Communication Scholars and Fair Use:
The Case for Discipline-Wide Education and Institutional Reform

ARAM SINNREICH
Rutgers University, USA

PATRICIA AUFDERHEIDE
American University, USA

A survey of 350 communication scholars internationally shows that, although scholars are increasingly aware of fair use and (when aware of it) benefit from the Code of Best Practices in Fair Use for Communication Scholarship, they continue to suffer from confusion and ignorance about how to apply this feature of copyright law that is crucial to their work. Most are not aware of the code, although those who use it report success. The survey results point to the need for discipline-wide education and application of the code's affordances for institutional reform.

Introduction

Fair use, a copyright doctrine that permits unauthorized copying in some situations and is commonly associated with art and journalism, plays an important role in scholarship. The implications range from academic freedom to institutional liability to the basic human right of access to knowledge. In this study, we review empirical data based on a survey of 350 communication scholars from around the world, examining the role that fair use plays in this community's work and the degree to which awareness and employment of the doctrine serve as boons or impediments to the production of knowledge.

Although much research of communication policy focuses on the structure of policy or the politics of its design, this study aims to provide a contextualizing cultural perspective. It focuses on policy's impact on the ground, in practice, thereby offering a concrete basis for debates that are too often argued solely in abstract terms.

U.S. copyright policy is designed to stimulate the production of new culture, both by offering creators a limited monopoly over the expression of their ideas and by limiting that monopoly sufficiently to permit new culture to be generated on the platform of existing culture (Hyde, 2010; Kaplan, 2005; Netanel, 2008; Patterson & Lindberg, 1991). More than a century of industry pressure to extend copyright has resulted in monopolies that are longer and stronger than ever before. Although large, content-holding media companies argue that this is crucial to stimulating creativity, there is much evidence of creative choice that has been limited by extending these monopolies (Aoki, Boyle, & Jenkins, 2008; Boyle, 1996, 2008; Demers, 2006; Lessig, 2004; McLeod, 2005; Sinnreich, 2010; Tushnet, 2009; Vaidhyanathan, 2001).

In the United States, the fair use doctrine exerts a check on cultural monopolization, permitting copyrighted material to be used for a new purpose, without permission from or payment to the rights holder, provided that only amounts appropriate to the new purpose are taken and thus existing markets are not damaged. This doctrine has risen rapidly into prominence as a primary way for new creators to get access to copyrighted material, as other avenues for unauthorized access to existing culture have been closed (Aufderheide & Jaszi, 2011; Netanel, 2011).

Although it was first codified in the Copyright Act of 1976, fair use has existed in U.S. common law since 1841. Even today, it remains a somewhat fuzzy notion; the law describes it only abstractly, with four general considerations (the nature of the work taken, the purpose of the new work, the amount taken, and effect on the market), and a recommendation to consider any other relevant factors. The law is also challenging to employ, because it can be used only as a reactive defense against claims of infringement rather than a proactive method of ensuring the legality of a use. Case law related to fair use is sparse, contradictory, and, as is typical, deals primarily with unusual situations. Thus, it is difficult for many creators and scholars to understand when fair use applies best to their activities and when they and their institutions may face unacceptable levels of risk. Communication scholars, among others, have documented the cost of such confusion and the inability to do reliable risk assessment (Aufderheide, Hobbs, & Jaszi, 2007; Flynn & Jaszi, 2009; International Communication Association, 2010). This is why several creative communities in the U.S. have crafted their own codes of best practices through deliberative processes overseen by legal advisors (Aufderheide & Jaszi, 2011).

Communication scholars created such a code in 2010 through their professional association, the International Communication Association. The code was then endorsed by another large professional association, the National Communication Association, and is available on both associations' websites.[1]

This study specifically investigates how communication scholars currently employ fair use since the creation of that code, and specifically whether—and if so, how—those practices may have changed since the release of this document.

