

# Cites & Insights

Crawford at Large  
Libraries • Policy • Technology • Media

Volume 12, Number 6: July 2012

ISSN 1534-0937

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## Libraries

### Give Us a Dollar: A Case Study

I believe [Give Us a Dollar and We'll Give You Back Four](#) could be useful for almost any public library, especially those in the middle—that is, not quite starving for funds but without really good funding. I call it the Middle 6,500: 6,492 public libraries with at least \$12 and less than \$61 per capita funding. (Not that I don't believe libraries below or above that point could find the book worthwhile, but I believe it's most relevant in the middle.)

But the book—in its current form or in a vastly revised 2010-data version—can't be useful if librarians don't use it or find it incomprehensible. I'm going to step through a case study in an attempt to make the possibilities more concrete. After all, if the book *isn't* useful, it shouldn't exist: It's not a literary work or an essay.

Actually, I'm going to do this twice: Once with pieces of a rethought structure for the book, again with the preliminary draft. I believe the rethought structure would be more directly meaningful and easier to use.

### The Rethought Version

Let's take a fictitious public library as an example and see what the director or staff could gain from the book. While this public library doesn't exist, its profile was created by averaging two New York public libraries with very similar legal service area populations (LSA).

Fourbuck Public Library (henceforth Fourbuck) is in New York, a largish small library that's serving Fourbuck fairly well but could probably do more with better funding. The director sends me email after buying the book and gets back something like this as part of a reply email shortly thereafter (except that labels are abbreviated):

State: NY  
Key: NY999X  
LSA population: 10,768  
Expenditures: \$280,057  
Visits: 48,019  
Reference: 3,590  
Circulation: 94,886  
ILL: 23,625  
Program attendance: 2,922  
PCs: 5  
Personal Computer Use: 6,189  
\$ per capita: \$26.01  
Benefits per capita: \$140.21  
Hours: 2,559  
Circulation per capita: 8.81  
Benefit ratio: 5.39  
Attendance per capita: 0.27  
PC use per capita: 0.57  
Reference per capita: 0.33  
Visits per capita: 4.46  
Circulation per hour: 37.1  
Visits per hour: 18.8

After a revised introduction, the book would consist of 20 chapters—19 fairly short, one very long. The long one: libraries by state, with each state showing a limited set of tables splitting libraries by size.

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Chapters 3 through 19 would each cover a group of libraries with similar population—between 493 and 506 libraries for the 2009 numbers, something fairly similar for 2010. Each chapter would have two sets of tables, which you can think of as benchmarks and budgets respectively. I show the full set of budget tables for Chapter 12, Libraries Serving 8,700 to 11,199 people, along with a partial view of one benchmark table. Chapter 2 would have the benchmark and budget tables for the full set of libraries.

## 12. Libraries Serving 8,700 to 11,199 People

First, here's one example of the benchmark tables—this time for circulation per capita. (Other benchmarks include attendance per capita, reference per capita, visits per capita and PC use per capita).

Circulation per cap	Count	%	Cum%
24+	16	3.2%	3.2%
20-23	16	3.2%	6.3%
18-19	7	1.4%	7.7%
16-17	12	2.4%	10.1%
15	5	1.0%	11.1%
14	14	2.8%	13.9%
13	19	3.8%	17.6%
12	12	2.4%	20.0%
11	20	4.0%	24.0%
10	22	4.4%	28.3%
9	25	5.0%	33.3%
8	39	7.7%	41.0%
7	32	6.3%	47.3%
6	47	9.3%	56.6%
5	50	9.9%	66.5%
4	51	10.1%	76.6%
3	44	8.7%	85.3%
0-2	73	14.5%	99.8%
Total	505		

Table 12.1 Benchmark percentages for circulation per capita

Two columns that do *not* appear here, for space reasons and because I haven't done the calculations, would appear to the right of Cum%: BenR and \$/cap, showing the median benefit ratio and expenditures per capita (respectively) for libraries on that row.

Fourbuck finds that it's in the top 40% for circulation per capita among libraries of roughly the same size—but one-third of those libraries do better. Is that a useful piece of information? (If it's accompanied by a strong correlation between circulation per capita and funding, would that help?)

The budget tables all use operating expenditures per capita (with ten divisions) as a secondary axis. This should mean that a typical row of data in a table covers roughly 50 libraries, although that number will vary (in the example shown here, it varies from 41 to 60). For most tables, each row shows two metrics with the median, 25%ile and 75%ile for that metric. The first table is a little different: It shows the breakdown of libraries by budget (and perhaps should include a cumulative % column to the right of the % column):

\$ per cap	Count	%
\$82+	34	7%
\$61-\$81	47	9%
\$46-\$60	41	8%
\$38-\$45	60	12%
\$32-\$37	55	11%
\$27-\$31	56	11%
\$22-\$26	45	9%
\$17-\$21	60	12%
\$12-\$16	57	11%
\$5-\$11	50	10%
Overall	505	

Table 12.2 Expenditure distribution

Table 12.2 is the only budget table showing number of libraries. Fourbuck notes that it's in one of the smaller groups—and also, significantly, that 58% of libraries in this size group have *better* funding.

