



Fair Use: Articulating the Liberal Approach

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abstract: Within the context of *Cambridge University Press et al. v. Patton et al.*, this article provides the rationale for the academic distribution of scholarly articles without requesting copyright permission or paying the corresponding fees. The fair use of scholarly articles is examined legally, historically, and in an economic context. This article builds upon the market failure model of fair use and fundamental models from economic anthropology to illuminate the underlying conflict between market and reciprocal economies. Fair use is presented as a limiter to market economy when, for socially sanctioned purposes, reciprocal economies yield greater utility to society.

Introduction: *Cambridge University Press et al. v. Patton et al.*

On April 15, 2008, three scholarly publishers sued the President, the Provost, the Dean of Libraries, and the Associate Provost for Information Systems and Technology of Georgia State University for declarative and injunctive relief. This lawsuit, *Cambridge University Press et al. v. Patton et al.*,¹ is currently being heard in the Georgia Northern District Court. In the complaint, the plaintiffs, (non-profit publishers Oxford and Cambridge, and for-profit publisher Sage), seek to end the “systemic, widespread, and unauthorized copying and distribution of a vast amount of copyrighted works”² that Georgia State University professors engaged in during the course of their teaching. The library’s electronic course reserve system, the university’s course management system, and the university’s Web pages were all used to distribute copyrighted materials to students without the authorization or payment of royalties to the copyright holders. In their answer to the complaint, Georgia State’s defense was, among other arguments, that their use was protected under the fair use statute.³

The American Association of University Presses (AAUP) issued a statement supporting the suit and clarifying the problematic effect of distributing copies in the course of teaching without authorization or payment.⁴ The AAUP statement argued that the

decline in demand for coursepacks, due to the implementation of course management and electronic reserves systems, undermines revenue in permissions fees. The statement cited *Basic Books, Inc. v. Kinko's Graphics Corp.*⁵ a suit that ended in a decision requiring

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Kinko's to pay copyright fees to publishers for the production of coursepacks, as grounds for the complaint against Georgia State University.

For copyright holders, there is a considerable amount of revenue at stake in the market for permissions. With the understanding that the licensing of digital material is only a portion of their business, the Copyright Clearance Center (CCC) distributed \$144 million in royalties

in 2009, up five percent from 2008.⁶ Thus far, seventy academic institutions have elected to sign annual CCC licenses.⁷ Convincing academic institutions that they are obligated to ask permission is an important component of the CCC's education strategy⁸ as every institution that complies provides another stream of revenue to enable the maximization of shareholder value in intellectual property.

In the case of scholarly articles, a conservative position on fair use is consistent with the interests of rights holders. As the AAUP summarized, fair use "permits spontaneous and limited uses of copyrighted material for education." Beyond that, "it is clear that universities need to seek permission for more regular and substantial uses of excerpts in coursepacks and other assigned readings."⁹ With the exception of brief, spontaneous, and non-repetitive uses,¹⁰ the professor or an agent of the institution must ask permission and pay the corresponding permissions fees. Alternatively, institutions can sign a blanket license with the CCC¹¹ and presumably monitor the individual transactions for the publishers with which the CCC has failed to secure an agreement, contacting and paying the publishers directly. Inherent in the conservative approach is the question of how these permissions fees should be funded.

In contrast, academic copyright practitioners have sought to apply fair use in flexible ways that facilitate teaching and learning. The recommended strategy¹² of issuing fair

use checklists¹³ illustrates the viewpoint of lawyers, librarians, policy professionals, and faculty members that uses not spontaneous or limited may still qualify as fair. There is no easy way to eliminate the possibility. As the Supreme Court directed in *Campbell v. Acuff-Rose*, the "task is not to be simplified with bright-line

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rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."¹⁴ It is not possible to determine that a use is not fair without specific evaluation, and even



after evaluation, a long history of fair use litigation suggests interested parties need not always be in agreement. As a result, fair use claims are inherently uncertain.

This article presents a liberal interpretation of fair use, explaining why it may be in the best interests of society to allow professors to copy and distribute scholarly articles without seeking the permission of the copyright holder. Since neither licensing nor coursepacks require a claim of fair use, this article focuses on the potential privilege of ignoring these two market mechanisms after the first sale. The problem has always existed in library reserves,¹⁵ but has become especially pronounced with the advent of the course management system as it directly competes with the coursepack market. For the purposes of argument, the university-administered course management system and the library reserves system are treated as equivalent mechanisms for the distribution of scholarly articles. This is consistent with presiding judge Orinda D. Evan's order in *Cambridge University Press et al. v. Patton et al.*, that the "two systems operate in different ways and instructors may choose to use one or both systems, but the general function of both systems is the same."¹⁶

This article begins with an overview of the copyright statute and its current interpretation based on relevant judicial decisions. Next, it examines fair use within the context of its codification. At the time of its drafting, the understanding of Section 107 was heavily influenced by the unprecedented effects of the photocopier and its ability to easily copy articles. Finally, the article examines the *Classroom Guidelines* as the single point of consensus between rights holders and educators. Seeing the potential for compromise outlined in the *Classroom Guidelines* led Congress to hope for a strengthening accord between the interested parties. Unfortunately, the Congressional desire for a compromise never materialized and instead, the conflict blossomed into the current lawsuit.¹⁷ The underlying reasons for the failure of the compromise are economic.