Method

A survey was administered online via Qualtrics and promoted through the International Communication Association, the National Communication Association, by some ICA division mailing lists, and through personal networks of scholars who were encouraged to not only take the survey but ask colleagues and students to take it as well. Of the 350 people who answered the survey, we selected only the students and teachers, excluding staff and administrators (whose answers were markedly different, reflecting their different roles), for a total of 326 survey responses. The survey respondent base is 51% female and 47% male, with 2% not disclosing.

Seventy percent of the respondents reside in the United States. Nearly three-quarters (73%) of the respondents are faculty, 21% are students, and 6% are in other scholarly categories such as

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[1] See http://www.icahdq.org/pubs/reports/fairuse.pdf and http://www.natcom.org/fair_use.aspx.

independent, postdoctoral, or retired. Seventy-seven percent are either current or past members of the International Communication Association.

More than 9 out of 10 respondents work at a research university, masters-level university, or both. About two-thirds of U.S.-based scholars and more than 90% of international scholars practice collaborative research. The respondent base is more or less evenly distributed among those who have worked in the field for fewer than 5 years (19%), 5 to 10 years (24%), 10 to 20 years (32%), and more than 20 years (25%).

Some responses were compared to a similar but not identical survey administered in 2009 by an ad hoc committee of the International Communication Association (2010), also on copyright issues. Those comparisons will be discussed in greater detail below.

Results

Our survey reveals some intriguing and, at times, troubling information about how communication scholars negotiate their teaching and research around copyright concerns, even subsequent to the publication of a code of best practices.

Communication scholars widely recognize fair use and value it highly. They are confident about their understanding of it—in fact, more confident than they should be, because they believe they know more than they demonstrate that they do. Their lack of expertise in applying it is hurting them, because too often they are not comfortable in asserting their rights or are not able to engage gatekeepers such as librarians, general counsels, editors, publishers, and funders whose policies do not accommodate existing law. Thus, they decide not to undertake some types of projects (although they can imagine undertaking them absent copyright concerns) and change other projects to accord with their insecurities or concerns.

The good news is that positive changes have occurred in communication scholars' behaviors since publication of the code of best practices. Our data show increased use of open licenses and open access options, especially among newer faculty. However, we did not see improvement in the level of frustration communication scholars experience within their institutional relationships. Thus, some positive changes have occurred, but they lack the ecological effects that are intended to result from a consensus document such as the code of best practices.

Communication Scholars Value and Employ Fair Use

Scholars said they find the fair use doctrine to be vital, at least in principle; on a Likert scale from 1 (*absolutely necessary for creators and scholars*) to 7 (*totally unfair to creators and scholars*), respondents' mean evaluation of the doctrine was 2.03, squarely at *very useful*. More than half rated it as *absolutely necessary*, although the figure was much higher for U.S.-based respondents (59%) than for international ones (34%).

Scholars associate fair use with one of their core purposes: to educate. Our survey included the open-ended question, "What words would you associate with fair use?" Out of 213 write-in responses, the most frequently used term was *educational* (52 instances)[2] as well as *teaching* (11), *academic* (11), and *research* (11). Other common terms concerned the liberty to communicate, critique, and share ideas, including *freedom* (32), *public* (16), *open* (13), and *criticism* (13). Yet responses also indicated that scholars are keenly aware of the limitations of fair use, for better and for worse, frequently using terms such as *limited* (22), *copyright* (22), *noncommercial* (18), *transformative* (13), and *reasonable* (10).

Fair use is widely employed by communication scholars. Nearly three in five (59%) who have done research in the last three years said that they have employed fair use, and almost half (49%) of international scholars said that they have used it. The most common uses are: to quote from published work; to refer to or analyze copyrighted work; and to perform searches and analysis on bodies of copyrighted material. Among U.S. scholars, 62% said that fair use was "essential" to recent research, and 70% said that fair use was "essential" in recent teaching. Eighty-four percent of U.S. respondents overall had employed fair use in teaching recent courses (compared with 55% of international scholars), most commonly by incorporating copyrighted material into teaching aids such as slide shows, posting material to electronic teaching platforms, and in the context of student projects.