\$ per cap	Hours			Personal Computers		
	25%	Med	75%	25%	Med	75%
\$82+	2,912	3,151	3,536	14	19	27
\$61-\$81	2,626	2,812	3,276	10	14	19
\$46-\$60	2,743	2,968	3,276	7	13	19
\$38-\$45	2,444	2,721	2,970	7	10	17
\$32-\$37	2,488	2,717	2,964	8	19	14
\$27-\$31	2,366	2,756	3,120	7	12	14
\$22-\$26	2,080	2,496	2,912	6	8	13
\$17-\$21	2,028	2,285	2,600	6	8	11
\$12-\$16	2,040	2,288	2,601	7	10	14
\$5-\$11	1,848	2,167	2,382	5	7	10
Overall	2,236	2,678	3,000	7	10	15

Table 12.3 Hours and personal computers

Fourbuck is open just slightly longer than most libraries with its funding level—but it's not in the top quartile. More to the point, libraries with better funding are open a *lot* more hours, which almost automatically means more service to the community (assuming those hours are added when the community needs them—typically evenings and weekends). Adding another two or three hours per week would put Fourbuck at the median point for libraries of this size, but more would be better.

And look at the other metric! Fourbuck is *really* short of internet-connected personal computers for public use: Just half of the median for all libraries of its size and in the bottom quarter of libraries even with its mediocre funding. Even most libraries on starvation diets (\$5-\$11) have more PCs.

\$ per cap	Circulation/cap			Benefit Ratio		
	25%	Med	75%	25%	Med	75%
\$82+	12.9	19.6	24.7	2.4	2.8	3.5
\$61-\$81	9.5	13.4	18.6	2.6	4.0	4.6
\$46-\$60	7.7	10.0	14.6	2.8	3.7	4.8
\$38-\$45	7.0	9.2	11.4	3.4	4.1	5.3
\$32-\$37	6.0	7.4	9.5	3.6	4.5	5.3
\$27-\$31	4.7	6.3	8.9	3.5	4.7	5.3
\$22-\$26	4.6	6.0	7.7	3.6	4.6	5.8
\$17-\$21	3.9	5.1	6.8	4.4	5.3	6.7
\$12-\$16	2.5	3.5	4.7	4.3	5.4	6.9
\$5-\$11	1.8	2.6	3.6	4.8	6.3	8.4
Overall	4.2	6.9	10.5	3.5	4.6	5.7

Table 12.4 Circulation per capita and benefit ratios

This is one of those tables that speak to better funding fairly directly—look at the pattern of median circulation per capita as funding changes. Fourbuck is in reasonable shape: Better than median for all libraries its size and well into the top quarter for libraries with its funding. Bump that funding up a little and it would still be nearly in the top quarter—but it would probably do better with more hours. (Ten circulations per capita is a good starting target, and it's not out of reach for Fourbuck.)

The benefit ratio for Fourbuck is above average for its mediocre funding but not in the top quarter—but benefit ratio is one place where you really don't want to be at the top.

\$ per cap	Attendance/cap			PC use/cap		
	25%	Med	75%	25%	Med	75%
\$82+	0.6	1.0	1.5	1.5	2.7	4.1
\$61-\$81	0.4	0.6	0.8	0.9	2.0	2.7
\$46-\$60	0.3	0.5	0.7	1.0	1.6	2.5
\$38-\$45	0.3	0.4	0.6	0.9	1.4	1.8
\$32-\$37	0.2	0.4	0.5	0.9	1.3	2.1
\$27-\$31	0.2	0.3	0.4	0.8	1.2	1.8
\$22-\$26	0.1	0.3	0.4	0.6	1.0	1.5
\$17-\$21	0.2	0.2	0.4	0.5	0.8	1.1
\$12-\$16	0.1	0.2	0.2	0.4	0.7	0.9
\$5-\$11	0.1	0.1	0.2	0.4	0.6	1.0
Overall	0.2	0.3	0.6	0.6	1.1	1.8

Table 12.5 Attendance and PC use per capita

More money, more and better programs, more program attendance—although few of the libraries in this size category, even the well-funded ones, do really well on this metric. At 0.27, rounded to 0.3, Fourbuck is just about average for program attend-

ance, but could do a lot better. (Should this—and some other metrics—show two decimal places?)

As for PC use—well, when the PCs aren't there, it's hard for them to be used heavily. Fourbuck's in the bottom quarter even for its funding level, barely half of the median level.