Using market failure theory and fundamental ideas from economic anthropology, the tensions between the embedded market economy and the communal social economies based on reciprocity and redistribution are outlined. As a policy analyst, I argue that the creation and dissemination of scholarship are based on economies of *reciprocal exchange* and that scholarly articles, because they are donated at little or no cost to publishers and because they generate no revenue when distributed to students through a course management system, fall outside the boundaries of market-based exchange and therefore, should not be subject to the copyright holder's monopoly privilege. Thus, copyright permission and corresponding fees, justifiably required from market-based coursepack printers, should not apply to professors who are not market agents. For teaching purposes at non-profit institutions of higher education, fair use should limit copyright monopolies for scholarly articles to the first sale.

The Copyright Statute

In Article I, Section 8 of the US Constitution, Congress was empowered to "promote the Progress of Science and useful Arts." Promotion was to be accomplished "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁸ Congress executed its mandate in the first national copyright law, the Copyright Act of 1790, an act modeled on the English copyright law, the Statute of

Anne.¹⁹ In 1909, the Copyright Act was revised,²⁰ and again in 1976. The law is currently codified under Title 17 of the US Code.²¹

In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court described the purpose of the copyright statute:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.²²

The Court emphasized the goal of copyright, motivating authorship and invention, is achieved by granting limited monopoly. Monopoly power, an economic tool, is the “mechanism” by which copyright achieves its goals.²³

The monopoly privilege bestowed by copyright is a suite of exclusive rights: the right to reproduce, to make derivative works, to distribute, to publicly perform, and to display.²⁴ The Court noted these rights are not without limitation, as the statute dictates they are “[s]ubject to sections 107 through 122,”²⁵ the list of exceptions to the exclusive rights of the copyright holder.

The Court recognized that Congress’s work in drafting and maintaining the copyright statute “involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.”²⁶ Copyright is intended to balance the interests of the individual with the needs of the collective. In the scheme of the copyright statute, the copyright holder enjoys the set of exclusive rights granted by the copyright statute while society is given the benefit of using the works for specific purposes without their permission.

Currently, the copyright statute provides protection for “original works of authorship” that are “fixed” in a tangible form, but does not extend protection to ideas, facts, concepts, or anything that does not have a minimal amount of creativity.²⁷ The limited term is the life of the author plus 70 years, and 95–120 years for works made for hire.²⁸ After that, the work falls into the public domain where the monopoly ends and anyone can use the work as they please.

Fair Use

Reserved for the specific purposes of “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,”²⁹ Section 107 allows individuals other than the rights holder to use copyrighted materials without infringement. The user must weigh their use against four factors that must be considered in any fair use claim:

- (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.³⁰

A faculty member claiming fair use in distributing an article to a class would be required to consider the purpose of its use, including whether the use is intended to generate profits; the nature of the work itself; the amount and substantiality of the work; as well as the effect of the use on the potential market for the work.

The fair use statute is brief, but it is understood through a rich judicial context. The decisions of the Supreme Court have shaped the common interpretation of the statute. While determining the first factor, in addition to whether the use was for profit or not, the faculty member would also need to determine if the use was “transformative” or not.³¹ Transforming intellectual property into something new and useful is favored over ordinary copying. The second factor, the nature of the work, favors the sharing

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of factual works over creative ones; creative works receive more protection. The amount and substantiality factor is both a “quantitative” and “qualitative” measure, and much has been written about “the heart of the work” being as important as the amount taken.³²

The fourth factor, market effect, is particularly complex. One must not only consider the effect on the current market for the work, but also the effect on markets that haven’t been established yet.³³ In addition, a professor should consider “‘whether unrestricted and wide-spread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market’ for the original.”³⁴ So, presumably, a professor distributing scholarly articles to students will need to understand the scalable market effects of their use in order to make a fair use judgment.

When considering the fourth factor, in judging the “effect of the use upon the potential market,” it is not clear whether one ought to consider the effect on the market for permission fees because fair use eliminates the need to ask for permission. This is a defect of circular reasoning that undermines the ability to apply the statute effectively. The problem of circular reasoning has been illustrated most eloquently by Lydia Loren in criticism of the Second Circuit’s decision in *American Geophysical Union v. Texaco, Inc.*,³⁵ explaining, “[e]vidence of lost permission fees does not bear on market effect. The right to permission fees is precisely what is at issue here. It is circular to argue that a use is unfair, and a fee therefore required, on the basis that the publisher is otherwise deprived of a fee.”³⁶ Despite this defect of circular reasoning, the justices in *Basic Books* made open consideration of permissions fees in their analysis of the fourth factor.³⁷

The Classroom Guidelines

In 1975, as part of the legislative process for the Copyright Act of 1976, an Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision joined the Authors League of America and the Association of American Publishers in drafting a

brief set of rules that would limit liability for educators making copies.³⁸ They presented the *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals* to Congress on March 1976. From the preamble, the purpose of the *Guidelines* are “to state the minimum and not the maximum standards of educational fair use under section 107,” and that they are “not intended to limit the types of copying permitted under the standards of fair use.”³⁹