Scholars almost universally (95%) support the notion that recombining third-party material for new creative purposes—a core justification of fair use—can be "original." Similarly, 96% of all respondents believe that at least some recombinant uses should not require permission from the copyright owner. These figures show communication scholars to be far more likely than the general population, and even more than professional creators such as documentary filmmakers,[3] to endorse the notion that copyright should permit recombinant uses for a new purpose (see Figure 1).

Significantly, not a single respondent could name an instance in which another party's "legitimate employment of fair use" had "hurt [their] research, teaching, or career standing."

Copyright Concerns Still Limit Scholars' Ability to Work

Copyright policy is very present in the thinking of communication scholars about their work. Overall, nearly two-thirds of communication scholars (64%) would do something different in their scholarly or teaching practices—sharing, quoting, remixing, archiving—if copyright were not a concern. This is true irrespective of career phase or expertise, and the figure is even higher for international scholars (73%).

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[2] For the purposes of analyses, we group together etymologically associated terms such as *education* and educational.

[3] The data for general population and documentary filmmakers were collected by the authors during 2014 via similar survey techniques, and are being published separately.
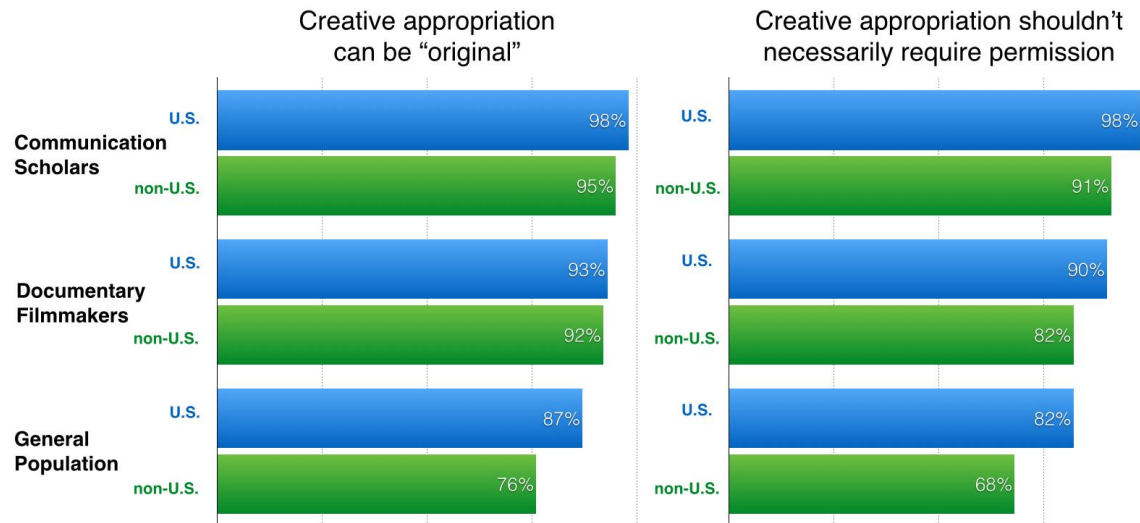
Figure 1. Communication scholars are receptive to creative appropriation.

What do scholars imagine doing in a world free of copyright? Interestingly, they would largely do what is actually permitted under today's law. When asked to provide examples of work they would undertake if copyright permitted, much of the work described by respondents would, in fact, be possible to accomplish within today's U.S. fair use doctrine, and much is actually being done, though perhaps not in the communication field. For instance, respondents described wanting to create remixes and mash-ups, multimedia projects, and e-books with multiple media; excerpt video for teaching, illustrations in scholarly texts, student assignments in media production; and expand curricula. This wish list suggests the significant cost to U.S. scholars today of not having confidence about employing their fair use rights, and the cost to international scholars of not having such rights.