\$ per cap	Reference/cap			Visits/cap		
	25%	Med	75%	25%	Med	75%
\$82+	0.6	1.4	2.2	9.9	13.8	18.3
\$61-\$81	0.5	0.7	1.4	6.7	10.1	12.5
\$46-\$60	0.2	0.7	1.0	4.9	6.9	10.2
\$38-\$45	0.3	0.6	0.9	5.5	6.9	9.0
\$32-\$37	0.4	0.7	1.0	4.7	6.4	8.7
\$27-\$31	0.2	0.4	0.7	3.8	4.9	7.5
\$22-\$26	0.2	0.3	0.6	3.1	3.8	5.7
\$17-\$21	0.2	0.4	0.7	2.8	3.9	5.2
\$12-\$16	0.1	0.2	0.6	1.8	2.6	4.3
\$5-\$11	0.1	0.3	0.7	1.4	2.0	2.7
Overall	0.2	0.5	0.9	3.1	5.4	8.2

Table 12.6 Reference questions and visits per

Here, Fourbuck is in reasonably good shape for its funding. Fourbuck is roughly average for its funding (but below average for its size) on reference, above average for its funding (but below average for its size) on visits per capita. You already know the refrain: Longer hours, more programs, more PCs, more money for fresher materials, and visits will go up along with circulation.

\$ per cap	Circulation/hour			Visits/hour		
	25%	Med	75%	25%	Med	75%
\$82+	38.5	57.4	87.0	31.9	38.2	57.4
\$61-\$81	30.3	47.6	55.4	20.8	29.5	43.1
\$46-\$60	23.2	34.6	51.0	16.6	21.1	35.8
\$38-\$45	26.0	32.3	41.1	18.8	24.4	31.9
\$32-\$37	21.6	25.8	36.0	16.4	25.2	31.5
\$27-\$31	16.6	24.5	33.6	13.2	18.9	25.8
\$22-\$26	17.5	24.0	28.2	10.1	15.2	22.4
\$17-\$21	17.0	21.0	28.9	10.9	16.4	22.8
\$12-\$16	10.0	14.2	21.9	7.8	12.0	19.4
\$5-\$11	8.5	11.8	16.6	7.3	9.7	12.3
Overall	16.6	25.8	37.0	11.8	20.3	29.5

Table 12.7 Circulation and visits per hour

Well-funded libraries attract more usage *per hour*, in addition to being open longer hours. Similarly for visits per hour: The ratio of best-funded median to worst-funded median is 2.6 to one, where it's 6.9 to one for visits per capita.

That's the set. I haven't included correlations or graphs, and it's not clear how many decimal places should appear. Remember that this set of tables (and similar state-by-state tables, but arranged by size rather than funding) would *replace* the other tables, not add to them.

I *believe* this would yield a book that many libraries would find helpful in seeing how they fit in compared to similar libraries and in making their case for better (or at least not worse!) funding. If at least 1% of public libraries would find this useful, I'd go ahead with the revised study using 2010 data. But I need feedback as to whether that's useful.

### The Current Structure

With the preliminary edition, the data line I send back to libraries (on request) is a little different—it doesn't include the two “per hour” metrics and includes some other derivative metrics that aren't addressed directly in the book. Let's see what you (Fourbuck's director) can learn from the current version—acknowledging that it turns out to be somewhat repetitive.

By the time you've read the first chapter, you know that with a 5.39 benefit ratio Fourbuck gets more bang per buck than most libraries. That may be too high (especially in a high-cost state)—it may be a sign that Fourbuck is underfunded (and, at \$26.01 per capita, it's certainly not swimming in money).

### 2. Library Size Breakdowns

Fourbuck is at the bottom edge of the LSA category with the most libraries: 10,000 to 24,999, with 1,713 libraries among the 8,506 in the book.

Dollars per cap	Count	Median figures			
		Circ/cap	Att/cap	Ben/cap	BenR
\$5-\$11	185	2.74	0.12	\$56.53	6.36
\$12-\$16	196	3.97	0.18	\$76.97	5.39
\$17-\$21	174	5.08	0.26	\$97.72	5.11
\$22-\$26	166	5.54	0.31	\$108.45	4.48
\$27-\$31	165	7.81	0.30	\$134.56	4.59
\$32-\$37	178	8.09	0.38	\$146.78	4.20
\$38-\$45	189	9.52	0.38	\$162.43	3.82
\$46-\$60	195	10.54	0.47	\$182.76	3.53
\$61-\$81	138	12.78	0.53	\$234.39	3.31
\$82+	127	16.51	0.84	\$296.69	2.40
Overall	1,713	7.18	0.32	\$132.37	4.32

Table 2.11 Selected per-capita metrics by expenditures per capita

Fourbuck is one of 166 libraries with \$22 to \$26.99 per capita funding. Among those libraries, Four-

buck has substantially higher circulation than most (8.81 compared to 5.54), but it's a little low on program attendance (0.27 compared to 0.31). There's strong evidence that Fourbuck would continue to offer excellent value if it had a dime a day funding (\$36.50 per capita) or even more (a buck a week?)—and its circulation and benefits are both close to the dime-a-day level.

### 3. Library Budget Breakdowns

At \$280K, Fourbuck's total operating expenses are in the \$250,000 to \$439,000 range along with 979 other libraries. How does Fourbuck compare with other libraries with comparable budgets?