After the brief preamble, the *Guidelines* are divided into three sections: *Single Copying for Teachers*, *Multiple Copies for Classroom Use*, and “*Prohibitions*” regarding the previous two sections. *Single Copying for Teachers* allows a copy to be made for instructors’ scholarly research. The second section, *Multiple Copies for Classroom Use*, allows for the sharing of articles, one to each student, provided the article passes three tests: brevity, spontaneity, and cumulative effect. The limits on brevity are specific: “a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or ten percent of the work, whichever is less, but in any event a minimum of 500 words.” Spontaneity is a temporal constraint that limits the use to a moment of “inspiration” so close to the time of teaching that there is not enough time to ask for permission. Cumulative effect limits the number of times these moments of “inspiration” can arise.⁴⁰

The final section, *Prohibitions*... could reasonably be applied to the current controversy over course management systems and library reserves. This section states, “[c]opying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of vari-

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ous works or excerpts therefrom are accumulated or reproduced and used separately.”⁴¹ The *Guidelines* could be interpreted to view the copying and distributing of articles from a central, virtual location as the creation of an “anthology.” Furthermore, the *Guide-*

lines specifically dictate against repeat uses of the “same item by the same teacher from term to term.”

At the time, for educators, the idea that professors should constrain themselves to these limitations was unappealing. The House Report notes, “[r]epresentatives of the American Association of University Professors and of the Association of American Law Schools have written to the Committee strongly criticizing the guidelines, particularly with respect to multiple copying, as being too restrictive with respect to classroom situations at the university and graduate level.”⁴² While they enable the same function, it is worth noting the stark difference between the *Guidelines* and fair use. As *Campbell* points out, while fair use “is not to be simplified with bright-line rules,”⁴³ the *Guidelines* are essentially a strict set of rules designed to simplify scholarly article distribution.

Despite the fact that the *Guidelines* are “the minimum and not the maximum standards,” there is considerable pressure to abide by them because the courts perceive the *Guidelines* as the bar against which to measure. The judicial decisions in the influential coursepack cases *Basic Books* and *Princeton University Press v. Michigan Document Services, Inc.*⁴⁴ suggest the courts are hoping professors will conform to the agreement set out in the *Guidelines*. In *Basic Books*, the court weighs Kinko’s use against each of the

proposed tests (brevity, spontaneity, and cumulative effect),⁴⁵ and in *Princeton*, the court states, “[a]lthough the Classroom Guidelines purport to ‘state the minimum and not the maximum standards of educational fair use,’ they do evoke a general idea, at least, of the types of educational copying Congress had in mind,” and again, “[a]lthough the guidelines do not purport to be a complete and definitive statement of fair use law for educational copying, and although they do not have the force of law, they do provide us general guidance.”⁴⁶

Why the District Court would consider the “minimum” standards as “a general idea” of what “Congress had in mind,” is best summed in Congress’s expression of “the hope that if there are areas where standards other than these guidelines may be appropriate, the parties will continue their efforts to provide additional specific guidelines in the same spirit of good will and give and take that has marked the discussion of this subject in recent months.”⁴⁷ The *Guidelines* constitute a government-sanctioned point of consensus between publishers and educators and Congress hoped then, as the judiciary has subsequently attempted to explain, that more consensus would develop.

A Broken Consensus

It is essential to understand the legislative context in which fair use was written. Uncertainty caused by the photocopier at the inception of the statute had a profound effect on the drafting of the copyright statute. Leon Seltzer’s analysis of the newly minted fair use statute was published in 1978 as the seminal work *Exemptions and Fair Use in Copyright*. To say it plainly, the photocopier broke the judicial conception of fair use.⁴⁸ Although fair use was codified in the 1976 statute, it had been known as “fair use” in case law since 1869,⁴⁹ and had been active since Justice Joseph Story’s decision in 1841.⁵⁰ Apparently, the problem posed by the photocopier, Seltzer’s “copying for its own sake,” had never arisen before in the context of fair use. Seltzer writes that fair use “has always had to do with the use by a second author of a first author’s work. Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose.”⁵¹ It had, until the 1975 decision in *Williams and Wilkins*,⁵² been considered infringement, as in Seltzer’s assertion that “[w]hen copies are made for the work’s ‘ordinary’ purposes, ordinary *infringement* has customarily been triggered.” But the *William and Wilkins* verdict, in which it was deemed a fair use for the National Institute of Health and the National Library of Medicine to photocopy and distribute between 80,000 and 120,000 articles annually to medical researchers and practitioners, created a new understanding of copyright and a new category of fair use.⁵³

At the time, there existed no more consensus on fair use than there is now. The Congressional reports reveal the difficulty fair use posed to legislators as they attempted to draft an acceptable statute: “Since it appeared impossible to reach agreement on a general statement expressing the scope of the fair use doctrine, and since in any event the doctrine emerges from a body of judicial precedent and not from the statute, we decided with some regret to reduce the fair use section to its barest essentials.”⁵⁴ Seltzer wrote that Congress saw “its task... as brokering a private agree-

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ment among educators, authors, and publishers.”⁵⁵ With the advent of the photocopier, fair use emerged as a zero-sum game between educators and rights holders that is still unresolved, necessitating *Cambridge University Press et al. v. Patton et al.*