Copyright concern also plays an active role in limiting scholarly practice. More than half (53%) of all respondents, equally among U.S. and international scholars, have changed a course or publication because of copyright restrictions against their use of others' work. Additionally, some 40% of communication scholars say they have sought permission to use copyrighted material despite believing that they had fair use rights to the work. In general, the longer a scholar has been in the field, the more likely he or she is to have altered work unnecessarily for copyright concerns. For instance, over half of scholars who have practiced for more than 20 years (51%) have sought permission for work they believed they had fair use rights to, while only 30% of scholars who have been in the field between 5 and 10 years have. The figure for students and newer scholars is higher (34%) than that of scholars in the 5- to 10-year zone, perhaps reflecting the greater degree of caution that students and newer scholars exhibit in their initial efforts, or the lower degree of latitude afforded to students institutionally.

The most common examples given of changed work were in publications, where images, graphics, and charts were left out. Scholars also reported truncating quoted text. In teaching, faculty reported changing assignments, finding different readings, choosing different films, and not electronically posting their lectures.

Scholars who changed their work because of copyright concerns were most likely to have done so preemptively, on their own initiative. Overall, 60% identified themselves as the person who raised copyright concerns, with 29% also selecting a librarian, 22% an editor, 16% a lawyer, and 13% a rights holder (respondents could check multiple answers). International scholars were considerably more likely (20%) to have problems with rights holders than U.S. scholars (12%). Students were far more likely than faculty to take preemptive action (80%). One possible reason for this is that they have had fewer interactions with other gatekeepers such as editors, lawyers, and rights holders.

How can we understand the greater propensity for unnecessary permission seeking among veteran scholars? One possible explanation is that those with more experience have simply learned (the hard way) when *not* to exercise fair use rights, even when they are legally permitted. Another is that scholars continue to be unsure how to make appropriate risk assessments, a possibility that would be linked to their familiarity with their associations' codes of best practices. Yet another possibility is that newer scholars have embraced alternate methods of mitigating copyright's effects, such as free software licenses, Creative Commons, and open access movements such as that coordinated by the American Research Libraries' SPARC.

We anticipated this latter possibility, and asked survey respondents whether they had ever searched out work that was open source, Creative Commons, or public domain. The responses varied neatly along lines of experience; 90% of the newest scholars had done so, while only 55% of the most senior scholars had (although this is still a high figure compared to the general population baseline of 36%).[4] Furthermore, about half of the respondents in each experience cohort had used a Creative Commons or open access license to make their own work more broadly available, except for the most senior cohort, of which only a third had. Thus, we believe that scholars now entering the field, and those who have entered in the last decade or so, have already been acculturated to understand, and to proactively mitigate to the extent that they can, the creative costs of copyright conservatism; additionally, a significant minority of senior scholars have come to embrace these alternatives. However, it is important to note that restricting a scholar's choice of material to that which is explicitly authorized for use under Creative Commons and prioritizing texts available in open-access formats also constitute harsh restrictions on pedagogy and creativity.

To summarize, a majority of communication scholars are changing or have changed their work to accommodate their or others' copyright concerns. The most common reason for making changes was not pressure from institutions or rights holders; rather, it was their own initiative, born of risk aversion. In other words, the phenomenon is a classic "chilling effect," limiting creative action not because of legitimate legal hindrances but because of what the poet Blake called "mind-chain'd manacles." In their

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[4] This figure is from a separate survey fielded by Sinnreich in 2014.

write-in responses to the question "Can you explain why you got permission rather than employing fair use?" several respondents used the phrase, "better safe than sorry," and another noted, "If not sure, don't use it; this generally always occurs during drafting." This comment echoes a comment made in the 2009 survey:

> In completing this survey, I realized that I don't have a lot of issues with copyright because I have tailored my research plan to avoid them. I use mostly public documents. . . . This was an unconscious effort, taking the path of least resistance.

These chilling effects are problematic; scholars and creators are not exercising their full legal rights, and, as a consequence, their work has frequently suffered. This brings us to the question: How well do communication scholars actually understand fair use, and how can the profession increase awareness of these rights?

Scholars' Fair Use Knowledge Is Inadequate to Their Needs

Scholars demonstrate a general awareness that fair use exists, but often find themselves unable to use it, typically because they are unsure how to interpret the law in their specific instance.