Dollars per cap	Count	Median figures			
		Circ/cap	Att/cap	Ben/cap	BenR
\$5-\$11	80	2.40	0.11	\$49.06	5.87
\$12-\$16	96	3.88	0.19	\$73.84	5.16
\$17-\$21	101	5.55	0.26	\$101.75	5.31
\$22-\$26	111	5.66	0.31	\$112.99	4.64
\$27-\$31	114	7.50	0.32	\$135.91	4.65
\$32-\$37	128	7.78	0.44	\$153.33	4.46
\$38-\$45	125	9.47	0.45	\$171.84	4.29
\$46-\$60	103	11.51	0.62	\$204.40	4.06
\$61-\$81	64	12.14	0.76	\$242.11	3.50
\$82+	58	21.17	1.14	\$404.63	3.62
Overall	980	7.22	0.35	\$141.57	4.51

Table 3.18 Median per capita benefit figures

There are 111 libraries with comparable expenditures per capita. Once again, Fourbuck is higher than most for circulation and lower than most for program attendance. Total benefits continue to be on the high side, with a benefit ratio *considerably* higher than most for this group (\$4.64).

Dollars per cap	Count	Median figures			
		Hours	Visits	Refer	PCUse
\$5-\$11	80	2,951	72,978	6,620	17,779
\$12-\$16	96	2,668	68,142	6,401	13,695
\$17-\$21	101	2,600	73,394	6,312	14,424
\$22-\$26	111	2,808	73,694	5,939	13,344
\$27-\$31	114	2,730	62,272	5,030	12,422
\$32-\$37	128	2,704	58,819	5,227	13,096
\$38-\$45	125	2,678	56,990	3,900	10,620
\$46-\$60	103	2,704	52,388	4,000	10,231
\$61-\$81	64	2,600	43,056	3,498	9,325
\$82+	58	2,486	49,161	3,567	9,516
Overall	980	2,702	60,703	5,201	12,433

Table 3.19 Additional median benefit figures, not per capita

At 2,559 hours (49 hours per week), Fourbuck is open fewer hours than most libraries with this level of funding (54 hours per week): Right there is a case for additional funding that would almost certainly increase community value, especially if the hours added are on weekends and evenings. Fourbuck is *well* below average for visits and reference use, and not even half of typical PC use: Does it need more public access computers as well as longer hours?

## 4. Expenditures Per Capita

What about the 954 libraries spending \$22 to \$26.99 per capita?

LSA	Count	Circ/c	Att/c	Vis/c	PC/c	BenR
0	70	5.6	0.3	4.5	1.5	8.0
1	201	6.5	0.3	4.7	1.2	6.9
2	154	6.3	0.3	4.7	1.1	5.9
5	148	6.5	0.3	4.5	1.1	5.4
10	166	5.5	0.3	4.8	1.0	4.5
25	94	5.8	0.3	4.5	1.0	4.1
50	55	5.9	0.2	4.2	0.9	4.3
100	47	5.7	0.2	3.6	0.8	3.9
250	19	5.9	0.2	4.4	0.9	4.5
Overall	954	6.1	0.3	4.5	1.0	5.3

Table 4.15 Median figures for libraries spending \$22 to \$26.99 per capita

This basically confirms what we've already seen, slicing the libraries differently.

## 5. State by State

This longest chapter, roughly half the book, breaks down libraries within a state in four different tables. The first table shows that Fourbuck is one of 142 libraries in its size category (out of 740 New York libraries considered in the book).

\$ per cap	Count	Circ/c	PC/c	Ben/c	BenR
\$82+	148	14.0	2.0	\$292	1.0
\$61-\$81	80	12.3	1.4	\$247	3.5
\$46-\$60	71	11.8	1.8	\$257	4.9
\$38-\$45	64	11.1	1.2	\$209	5.3
\$32-\$37	55	8.8	1.2	\$192	5.4
\$27-\$31	73	7.3	1.1	\$157	5.4
\$22-\$26	74	6.4	0.9	\$134	5.6
\$17-\$21	65	4.9	0.7	\$120	6.2
\$12-\$16	70	3.9	0.6	\$93	6.5
\$5-\$11	40	2.4	0.5	\$71	7.3
Overall	740	8.3	1.1	\$172	5.1

Table 5.134 New York median per capita metrics by expenditures per capita [LSA column removed]

Compared to all 74 New York libraries with \$22 to \$26.99 per capita funding, circulation is on the high side and PC usage is on the low side, with overall benefits a little above the median and benefit ratio a little below. Could Fourbuck offer better programs, longer hours, a fresher collection, more PCs and—don't forget—the high-value services that don't show up on this simplistic analysis if it had, say, \$37 per capita funding (an extra \$117,000, roughly)? Based on everything else in this book, it's fair to suggest that Fourbuck would *still* give the community at least \$4 in benefits for every \$1 in expenditures—and probably \$5, given the New York picture.

## 6. Benefit Ratios

Fourbuck is one of 1,299 libraries with benefit ratios between 5.00 and 5.99. That group, 15% of the libraries considered in the book, serves 12% of the people. Fourbuck doesn't meet any of the suggested robust criteria for library usage—ten circulations per capita, one program attendance per capita, one reference transaction, five visits and two PC uses—but it's close on circulation.

