Envisioning How Fair Use and Fair Dealing Might Best Facilitate Scholarship

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ABSTRACT

Copyright law grants exclusive rights to authors of original works of authorship, but those rights are subject to numerous exceptions and limitations, including fair use in the United States and fair dealing in Canada. These exceptions have traditionally worked to ensure that the rights of copyright owners are adequately balanced with the interests of subsequent authors, researchers, and consumers of copyrighted works. Moreover, fair use has emerged as the most promising legal mechanism for the digitization, preservation, and study of large collections of copyrighted work. Fair use and fair dealing provide much of the flexibility needed to ensure that copyright protection serves to facilitate scholarship rather than threaten it. Scholars encounter copyright law both as authors and as users of copyrighted works.

With an eye toward the future, this panel will examine the extent to which the discourses and practices of the past decade have contributed to shaping and reshaping our scholarly environment, how the information field has responded, and why and how information scholars, researchers and professionals ought to remain engaged in these matters in the future.

Keywords
Intellectual property; fair use; scholarly publishing; authorship; information access.

INTRODUCTION
In the past decades, we have seen major changes taking place in the scholarly publishing landscape along with changes in our framing of intellectual property. During that time, legislation, policies, practices, and discursive strategies have emerged, shaped, and reshaped different spheres of society, both nationally and globally. The changes introduced

or, in some cases, expanded stringent anti-user rights legislation (Dreyfuss, 2004), restrictions on access to information, and a reliance on technologies (and laws that protect technologies) that both enforce and enlarge the exclusive rights of copyright without reference to its established exceptions (Samuelson, 2003). Each of these phenomena has contributed to the ongoing evolution of the relationship between content producers and consumers, and between authors/owners' rights and user rights (Aufderheide & Jaszi, 2011).

Fair use and fair dealing—important limitations on copyright in the United States and Canada, respectively—have traditionally been essential to many aspects of teaching and scholarship (Leval, 1990; Samuelson, 2008). The scope and application of these limitations on copyright have enormous implications for the information field. Consider the following ways in which the evolving contours of fair use either have had or might yet have a tremendous impact:

- In the United States, the mass digitization of copyrighted works for purposes of preservation, access to the print disabled, and facilitating new kinds of research with large-scale, computer-driven analysis of text, has been allowed to move forward due to fair use, at least for the time being (Samuelson, 2015).

- Scholarship of all kinds regularly incorporates copyrighted third-party works in order to analyze, engage, criticize, and illustrate (Samuelson, 2008). Many of these kinds of uses would be threatened or diminished in the absence of a limitation on copyright like fair use or fair dealing.

- Laws protecting technical protection measures for copyrighted digital content have not been interpreted to provide exceptions for fair use. In an increasingly digital publishing environment, the lack of effective limitations and exceptions might threaten traditional scholarly and archival

uses (Samuelson, 2003).

The purpose of this panel is to initiate a critical reflection and open discussion around the impacts of fair use on the information field and professions broadly speaking, with a particular focus on the production, management and diffusion of scholarly information. Key questions considered will include:

- How have these changes been evidenced in levels of information available to members of the public and to information professionals? How have the attitudes of information professionals to these laws, policies, and practices changed?

- How might codes of best practices ensure that fair use remains an accessible option in the work of practitioners and scholars?

- How have the laws, policies, and practices affected different channels and platforms of access?

- How has education of future information professionals changed? What should students be prepared for in relation to these issues?

- What laws, policies, and practices should the information professions advocate for in these areas?

Invigorating and reflective discussion of these topics is extremely important for the information professions, as they are best positioned to understand the implications of the laws, policies, and practices and to propose alternatives that would better balance the needs of authors and rightsholders with the importance of access, preservation, and reuse to a vibrant creative economy.

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PANEL STYLE

The panel will last 1.5 hours. The panel will begin with a short introduction to the panel topic by one of the panelists. Following the Pecha Kucha-style for the presentations, each panelist will then provide a short, focused presentation on certain elements of the overall panel topic:

- Pamela Samuelson will discuss how relevant policy goals have been favored in fair use law and how those goals might continue to be furthered in the evolving fair use landscape.

- Alissa Centivany will discuss the promise and perils of fair use in the context of mass digitization and knowledge infrastructure development, drawing upon her research on HathiTrust.

- Michael Wolfe will discuss the need for best practices in fair use for authors and users of scholarly work and the Authors Alliance's role working to see fair use remain accessible for creators needing to incorporate copyrighted third-party content into their works.

- Nadia Caidi will present a Canadian perspective on the topic, and reflect on the topics' implications for the information professions in terms of education and advocacy. She will also moderate the panel.

After the presentations, we will open the floor for discussion with the audience. Fair use best practices, an area of emphasis for the panel, are shaped and informed by the existing practices and problems facing relevant communities. We envision that the audience, as both creators and users of copyright works, will provide various use cases that will better frame, reinforce, or perhaps challenge the panelists' presentations.

It is hoped that the engagement between the panelists and the audience leads to the formulation of a relevant research agenda for our field. The panelists will subsequently post this research agenda on the ASIS&T Information Policy website, solicit further input and encourage meaningful dialog and engagement with the critical issues stemming from this research area.

PANELISTS

The panelists are uniquely qualified to present upon and discuss these materials, as information policy is central to the work of all of the panelists:

Nadia Caidi is an Associate Professor at the Faculty of Information at the University of Toronto, and the incoming President of ASIST. Her primary research interests are in information policy and information access. She is also involved in cross-cultural and comparative studies, researching the influence of culture on the production, distribution and use of information and its technologies.

Alissa Centivany is a PhD candidate at the School of Information at the University of Michigan and a research associate at the Centre for Innovation Law & Policy at the University of Toronto's Faculty of Law. Her primary research interests are the processes of transformation in sociotechnical systems and, in particular, the role of innovative deviance. Centivany holds a Juris Doctor degree from Wayne State University and is a member of the State Bar of Michigan.

Pamela Samuelson is the Richard M. Sherman Distinguished Professor of Law and Information at the University of California, Berkeley. She is recognized as a pioneer in digital copyright law, intellectual property, cyberlaw and information policy. Since 1996, she has held a joint appointment at Berkeley Law School and UC Berkeley's School of Information. Samuelson is a director of the internationally-renowned Berkeley Center for Law & Technology. She serves on the board of directors of Authors Alliance and the Electronic Frontier Foundation, as well as on the advisory boards for the Center for Democracy & Technology, Public Knowledge, and the Berkeley Center for New Media.

Michael Wolfe is the executive director of Authors Alliance, a Berkeley-based non-profit dedicated to furthering the public interest by supporting authors who write to be read. Wolfe is also a copyright research fellow at the University of California, Berkeley Law School and a member of the State Bar of California.

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