Scholars are familiar with the term *fair use*, although the rate of familiarity is significantly higher in the United States (98%) than internationally (85%)—understandably, since fair use is unavailable in most other countries. Even so, the high rate of familiarity internationally with the term suggests that international scholars are often in the position to use or know about fair use, perhaps because of collaborative work or publication on a U.S.-based platform. Also, the term *fair use* is sometimes used internationally as a general reference to specific exemptions such as fair dealing and right of quotation. Additionally, the more experience scholars have, the more likely they are to be familiar with the term.

Most scholars who have heard of fair use rate their knowledge of it as either good or excellent (87%), with U.S. scholars much more likely (28%) to rate their knowledge as excellent than international scholars (16%). However, only 77% of respondents, when presented with a definition of fair use written by a legal scholar, said that the definition matches their understanding. Thus, a substantial minority believe that they understand the term, but do not recognize it when described as it is currently interpreted.

Furthermore, in practical applications, scholars demonstrate more ignorance and insecurity than they ascribe to themselves abstractly. For instance, when asked whether they had ever asked a publisher or editor to incorporate third-party material into a publication under fair use—one of the most common scenarios for scholars—48% of U.S. scholars chose the response, "I didn't know I could do that." Additionally, when asked whether they were aware that some widely respected presses in the field of communication, including Oxford University Press and University of Chicago Press, accept fair use claims for third-party material, more than four in five respondents said no (senior scholars were the most likely to be ignorant of this fact). Even among people who have published often, 71% of U.S. scholars (and 77% internationally) have never asked a publisher or editor to include fairly used material.

Even on their home turf, scholars seem unfamiliar with copyright policy in practice. When asked whether students at their institutions could file theses or dissertations with uncleared copyrighted material in them, most U.S.-based academics did not know (75%).

This lack of expertise is especially dismaying given that communication scholars have created a guide to help interpret fair use in the most common academic scenarios: the International Communication Association's Code of Best Practices in Fair Use, issued in 2010 and endorsed by the National Communications Association. But the code does not seem to be known widely, and even where it is known, it is rarely consulted; it is even hard to find on the websites of the associations. Fewer than one-third of respondents (32%) have heard of it, and the figure is even lower (25%) for international scholars. However, current and former members of the International Communication Association are more likely than others to know about it, with awareness levels of 33% compared to only 22% among nonmembers. Familiarity with the code also increases with time in the field, and ranges from 19% (students and newest faculty) to 39% (most senior).

Further, only 31% of those who have heard of the code have used it. On those rare occasions when the code is used, it appears to be a valuable resource; 88% of those who used it say it was helpful, and the remaining 12% say they can't remember. But the data show incontrovertibly that it is a grossly underutilized resource in a field where unauthorized quotation of copyrighted material appears to be extremely important to daily practice and to generate enough anxiety to curtail or change projects.

In recent years, U.S. scholars have asked the U.S. Copyright Tribunal for—and won—a three-year, renewable exemption to the Digital Millennium Copyright Act's (DMCA's) clause criminalizing decryption. In practical terms, this means that, unlike most citizens, scholars can legally break software locks around commercial products such as DVDs and games to access work for fair use purposes. This exemption allows scholars to employ their fair use rights in teaching and research when the material they need is stored in an encoded format. This functionality is available via easy-to-use, widely distributed digital tools such as Handbrake. The exemption is important for scholarship across a range of disciplines as cultural and informational materials of all kinds are increasingly presented via encrypted digital formats.

Yet, despite the importance of this hard-won right, only 32% of U.S. respondents knew that they possessed a DMCA exemption, and only 28% said they had broken encryption. Interestingly, roughly one-third (32%) of those who had broken encryption did not even know that they had the right to do so. This is especially disappointing because knowledge of one's rights clearly has an impact on behavior. For instance, among U.S. scholars who are aware they have the right to break encryption for fair use, 61% have done it. Among those who are not aware, only 13% have. So people who are aware they have the right to break encryption are nearly *five times as likely* to have done so as people who are not aware.