LSA	Count	Circ/c	Att/c	Ref/c	Vis/c	PC/c
0	117	7.3	0.4	0.4	5.7	1.6
1	244	6.8	0.5	0.4	5.0	1.2
2	208	6.5	0.3	0.4	4.8	1.2
5	238	6.9	0.3	0.4	4.8	1.0
10	247	6.9	0.3	0.5	5.1	0.9
25	119	8.3	0.3	0.6	5.2	0.9
50	51	5.5	0.2	0.5	4.0	0.9
100	47	5.1	0.2	0.6	3.9	1.0
250	28	8.7	0.2	1.0	5.8	1.1
Overall	1,299	6.9	0.3	0.5	5.0	1.1

Table 6.18 Median per capita metrics by size of library

Fourbuck's a bit above average for circulation for this size library, below on all other service metrics.

\$ per cap	Count	Circ/c	Att/c	Ref/c	Vis/c	PC/c
\$82+	25	25.7	1.4	1.9	19.3	5.4
\$61-\$81	60	20.3	0.9	1.2	12.3	2.9
\$46-\$60	117	15.5	0.7	0.8	8.9	2.0
\$38-\$45	138	11.8	0.5	0.7	7.7	1.5
\$32-\$37	148	8.7	0.4	0.6	6.2	1.4
\$27-\$31	166	8.4	0.4	0.5	5.4	1.1
\$22-\$26	176	6.4	0.3	0.5	4.6	1.0
\$17-\$21	166	5.2	0.2	0.4	3.9	0.9
\$12-\$16	173	3.7	0.2	0.3	2.9	0.7
\$5-\$11	130	2.1	0.1	0.2	1.6	0.5

Table 6.19 Median per capita metrics by expenses per capita

## Summing Up

Appendix A shows something mildly interesting: For libraries with \$140 to \$164.99 benefit per capita serving 10,000 to 24,999 people, the median per capita circulation is 8.77, nearly identical to Fourbuck's 8.81.

Fourbuck could use better funding—to stay open longer hours, to add more computers, to add more and better programs, and probably to improve the collection. The library could also almost certainly use funding for less countable improvements: job center, teen area, adult literacy programs, micropublishing support, maybe a makerspace.

Based on the data in this book, there's *strong* reason to believe better funding will yield nearly proportional better benefits. The benefit ratio might drop into the \$4 range and that might be a good thing—the library's clearly an excellent steward of public funds.

## Worth Doing?

I'll repeat the offer to send out review PDF copies if you're wondering whether this *might* make sense. A review could be email back to me (positive or negative, doesn't matter) or a post elsewhere. Reviewers can (and probably should) also request their library's data line.

To date, I've received very limited feedback based on an earlier version of this commentary and my other posts, not on the book itself. That feedback is not promising: It suggests I'm wasting my time and libraries' attention with a result that nobody else can make sense of. If that's generally true, I'll shut down the project. On the other hand, if 10% of libraries would find a refined version (most likely based on the last section of this essay) useful, I'd definitely proceed. So far, less than 0.1% of public libraries have shown any interest, and that's a clear message as well.

## Policy

# Copyright: Fair Use, Part 2

While Part 1 was fairly specific, with articles relating to a copyright troll and GSU (separately), this part's more general. First we have a range of items relating to academic libraries (other than GSU) and fair use. Then comes a group of miscellaneous items

related to fair use that I thought were worth noting. Finally, a few notes on developments on the Georgia State situation since the judge ruled on the case.

## Academic Libraries and Fair Use

What better place to begin than a 23-page PDF from ARL [published December 20, 2010](#) and entitled *Fair Use Challenges in Academic and Research Libraries*? The document was prepared by Prudence Adler, Brandon Butler, Patricia Aufderheide and Peter Jaszi. It “summarizes research into the current application of fair use to meet the missions of U.S. academic and research libraries.” It's based on one-hour interviews with 65 librarians. The investigators found a wide range of practice.

Interview subjects expressed various levels of certainty about how to interpret and apply fair use. They were aware of the doctrine, of its status as a flexible “rule of reason,” and of some general categories of behavior it may protect, but some lacked a reliable, low-risk method of interpretation. Many moved immediately to “risk management” (i.e., strategizing about how to avoid litigation and other negative consequences) without first determining their fair use rights, and many followed arbitrary but familiar quantitative “guidelines” rather than taking advantage of the flexibility of fair use doctrine. Often, interviewees preferred to be guided by the more specific provisions in Sections 108, 110, and 121 of the Copyright Act, even where fair use would permit activities unsanctioned by those exemptions. Many interviewees found the terms of licenses interfered with otherwise acceptable fair uses. Finally, interviewees reported receiving varying levels of institutional support as they puzzled through copyright problems, with some describing university counsel's offices that had little time or ability to help given the range of pressing concerns competing for their time, while others reported having knowledgeable, responsive legal experts located inside the library.

As the next paragraph notes, this damages the library mission.

