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### Integrating Fair Use into Information Literacy: Perspectives from the Georgia State University eReserves and HathiTrust Copyright Infringement Cases

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# INTEGRATING FAIR USE INTO INFORMATION LITERACY

PERSPECTIVES FROM THE GEORGIA STATE UNIVERSITY ERESERVES AND HATHITRUST LAWSUITS

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# ACRL INFORMATION LITERACY FRAMEWORK: INFORMATION HAS VALUE

- Information possesses several dimensions of value, including as a **commodity**, as a **means of education**, as a means to influence, and as a means of negotiating and understanding the world. **Legal** and socioeconomic interests influence information production and dissemination.

## FAIR USE

- Fair use is an exception to the exclusive rights of the copyright holder
- Fair use allows others to make use of a copyrighted work without permission or payment
- Fair use is a legal response to the need to balance the rights of the owner with the Constitutional purpose of copyright to promote the progress of science

# FAIR USE STATUTE

- “[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—”
  - The purpose and character of the use
  - The nature of the copyrighted work
  - the amount and substantiality of the portion used in relation to the copyrighted work as a whole
  - the effect of the use upon the potential market for or value of the copyrighted work

## CASE LAW

- Campbell v. Acuff-Rose Music – 1994 Supreme Court decision
- Transformative Use
  - “[T]he enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is "transformative," altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”

## GEORGIA STATE CASE (CAMBRIDGE UNIV. PRESS, ET AL. V. BECKER, ET AL.)

- Unlicensed electronic reserves – digitized portions of copyrighted books
- Publishers argue any use is infringing unless licensed
- GSU argues the uses are fair uses
- GSU does not argue that the uses are transformative
  - Mirror-image copying

## GSU LAWSUIT

- U.S. District Court, Northern District Georgia in 2012 found infringing only 5 of 76 alleged infringements
- 11<sup>th</sup> Circuit Court of Appeals – Reversed and remanded, but did not find unlicensed use in this context to be infringing as a matter of law
- U.S. District Court - Northern District Georgia in March, 2016 found infringing 4 of 48 alleged infringements
- Appeal filed September, 2016



# HATHITRUST LAWSUIT (AUTHORS GUILD, ET AL. V. HATHITRUST, ET AL.)

- Derives from the Google Books (Google Library) project
- Mass digitization of books in university libraries, without permission or payment
- Full books scanned, only metadata visible except for
  - Works in the public domain
  - Works made accessible to the visually impaired
- Authors Guild argues massive infringement
- HathiTrust argues TRANSFORMATIVE fair use

# HATHITRUST LAWSUIT

- U.S. District Court, Southern District of New York in 2012 finds HathiTrust to be fair use – decision focuses on transformative nature of the project – “non-consumptive purposes”
- 2<sup>nd</sup> Circuit Court of Appeals in 2014 affirms
- No appeal is filed

# COMPARING THE CASES IN LIGHT OF THE INFORMATION HAS VALUE FRAME

- Both cases recognize the value of the information contained in the books
- The characterization of that value differs between the cases

# COMPARING THE CASES IN LIGHT OF THE INFORMATION HAS VALUE FRAME

- GSU not based on a transformative work theory
- Decisions focus on the 4<sup>th</sup> factor - the effect of the use upon the potential market for or value of the copyrighted work, and the 3<sup>rd</sup> factor, the amount used
- The market is considered both the market for the original book and the licensed excerpts
- The book is a commodity – the issue is how to get as much value (profit) from the book as can

## COMPARING THE CASES IN LIGHT OF THE INFORMATION HAS VALUE FRAME

- HathiTrust is based on a transformativeness theory
- Focus on the purpose and character of the use being transformative
- The market becomes a lesser factor
- The book is a means of education – the issue is how to get as much value (learning) as can

## COMPARING THE CASES IN LIGHT OF THE INFORMATION HAS VALUE FRAME

- Information possesses several dimensions of value, including as a commodity, as a means of education, as a means to influence, and as a means of negotiating and understanding the world. Legal and socioeconomic interests influence information production and dissemination.

# FAIR USE BALANCING INFORMATION AS COMMODITY AND INFORMATION AS MEANS OF EDUCATION

- Copyright law recognizes that information (book) is a commodity and gives the owner exclusive rights, for a limited period, to profit from the work.
- With the Fair Use exception, copyright law recognizes that information (book) is a public good that promotes the progress of society, here through learning

# LEARNERS WHO ARE DEVELOPING THEIR INFORMATION LITERATE ABILITIES

- Understand the purpose and distinguishing characteristics of copyright, fair use ...
- respect the original ideas of others;
- value the skills, time, and effort needed to produce knowledge;
- see themselves as contributors to the information marketplace rather than only consumers of it



## FAIR USE AND INFORMATION HAS VALUE

- Fair use is the bridge that leads from respecting the work of others to building upon that work
- The cases demonstrate how different facts lead to different balancing of the factors
- Understanding non-transformative uses (GSU) helps learners consider the value of the information to the owner, and the importance of not overusing others' work
- Understanding transformative uses (HathiTrust) helps learners navigate critically approaching others' works, consider alternative understanding, and advance knowledge in new ways.

# WHAT DO YOU THINK?

- Questions? Comments? Discussion?