Thus, communication scholars are woefully underinformed about the nature and scope of their fair use rights, and this ignorance negatively affects their scholarly output. Yet even when communication scholars are comfortable with interpreting fair use and apply their customized best practices code, they

sometimes find obstacles. Respondents who said they had tried to use copyrighted materials without permission in a publication reported mixed results. Some presses, both commercial and open access, acceded to their requests; others did not. Other scholars signed agreements that abnegated their right to fair use, often because they did not want to delay publication. In short, the challenge resides not merely with the ignorance of individual scholars but with a discipline-wide, institutional blindness to fair use rights and their value.

In other fields, gatekeepers have changed behavior based on the existence of a consensual code of best practices in fair use. For instance, errors and omissions insurers reversed a decades-long policy of refusing routinely to insure against fair use claims in documentary film, once a code of best practices was created (Aufderheide, 2007). In the case of academic presses, individual scholars have had success invoking the communications and other codes to protect and assert their fair use rights (M. Delli Carpini & B. Williams, personal correspondence, May 9, 2011). Thus, the wider problems faced by scholars are also, to some extent, a failure to leverage the existence of a consensual best practices document for scholarly creativity.

Changes Since Publication of the Code

By comparing the results from the present survey to another fielded by Aufderheide in 2009 (International Communication Association, 2010), the year before the code's publication, we can assess the degree to which awareness, attitudes, and behaviors surrounding fair use in communication scholarship have changed during the interim years, and surmise the degree to which the code has played a role in those changes.

First, there appears to be much greater awareness of both copyright issues and fair use within this population than there was in 2009. In 2009, 43% of respondents said they had employed fair use in their work. The figure grew to 58% in 2014. In the earlier survey, 57% said their knowledge of copyright was good or excellent. The figure is much higher today, at 87% (though, as discussed above, self-evaluations are not always accurate). In 2009, 51% of respondents said they would likely or definitely undertake new research if they were free of copyright concerns. Today, 65% say they would change their scholarly or teaching practices absent copyright concerns. In 2009, 30% of respondents had had to pay or get permission to use copyrighted material in a publication, despite believing they had fair use rights to it. That figure is larger today, at 40%.

Despite growing awareness of copyright's role in scholarship and the opportunities afforded by fair use, however, scholars consistently complained about the same problems from 2009 to 2014, including intransigent publishers, problems accessing and displaying material for teaching, and frustrations with encrypted material. Yet today, more than twice as many scholars say they have broken encryption: 28%, compared to only 12% in 2009. This clearly reflects the fact that savvier scholars have taken advantage of recent policy wins to exercise digital fair use.

Discussion

Communication scholars articulate many reasons to depend on fair use in their daily work, both as researchers and as teachers. But they also do not know reliably how to apply the fair use exception to copyright monopoly in the course of these practices, despite the fact that their own associations have created and endorsed a code of best practices specific to their research and teaching situations.

The good news is, the challenges identified in this article can be overcome through a coordinated, discipline-wide initiative to educate scholars and upgrade institutions. We already possess many of the requisite resources, especially the Code of Best Practices in Fair Use for Communication Scholars. The leading associations in our field, the International Communication Association and the National Communication Association, have endorsed this document, and they should help guide the academic publishers affiliated with them, such as communication journals, to affirm its principles in their editorial policies. The institutions where communications scholars work are also places for the transmission of sound fair use knowledge, to students, other faculty, IT and audiovisual staff, and, of course, general counsel. Well-informed scholars can also work productively with gatekeepers, especially in the publishing realm, where some academic presses are already well aware of the value of fair use in scholarly publishing. Indeed, scholarly ranking of journals should include an element of transparency about fair use policies, which are vital to the efficient spread of knowledge and expertise.

Communication scholars, on the front lines of media production as well as analysis and critical reception, can escape the trap of stifled creativity using tools already at their disposal and by emphasizing their core value and greatest strength: education.

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