Interviewees described downsizing, postponing, and shelving courses, research projects, digitization initiatives, and exhibits due to costs associated with seeking permission or making what seem to be tedious case-by-case determinations of fair use. Scholars were denied access to materials, or put to considerable hardship, because of constraints interviewees imposed on the use of copyrighted materials. Some interviewees described providing disabled students with lower levels of access than their peers for fear of violating copyright. Materials with inherent flaws (e.g., books with acidic paper, and analog tape and film that will warp and disintegrate

over time) and in near-obsolete formats are languishing because some interviewees were not comfortable acting under fair use where other reformatting provisions may not apply. Interviewees were typically aware that they could go further, but felt constrained in exercising fair use in various situations.

The conclusion? A code of best practice in fair use could be worthwhile—and that's a conclusion ARL acted on, as we'll see later.

One interesting comment from some librarians who've been around a long time: "institutional concerns about copyright compliance are a relatively recent phenomenon." I vaguely remember such concerns being raised as early as the 1970s, but that may be false memory (or UC may have been an unusual institution).

All indicated that today, copyright decisions come up constantly for librarians working in furtherance of library mission. One interviewee told us, "I've seen a marked shift about knowledge of copyright, that now you need to understand copyright to be an effective archivist or librarian. That wasn't as true when I joined the profession." Unlike in some communities of practice, interviewees appeared relatively unconcerned about the consequences to them personally for making a potentially infringing decision. They often exhibited clear concern, however, not to jeopardize their institutions, either by triggering adverse legal action or by harming the institution's reputation...

Could librarians turn to university counsel for assistance? Sometimes:

Some described university counsel who were fairly easy to reach, but not always fully conversant with copyright law or with library practice. Many, however, described university counsel offices that were too busy with other pressing legal concerns to answer library questions, whose answers did not necessarily give full weight to library mission, or both.

In many cases, librarians are the *de facto* policy-makers on their campuses, rightly or wrongly.

It's an interesting discussion, worth reading if you're an academic librarian and haven't already encountered it. Consider this (partial) discussion:

Interviewees usually correctly understood fair use as a rule of reason—a part of the law that requires interpretation on a case-by-case basis—but many of them showed anxiety over how to conduct that reasoning. Moreover, they often faced patrons who demanded certainty—"tell me exactly how much of the book I can include"—or wanted librarians (who typically did not know the teaching objectives a particular use was intended to serve) to do all the decision-making for them. Interviewees often also supervised

staff, including work-study students. Even interviewees who considered checklists and quantitative guides unduly limiting commonly instructed students and staff to employ them, telling us, for example, "Staff need or want black and white rules." In some contrasting instances, however, interviewees reported simply telling staff to use common sense; in close cases, the staff members were instructed to check with the supervisor.

The next steps called for in this research report:

Librarians can take action themselves to improve their situation:

- Academic and research librarians collectively need to develop a code of best practices in fair use that clearly asserts the principles and limitations under which they affirmatively apply their fair use rights. Understanding the law helps make risk management decisions easier, as well as minimizing the impact they have on lawful activity.
- Academic and research libraries and their parent institutions should do more to support librarians as they make important decisions that implicate copyright. A code of best practices in fair use is a powerful and important tool, but librarians need better education and support regarding all of their rights and responsibilities under copyright law, including the specific exceptions described in Sections 108, 110, 121, and the like. The creation of in-house library copyright offices and copyright counsel can be extremely helpful toward that end.
- Individual academic and research librarians need to assert their fair use rights (and other rights) when negotiating licenses with vendors, so that vendor terms of service do not unnecessarily curb important academic uses. Libraries may have good reasons to give up fair use rights in licensing, but some institutions do this in an unconsidered way. With a clearer conception of what the law normally allows under fair use and other exemptions, academic and research libraries and librarians will better understand the trade-offs involved in license terms that restrict those rights. A fair use best practices code will provide standards both for themselves and their patrons, standards that are driven first by the mission of academic and research libraries.
- Academic and research librarians' associations can organize meetings with certain key providers, such as ProQuest and key publishers in academic and research areas, to investigate how the fair use rights of scholars are being recognized in their policies.

The report itself ends with this: "Feel free to reproduce this work in its entirety. For excerpts and quotations, depend upon fair use."



## *Codes of Best Practices for Fair Use*

This [December 7, 2010 post](#) by Jill Hurst-Wahl at *Digitization 101* is just what it says it is: A set of eight links to best practices codes—some created by the Center for Social Media at American University, some from other organizations.