Market Failure

The remainder of this article presents a liberal copyright policy argument based on economic theory. Because the *Guidelines* are “the minimum and not the maximum standards,” there is a space somewhere between the *Guidelines* and fair use within which, presumably, professors can do more. The increasing influence of economics in legal scholarship over the last fifty years,⁵⁶ and more specifically, the work of Professor Wendy Gordon, has promising implications for a liberal interpretation of fair use in education. Gordon introduced economics into the scholarly discussion of fair use with her article, *Fair Use as Market Failure*.⁵⁷ As an attempt to explain how the presence of market failure could be an additional factor in a fair use decision,⁵⁸ her ideas garnered attention⁵⁹ for illuminating the fair use statute in a novel way.⁶⁰ The Supreme Court’s reference in *Harper* to Gordon’s article provides a strong signal that economic discussions have relevance in the context of fair use.⁶¹

Following a Congressional mandate for the “further evolution of the fair use doctrine in the courts,” Gordon noted that the factors to be considered in a fair use determination are “nonexhaustive.”⁶² Given significant cause, the courts do not have to limit themselves to the four factors. Thus, Gordon proposed that a three-part test based on the economic rationale of market failure could be used to determine if a use was fair. First, the situation had to be a genuine instance of market failure. Second, the court would need to determine that the use was socially desirable. Third, a final “hurdle” should be in place to insure that “substantial injury” to the incentives of the copyright holder would not result from a judgment of fair use.⁶³ This third test she later rescinded after significant criticism⁶⁴ of it as being, “overly restrictive,” because it “effectively forces all inquiries to be subordinated to the economic.”⁶⁵ Instead, in *Excuse and Justification*, she continued to develop the market failure theory of fair use by proposing two distinct classes. Gordon argued that some fair uses should be “excused” because they are undesirable but understandable under the circumstances; these she refers to as “market malfunctions.” A second class of uses, market limitations, she refers to as “justifiable” because, copyright being based in the market, these uses are fair ones since they work better outside the market system.⁶⁶ This present article argues that scholarly articles fall within the second class of fair uses.

A market is a place where goods are bought and sold and “market failure” is simply an economist’s term for the presence of inefficiency in the market. These inefficiencies can come from different causes and produce varying degrees of impact, but their effect is, in an absolute sense, to make the market function in a suboptimal way.⁶⁷ Often, economists refer to these inefficiencies as “externalities” because they can have an effect, for better or for worse, on people “external” to the transaction.⁶⁸ For example, if a professor purchases a scholarly article and, in an effort to share it with a class, posts it on a personal website where it can be accessible to anyone using the Internet, it would constitute an externality, because the professor and the copyright holder are the only

parties in the purchasing transaction, yet an unlimited number of users could benefit from the professor's behavior without compensating the copyright holder.

Among the many causes of market failure, the problem of transaction costs has dominated the conversation in copyright.⁶⁹ High transaction costs, which can take many forms from the technical to the social, can make copyright transactions prohibitive. The idea of transaction costs became so pervasive some had mistakenly assumed if a licensing or permission system was present, there could be no fair use.⁷⁰ This simplistic assumption failed to take into account any number of causes could be relevant factors leading to a market failure judgment in a fair use inquiry.⁷¹ Gordon herself proposed amending the fair use statute to correct this misperception, "The fact that a work is unpublished or *that a license is available for the contested use* shall not itself bar a finding of fair use if such finding is made upon consideration of *all relevant* factors."⁷² Many other causes, both positive and negative, of market failure have been recognized as relevant to fair use such as censorship (where licensing permission is purposely withheld from a potential parodist)⁷³ or the positive externality of scholarship (because it becomes impossible to monetize the benefit that society reaps from knowledge and learning).⁷⁴

In the presence of either of Gordon's two classes of market failure (malfunction or limitation), markets become unreliable as "socially satisfactory institutions for the distribution of resources." Market malfunctions are cases where the market is the appropriate structure for exchange, but there is an internal breakdown, such as the case of transaction costs. In contrast, market limitations are caused by the presence of factors external to the market, "market norms themselves fail to provide suitable criteria for resolving a dispute." She argues that in cases of market limitation, "[t]he market simply is the wrong place to look for answers," thus justifying a fair use claim. In these instances, Gordon deemphasizes the importance of the copyright holder's monopoly rights, as "society cannot afford to rely on private ownership for its decision-making." Instead, she credits "the presence of nonmonetizable interests and other non-monetary issues" as the significant factors that should weigh heaviest in the fair use decision.⁷⁵

Market Limitation and Reciprocal Exchange

Karl Polanyi, one of the founders of what is now known as economic anthropology, proposed three fundamental ways goods are exchanged in human society: reciprocity, redistribution, and markets.⁷⁶ He argued that reciprocal exchange systems are based on symmetrical relationships among groups. Redistributive systems are based on a strong centralized structure in which resources are pooled and redistributed. Markets ("exchanges") are based on buying and selling with a fixed, monetary

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price system. Societies are shaped by the dominant form of exchange, so while reciprocal societies tend toward community, redistributive societies are characterized by a strong, central political regime, and market societies tend to be characterized by the impersonal benefits of market exchange. For Polanyi, reciprocal and redistributive systems of exchange directly contrasted with market systems. In his view, both reciprocal and redistributive exchanges formed economies “embedded” in social relationships and institutions, while in a market-dominant system, the economy rests in the marketplace. Ultimately, Polanyi understood the human economy to be “embedded and enmeshed in institutions, economic and noneconomic. The inclusion of the noneconomic is vital.”⁷⁷ What emerges in the context of Polanyi’s model of embedded economy is the inherent tension between exchanges that transpire through reciprocity and redistribution, often referred to as “social” economies, and the impersonal nature of the market economy.

