practices for Communication Scholarship* by the International Communication Association (Sinnreich & Aufderheide, 2015). From those surveyed, the authors found that many scholars would engage in more sharing and appropriate use of copyrighted materials if copyright issues, as most scholars believe them to be, did not exist (Sinnreich & Aufderheide, 2015). Another point made is that while awareness of fair use and the existence of the code has risen among those surveyed, the older generation of scholars is still less likely to use materials falling under Creative Commons licenses or other alternatives. In addition, many scholars self-censor their own work as a result of copyright concerns (Sinnreich & Aufderheide, 2015). Sinnreich and Aufderheide (2015) note that many of the scholars surveyed believed that their understanding of fair use was better than it actually was; however,

they still did not feel confident in knowing how best to exercise those rights despite the increase in cognizance about fair use since the creation of the code in 2010.

### **Conclusion**

Reviewing the observations made and positions held by the scholars discussed in this article reveals a common belief: Most scholars, regardless of the field, are hesitant to act on the rights available to them under the fair use exception because they are being dissuaded from doing so by their institutions, because there is industry misinformation about the rights afforded under the copyright code, or because of their own confusion about what those fair rights use entail. It is clear, that Hobbs, Aufderheide, and others believe that educators will avail themselves to these rights more often if they are made more directly aware of them in a more easily digestible manner. Further, they believe that to educate and aid scholars in raising awareness of the fair use rights already afforded them under the current copyright law, and encouraging a strong network of solidarity among professionals in those fields in asserting those rights, are the most likely ways that educators and professionals will begin to strengthen their position as they assert their rights in the face of misinformation and industry pressure to do otherwise. While this is true, Hobbs' assertion that there is no absolute certainty when fair use is concerned until there is a court ruling on the matter is likely to remain true.

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