It's an interesting set. The first one (on dance-related materials in libraries and archives) devotes ten (or 12) pages of a 38-page document (presented as 19 10" x 16" double pages) to the code itself; the rest is supporting material. The second, an HTML page related to media literacy education, also begins with a fair amount of supporting material including this striking section:

### THE TYRANNY OF GUIDELINES AND EXPERTS

Today, some educators mistakenly believe that the issues covered in the fair use principles below are not theirs to decide. They believe they must follow various kinds of "expert" guidance offered by others. In fact, the opposite is true. The various negotiated agreements that have emerged since passage of the Copyright Act of 1976 have never had the force of law, and in fact, the guidelines bear little relationship to the actual doctrine of fair use. Sadly, as legal scholar Kenneth Crews has demonstrated in "The Law of Fair Use and the Illusion of Fair-Use Guidelines," *The Ohio State Law Journal* 62 (2001): 602–700 (<http://moritzlaw.osu.edu/lawjournal/issues/volume62/number2/crews.pdf>), many publications for educators reproduce the guidelines uncritically, presenting them as standards that must be adhered to in order to act lawfully. Experts (often non-lawyers) give conference workshops for K–12 teachers, technology coordinators, and library or media specialists where these guidelines and similar sets of purported rules are presented with rigid, official-looking tables and charts. At the same time, materials on copyright for the educational community tend to overstate the risk of educators being sued for copyright infringement—and in some cases convey outright misinformation about the subject. In effect, they interfere with genuine understanding of the purpose of copyright—to promote the advancement of knowledge through balancing the rights of owners and users.

In fact, this is an area in which educators themselves should be leaders rather than followers. Often, they can assert their own rights under fair use to make these decisions on their own, without approval. In rare cases where doing so would bring them into conflict with misguided institutional policies, they should assert their rights and seek to have those policies changed. More generally, educators should share their knowledge of fair use rights with library and media specialists, technology specialists, and other

school leaders to assure that their fair use rights are put into institutional practice.

Educational guidelines have often hurt more than they have helped.

The code itself (which is *not* a list of stringent numbers) is brief and well organized and works from CSM's apparent guiding principle:

This code of best practices... is shaped by educators for educators and the learners they serve, with the help of legal advisors. As an important first step in reclaiming their fair use rights, educators should employ this document to inform their own practices in the classroom and beyond. The next step is for educators to communicate their own learning about copyright and fair use to others, both through practice and through education. Learners mastering the concepts and techniques of media literacy need to learn about the important rights that all new creators, including themselves, have under copyright to use existing materials. Educators also need to share their knowledge and practice with critically important institutional allies and colleagues, such as librarians and school administrators.

It ends with a set of "common myths about fair use" worth reprinting in its entirety (and the same note about reprinting as the ARL document). I've altered it only to the extent of substituting bold for all-caps in the myths themselves.

MYTH: Fair use is too unclear and complicated for me; it's better left to lawyers and administrators.

TRUTH: The fair use provision of the Copyright Act is written broadly—not narrowly—because it is designed to apply to a wide range of creative works and the people who use them. Fair use is a part of the law that belongs to everyone—especially to working educators. Educators know best what they need to use of existing copyrighted culture to construct their own lessons and materials. Only members of the actual community can decide what's really needed. Once they know, they can tell their lawyers and administrators.

MYTH: Educators can rely on "rules of thumb" for fair use guidance.

TRUTH: Despite longstanding myths, there are no cut-and-dried rules (such as 10 percent of the work being quoted, or 400 words of text, or two bars of music, or 10 seconds of video). Fair use is situational, and context is critical. Because it is a tool to balance the rights of users with the rights of owners, educators need to apply reason to reach a decision. The principles and limitations above are designed to guide your reasoning and to help you guide the reasoning of others.



MYTH: School system rules are the last word of fair use by educators.

TRUTH: If your school system's rules let you do everything you need to do, you certainly don't need this code. But if you need to exercise your fair use rights to get your work done well, in ways that your system's rules don't foresee, that's a different story. In that case, the code may help you to change the rules! Many school policies are based on so-called negotiated fair use guidelines, as discussed above. In their implementation of those guidelines, systems tend to confuse a limited "safe harbor" zone of absolute security with the entire range of possibility that fair use makes available.

MYTH: Fair use is just for critiques, commentaries, or parodies.

TRUTH: Transformativeness, a key value in fair use law, can involve modifying material or putting material in a new context, or both. Fair use applies to a wide variety of purposes, not just critical ones. Using an appropriate excerpt from copyrighted material to illustrate a key idea in the course of teaching is likely to be a fair use, for example. Indeed, the Copyright Act itself makes it clear that educational uses will often be considered fair because they add important pedagogical value to referenced media objects.

MYTH: If I'm not making any money off it, it's fair use. (and if I am making money off it, it's not.)

TRUTH: "Noncommercial use" can be a plus in fair use analysis, but its scope is hard to define. If educators or learners want to share their work only with a class (or another defined, closed group) they are in a favorable position. However, some more public uses may be unfair even if no money is exchanged. So if work is going to be shared widely, it is good to be able to rely on transformativeness. As the cases show, a transformative new work can be highly commercial in intent and effect and qualify under the fair use doctrine.

MYTH: Fair use is only a defense, not a right.

TRUTH: In court, doctrines like self-defense or freedom of speech or fair use aren't considered until after the plaintiff has proved that there may have been assault or defamation or copyright infringement. Procedurally, that makes these doctrines "affirmative defenses." But in the real world, people are entitled to protect themselves from harm and to speak their minds; likewise, we acknowledge the right of fair use, which is specifically provided by law to people who make reasonable but unauthorized use of copyrighted works.