Polanyi’s ideas have emerged in fair use discussions along these very lines. Michael Madison’s article on pattern-oriented fair use references Polanyi in its discussion of the fourth factor, and notes,

The distinction between the (modern) market economy and the (premodern) “embedded” economy, as drawn by Karl Polanyi, both illustrates and integrates how a court should distinguish between transactions requiring compensation and those that do not. Within a social or cultural pattern, information transactions are arranged according to the conventions and structures of the pattern, rather than according to those of the market economy.⁷⁸

Following Madison’s logic, fair use enables society, through judicial authority, to choose the system of exchange it deems most suitable to its purposes.

While one form of exchange may dominate, Polanyi noted, no instances of society are without some form of the other, and reciprocity functions better when it employs both redistribution and markets.⁷⁹ For example, social networking sites, which can enable countless intellectual property exchanges, frequently depend on advertising revenue, and websites like Bookmooch allow users to trade books for free with a point system functioning as a common currency.⁸⁰ Neither should it be assumed that markets are inherently bad for society. Markets may be used to free individuals from oppressive social structures⁸¹

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The study of reciprocal exchange was pioneered by Marcel Mauss in the form of gift exchange. By examining characteristics of differing tribal cultures, he showed how gifts function as systems of obligatory reciprocity among communities observing that the

and, as the Constitution assumes in the copyright statute, they can be used to provide incentive for social progress. However, a copyright perspective based solely in the market may leave the importance of social economies in a



obligation to give, the obligation to receive, and the obligation to repay are all requirements of reciprocal systems.⁸² Thus, gifts are not “free,” but rather communal bonding mechanisms. Refusal of any of the obligations is a threat that may merit removal from the community.

To expand on Gordon’s arguments on fair use and market limitation, an “externality” to a market could also be a fully functioning social economy. Activities like holiday gift giving, potlucks, blood drives, philanthropy, social networking, Freecycle, and tithing may thrive when society finds that reciprocity and redistribution work better than buying and selling for certain classes of exchange.⁸³ Scholarship is also a form of reciprocal exchange, and the scholarly article is one of the copyrightable mediums through which these exchanges occur.

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Scholarship as Reciprocal Exchange

Four elements identify the current system of scholarship as primarily a reciprocal exchange. First, scholars *donate* their articles to publishers to gain acceptance in the scholarly community. Scholars are given little or nothing in the form of remuneration from publishers. Instead, they are rewarded with acceptance within the scholarly community in the form of tenure and promotion in rank. Second, articles are peer-reviewed to enforce the standards of the community. The peer review process has a gate-keeping function to ensure the professor’s work is a credible contribution to the scholarly record.⁸⁴ Third, publishers of scholarly articles sell a product they didn’t have to purchase. That scholarly articles are donated, not sold, by members of the scholarly community to publishers, places them outside the category of a pure market transaction. This creates an expectation of reciprocal obligation from the publisher as a member of the scholarly community, (an admittedly difficult position for a business). Thus, the advantage that publishers enjoy in the market is not free. Publishers are expected to behave as members of the community, not pure market agents. Institutions buy back their own research, and purchase the research of other members of the community, in the form of first sales to compensate publishers for their costs in vetting and distribution. Fourth, when professors distribute articles to students, they do not sell them to the students. Professors, having acquired articles through first sales in the form of personal, department, or library subscriptions, subsequently distribute these fairly purchased articles to students. These distributions, whether in a coursepack or a course management system, do not generate direct profits for the scholars of the institutions. Professors share articles in order to teach students. The students are obligated to take part in the scholarly community by learning. Students have little chance of passing the class without the course readings. In addition, the recruitment of new scholars from the student population depends on access to scholarship. These four reasons support the reciprocal economy of scholarship; communal obligation, not buying and selling, structures the exchange of articles in the academy.

The Liberal Approach

There are times when the embedded market economy disrupts the workings of social economies and institutions. In these cases, it can be difficult to judge an appropriate course because the interests of both are appropriate. We would like to honor both, but in the specific case, we end up choosing one or the other to some dissatisfaction. The liberal view of fair use favors the type of economy that seems to best serve the particular goal.

When reciprocity excels and communal obligation is paramount, the interest of the market should be suppressed. When the market serves as a better means of exchange, reciprocity must give way to the impersonal efficiency of buying and selling. In the context of scholarly articles, fair use should favor reciprocity because it is consistent with the economy in which society exchanges scholarship.

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“Embeddedness” can create challenges to discernment. In the first fair use case, Justice Story’s exposition that “copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent” is certainly still applicable.⁸⁵ Without a means of approaching such subtle distinctions, fair use becomes unintelligible in the fourth factor.

The enmeshed nature of the market economy within the social economy can make their individuality seem like a trivial distinction until a zero-sum situation arises. For example, if a corporate publisher sells a journal article and a university sells a journal article, the profits from each are perceived differently in the eyes of the federal government, despite the fact that they’re engaged in the same market-based behavior. While it taxes the corporate publisher, the federal government does not tax the university on its profit. The 501(c)(3) designation of universities in the US Tax Code dictates that so long as they are conducting business “related” to their mission, colleges and universities are not subject to federal income tax, even if they’re selling something like housing, meals, or journal articles.⁸⁶ The Congressional Joint Committee on Taxation in its *Analysis Relating to Tax Benefits for Higher Education*, explains the economic benefit of education as a “public good.”⁸⁷

“While much evidence suggests that job skill acquisition and education benefit the private individual in terms of higher market wages, many people have long believed that education also produces positive externalities. Commentators argue that society functions better with an educated populace and that markets function better with



educated consumers. They observe that education promotes innovation... Thus, it is argued, subsidies for education are needed to improve the efficiency of society."⁸⁸

The "unfair"⁸⁹ situation that arises when the corporate publisher encounters their non-profit competitor's market advantage must elicit some dissatisfaction. Yet the law continues to favor the social economy. When this nuanced but powerful distinction is applied to fair use and the sharing of scholarly articles the conclusion is that the market for permission may function in a copy shop, but cannot function in a classroom. While the difference between a classroom and an off-campus copy shop may seem like a trivial distinction, it isn't.

Colleges and universities constitute a form of market, but revenue generated by educational institutions is not the same as corporate profits. Nonprofit revenue cannot be redistributed to shareholders.⁹⁰ It has to be reinvested entirely into the work of the enterprise. If we were to insist on seeing the classroom as a market space, we would have to admit that it is a market of a different nature. What gets extracted by a demand for revenues for permission is not profits from sales of articles, as in the case of the coursepack printer, but the proceeds of a social economy.

Publishers enjoy revenue from permissions fees in coursepacks and they perceive reserves and course management systems as a form of competition. Certainly, there is judicial precedent supporting the expansion of new markets in the copyright holder's interest.⁹¹ But professors do not sell articles to students; the classroom is not a market space in which articles are sold for monetary consideration. An argument could be made that tuition somehow constitutes payment for classroom articles. But such an argument fails to take into account the variety of funding sources that colleges and universities depend on for revenue to purchase journal subscriptions.

The imposition of a market for permission in the classroom actually threatens the scholarly community itself. An unfavorable judicial decision concerning the distribution of scholarly articles may ultimately result in a system of education far different than the one we now enjoy. In an equitable market system, universities have incentive to treat scholarly articles as works made for hire⁹² and to demand a share of revenues from publishers. Faculty members have incentive to demand a fair share of profits as well. These market based behaviors would potentially destabilize the production of new scholarship and change society's understanding and expectations of scholars. In the absence of reciprocity, no one wants to be exploited.

Limiting the Market for Permission in Scholarly Articles

In cases of fair use, leveraging economic theory that distinguishes between social and market economy enables responsible decision-making. The AAUP, citing *Basic Books*, makes it clear that publishers are owed revenue for copies of articles in coursepacks.⁹³ But what *Basic Books* proves is that *printers* owe money to publishers. The court refused to offer declarative relief for all anthologizing, which means anthologizing can still be fair use. "Plaintiffs say they are entitled to declaratory judgment as to any and all instances of copying or 'anthologizing' without the author's permission. This is not so. ... The guidelines state that some instances of copying which exceed its boundaries may in fact 'be permitted under the criteria of fair use.' ... Declaratory judgment is denied."⁹⁴

Coursepack printers are market agents that make profits from sales of coursepacks. As Kinko's discovered, there is nothing reciprocal about mass-producing copies and selling them for profit. If profit is being generated from buying and selling in a pure market economy, barring other factors, there is no reason that the market for permis-

The law divides the copyright obligations of printers from the copyright obligations of students and considers them separately.

sion should not extract its share. This can be extended to *Princeton* as well. But if printers are savvy enough to pass along permissions costs to students, it does not mean that students owe permissions costs. The law divides the copyright obligations of printers from the copyright obligations of students and considers

them separately. The copyright obligations that printers have are not automatically transferred to their customers. The coursepack printer who does not operate on the basis of reciprocity should reasonably be expected to honor the publisher's copyright. If the library reserves or course management system renders the coursepack printer obsolete, the market for permission in scholarly articles, because it is a market by nature, shrinks. It does not expand endlessly into the scholarly system of reciprocal exchanges because fair use limits the market by protecting reciprocal exchanges society deems to be significant.

With the assumption that the professor acquired a copy of the article legally, a first sale payment has already been made to the publisher for their costs and profit, honoring the copyright monopoly. A secondary payment for permission to copy would undermine the "progress of science and useful arts" by impeding the flow of information between professor and student and, because the money has to come from somewhere, allow publishers to extract tuition, profits, donations, and taxes without providing any additional benefit to society.

Because publishers have already received first sales for articles, we can justify the injury to the copyright holder's market in order to protect society's interest in education and the fact that reciprocal exchange, not markets, is the method of exchange by which society has chosen to educate its membership. As Gordon writes, "[i]n cases of 'justification,' we sometimes tolerate such injury in pursuit of other goals."⁹⁵

Conclusion

The liberal approach to fair use could be summed up in a paraphrase from an anecdote about the origins of Alcoholics Anonymous: There are things that can be done with money and there are things that cannot be done with money.⁹⁶ In copyright, as in other systems of exchange, society gets to choose whether a market economy is the best way to fulfill its purposes. The liberal approach is to favor the market when the market works better and to favor the social economy when the social economy works better. Society is empowered to endorse reciprocal exchange where it yields more utility than a market system, because fair use can function as a market limiter.

This article is meant to illuminate the relationship between fair use and social economy. It characterizes the production and circulation of scholarly articles as a form



of reciprocal economy that merits protection under the fair use statute from the recently developed market for permissions. In doing so, it employed the market failure theory of fair use and the economic theories of Karl Polanyi. Congress hoped rights holders and educators could develop some form of consensus that would settle the matter of copying for classroom use. Despite the successful drafting of the *Classroom Guidelines*, a potential accord between the stakeholders in scholarly articles has not emerged. The specific controversy over the photocopier, forcing Congress to strip the doctrine to its essentials during the codification of Section 107, is still active in *Cambridge University Press et al. v. Patton et al.* We can hope the suit leads to the eventual understanding that limiting the market for scholarly articles to the first sale, while dissatisfying, is, at least, the most consistent outcome.

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Notes

1. Cambridge University Press et al. v. Patton et al., No. 1:2008cv01425 (N.D. Ga. 2008).
2. *Cambridge*, Complaint, 2.
3. *Cambridge*, Answer.
4. Association of American University Presses, "AAUP Supports University Presses in Suit Against Georgia State," press release (April 16, 2008), <http://www.aaupnet.org/news/press/AAUPonGSU.pdf> (accessed October 1, 2010).
5. Basic Books, Inc. v. Kinko's Graphics Co. 758 F. Supp 1522 (S.D. N.Y. 1991), No. 89 CIV. 28807 (CBM) http://www.bc.edu/bc_org/lavp/cas/comm/free_speech/basicbooks.html (accessed October 1, 2010).
6. Copyright Clearance Center, *2009 Annual Report* (Danvers, MA: Copyright Clearance Center, 2009), 2, <http://www.copyright.com/media/pdfs/FY09-Annual-Report-Single.pdf> (accessed October 1, 2010).
7. *Ibid.*, 7.
8. Copyright Clearance Center, *Using Content: Course Management Systems* (2005), <http://www.copyright.com/Services/copyrightoncampus/content/cms.html> (accessed October 1, 2010).
9. Association of American University Presses, "AAUP Supports University Presses in Suit Against Georgia State," press release, 16 April 2008, <http://www.aaupnet.org/images/stories/documents/gsu/AAUPonGSU.pdf> (accessed 22 January 2012).
10. H. Rep. No. 94-1476, 94th Cong., 68-70 (1976).
11. Copyright Clearance Center, *Annual Report*, 13.
12. Carrie Russell et al, *Complete Copyright: an Everyday Guide for Librarians* (Chicago: American Library Association, 2004), 20.
13. Kenneth D. Crews et al, *Copyright Law for Librarians and Educators*, 2nd ed. (Chicago: American Library Association, 2006), 123-124.
14. Campbell, Aka Skyywalker et al. v. Acuff-Rose Music, Inc. 510 U.S. 569, 577 (1993).
15. Thomas H. P. Gould, Tomas A. Lipinski, and Elizabeth A. Buchanan, "Copyright Policies and the Deciphering of Fair Use in the Creation of Reserves at University Libraries," *Journal of Academic Librarianship* 31, 3 (2005): 182-197.
16. *Cambridge University Press*, 7.
17. *Ibid.*
18. U.S. Const. art. I, § 8.

19. Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), 25.
20. *Ibid.*, 38.
21. United States Copyright Act, U.S. Code 17.
22. Sony Corp. of Amer. v. Universal City Studios, Inc. 464 U.S. 417, 429 (1984).
23. Leon Seltzer, *Exemptions and Fair Use in Copyright* (Cambridge: Harvard University Press, 1978), 8.
24. 17 U.S.C. § 102(a).
25. 17 U.S.C. § 106.
26. *Sony*, 429.
27. 17 U.S.C. § 102(a)(b).
28. Crews, *Copyright Law*, 17.
29. 17 U.S.C. § 107.
30. *Ibid.*
31. *Campbell*.
32. Crews, *Copyright Law*, 46–48.
33. *Sony*.
34. *Campbell*, 590.
35. American Geophysical Union v. Texaco Inc. 60 F.3d 913 (2nd Cir. 1994), http://www.law.cornell.edu/copyright/cases/60_F3d_913.htm (accessed October 1, 2010).
36. Lydia Loren, "Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems," *Journal of Intellectual Property Law* 5, 1 (Fall 1997): 41.
37. *Basic Books*, 1534.
38. Seltzer, *Exemptions and Fair Use*, 178.
39. H. Rep. No. 94–1476, 94th Cong., 68–70 (1976).
40. *Ibid.*
41. *Ibid.*
42. H. Rep. No. 94–1476, 94th Cong., 72 (1976).
43. *Campbell*, 577.
44. Princeton University Press v. Michigan Document Services, Inc. 99 F.3d , 1381 (6th Circ. 1996), <http://www.bitlaw.com/source/cases/copyright/pup.html> (accessed October 1, 2010).
45. *Basic Books*.
46. *Princeton*, section 4.
47. H. Rep. No. 94–1476, 94th Cong., 72 (1976).
48. Seltzer, *Exemptions and Fair Use*.
49. Kaplan, *An Unhurried View of Copyright*, 67.
50. Crews, *Copyright Law*, 40.
51. Seltzer, *Exemptions and Fair Use*, 24, 26. Italicized text within quotation in original.
52. Williams & Wilkins Co. v. United States. 420 U.S. 376 (1975).
53. Seltzer, *Exemptions and Fair Use*, 24, 26.
54. Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law. 89th Cong., 1st sess. (1965), reprinted in *Exemptions and Fair Use in Copyright*, Leon Seltzer (Cambridge: Harvard University Press, 1978), 22.
55. Seltzer, *Exemptions and Fair Use*, 28.
56. Nicholas Mercuro and Steven G. Medema, *Economics and the Law: From Posner to Post-Modernism and Beyond*, 2nd ed. (Princeton: Princeton University Press, 2006).
57. Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors," *Columbia Law Review* 82, 8 (1982): 1600–1657.
58. Wendy J. Gordon and Daniel Bahls, "The Public's Right to Fair Use: Amending Section 107 to Avoid the 'Fared Use' Fallacy," *Utah Law Review* 3 (2007): 623.
59. Wendy J. Gordon, "The 'Market Failure' and Intellectual Property: A Response to Professor Lunney," *Boston University Law Review* 82 (October 2002): 1031–103.

60. Kenneth Frazier, "What's Wrong with Fair-Use Guidelines for the Academic Community?" *Journal of the American Society for Information Science* 50, 14 (1999): 1321.
61. Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985), 570.
62. Gordon, "Fair Use as Market Failure," 1603.
63. *Ibid.*, 1614.
64. Gordon, "The 'Market Failure' and Intellectual Property," 1618.
65. Wendy J. Gordon, "Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives," *Boston University School of Law Working Paper Series, Law and Economics*, Working Paper no. 01-22 (Boston: Boston University, 2001) 6, 41, http://128.197.26.35/law/faculty/scholarship/workingpapers/abstracts/2001/pdf_files/GordonW120501.pdf (accessed 10/1/2010).
66. *Ibid.*, 4.
67. Mercurio, *Economics and the Law*, 25.
68. Gordon, "Fair Use as Market Failure," 1607-1609.
69. Loren, "Redefining the Market Failure Approach," 33-34.
70. Gordon et al., "The Public's Right to Fair Use," 657.
71. *Ibid.*, 621.
72. Gordon, "The 'Market Failure' and Intellectual Property," 1034.
73. Gordon, "Excuse and Justification in the Law of Fair Use," 29-31.
74. Loren, "Redefining the Market Failure Approach," 33.
75. Gordon, "Excuse and Justification in the Law of Fair Use," 5, 16-19.
76. Karl Polanyi, Conrad M. Arensberg, and Harry W. Pearson, *Trade and Market in the Early Empires: Economies in History and Theory* (Glencoe, IL: Free Press, 1957), 250-256.
77. Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957), 47. Polanyi, *Trade and Market in the Early Empires*, 247, 250.
78. Michael J. Madison. "A Pattern-Oriented Approach to Fair Use," *William and Mary Law Review* 45, 4 (2004): 1669.
79. Polanyi, *Trade and Market in the Early Empires*, 253.
80. John Buckman, *BookMooch*, <http://bookmooch.com/> (accessed 10/1/2010).
81. Hahn, *Market and Society*, 2.
82. Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies* (London: Cohen & West Ltd, 1954), 11.
83. The Freecycle Network. *Freecycle*, www.freecycle.com (accessed 10/1/2010).
84. David Shatz. *Peer Review: A Critical Inquiry* (Lanham, MD: Rowman & Littlefield, 2004) 1.
85. Folsom et al. v. Marsh et al., 9 F. Cas. 342, 6 (1841).
86. 26 U.S.C. § 501(c)(3). Susan Rose-Ackerman, "Unfair Competition and Corporate Income Taxation" *Stanford Law Review* 34, 5 (1982): 1017-1018, <http://www.jstor.org/stable/1228542> (accessed 10/11/2011).
87. Henry B. Hansmann, "The Role of the Nonprofit Enterprise," *Yale Law Journal* 89, 5 (1980): 848, <http://www.jstor.org/stable/796089> (accessed 10/27/2011).
88. Joint Committee on Taxation, "Present Law and Analysis Relating to Tax Benefits for Higher Education," No. JCX-35-08, <http://www.jct.gov/publications.html?func=startdown&id=1305> (accessed 10/11/2011).
89. Rose-Ackerman, "Unfair Competition and Corporate Income Taxation," 1017-1018.
90. Hansmann, "The Role of the Nonprofit Enterprise," 838.
91. *American Geophysical*.
92. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).
93. Association of American University Presses, "AAUP Supports University Presses in Suit Against Georgia State."
94. *Basic Books*, 1543.
95. Gordon, "Excuse and Justification in the Law of Fair Use," 42.
96. Robert K. Greenleaf et al, *Servant Leadership: A Journey into the Nature of Legitimate Power and Greatness*, 25th anniversary ed. (Mahwah, NJ: Paulist Press, 2002), 50.