MYTH: Employing fair use is too much trouble; I don't want to fill out any forms.

TRUTH: Users who claim fair use simply use copyrighted works after making an assessment of the par-

ticular situation—there's nothing formal or official to "do" to claim fair use. You do not have to ask permission or alert the copyright holder when considering a use of materials that is protected by fair use. But, if you choose, you may inquire about permissions and still claim fair use if your request is refused or ignored. In some cases, courts have found that asking permission and then being rejected has actually enhanced fair use claims.

MYTH: Fair use could get me sued.

TRUTH: That's very, very unlikely. We don't know of any lawsuit actually brought by an American media company against an educator over the use of media in the educational process. Before even considering a lawsuit, a copyright owner typically will take the cheap and easy step of sending a "cease and desist" letter, sometimes leading the recipient to think that she is being sued rather than just threatened. An aggressive tone does not necessarily mean that the claims are legitimate or that a lawsuit will be filed.

Well...if print is a medium, the GSU suit means that last "myth" is no longer a myth. On the other hand, the Righthaven fiasco seems to have strengthened the antepenultimate case: At least one judge seemed to be saying, "It's fair use, so we don't need to consider infringement." Ideally, fair use—a part of the law—can stop a prosecution before it starts.

Other codes have similar sets of myths worded differently. As sometimes happens with lists of links, you won't find eight codes of best practices, much less eight codes written from a variety of authorship perspectives. The last two aren't available; all the ones I did scan appear to be written or coordinated by Peter Jaszi at American. All in all, an interesting set of attempts to broaden the understanding and use of fair use.

*How balanced is the balancing test?*

Kevin Smith asks that question in [a December 29, 2010 post](#) at *Scholarly Communications @ Duke*, always a worthwhile source for well-written commentary on copyright and fair use in academic libraries.

Fair use, we know, is a balancing test. What that means, fundamentally, is that whereas all of the other exceptions to copyright's exclusive rights have a set of requirements or circumstances that must be fulfilled for the exception to apply, the four fair use factors work differently. They are not a list of requirements, such that every fair use must fulfill some standard in regard to each factor. Rather, the four factors describe "an equitable rule of reason" where these factors, and others, are balanced to help a court determine if the specific use in question is, given all of its particular circumstances, fair.

The question of how the factors relate to each other is persistent. If we view them, as I think we should, as inquiries that direct courts to examine pertinent circumstances, they will obviously overlap and interrelate. But courts often apply the factors quite mechanically, with the result that there are quite a few 2 to 2 “ties.” In those situations, and at other times, courts will sometimes suggest that one factor or another has more weight or importance than the others. Thus the balancing test can become unbalanced.

I’ve seen evidence of the first problem in any number of commentaries: “Well, you win on three of four factors, so it must be fair use!” Smith notes one case (*Harper & Row v. Nation Enterprises*, 1985) that “has been particularly pernicious in its impact.” First, it’s cited as an argument that you *can’t* make fair use of an unpublished work, even though it doesn’t say that. Fortunately, Congress fixed that problem by amending the fair use provision. The second impact continues to be troublesome:

Its assertion that the fourth fair use factor—the impact of the use on the potential market for and value of the work—was “the single most important element of fair use.” In its recent report on “Fair Use Challenges in Academic and research Libraries” a research team associated with the Association of Research Libraries reported on interviews regarding fair use with 65 librarians and identified as one of the common “misconceptions” the belief that the fourth factor was dominant, especially in regard to video. Since the language quoted above from *Harper & Row* is still out there as part of a Supreme Court precedent, it is worth asking why this belief is, at least sometimes, misleading.

Smith offers one reason: “Even the Supreme Court changes its mind.” More recent fair use reasoning has emphasized transformative nature of new works—if a use is transformative, the market effect may be less important.

If we generalize this reasoning a bit, it has two important results. First, it reminds us that the factors interrelate in such a way that the importance of one factor may be influenced by facts uncovered as part of the analysis of another factor. That is how fair use ought to work, IMO. Also, the *Pretty Woman* case, and the transformative analysis in general, is an example of how fair use prevents a plaintiff from using copyright to stifle free speech about the original work. If parody or criticism were subject to an absolute rule about market impact, a critical book review could be enjoined because its quotations from the original, combined with a negative judgment on that original, would inhibit sales and should not, therefore, be judged fair use. We should never allow copy-

right to work that way, and the flexibility of fair use is a safety valve against should restraints on speech.

Then there’s the third factor—the amount and substantiality of the portion used. There *should* be cases where it’s legitimate to reuse an entire article (the wrongs of *Righthaven* seem to support that idea—indeed, the post cited by Smith relates to a *Righthaven* suit).

The lesson from all this, that a fair use analysis must plod through all the factors in light of the specific circumstances and is never subject to “short cuts,” may not be welcome news for all. But it is, nevertheless, good news, since it reminds us that fair use exists to permit uses that are socially valuable but which cannot be anticipated or encompassed within definitive rules laid down in advance.

The problem, of course, is that people want a simple set of rules—and *effective* use of fair use doesn’t allow for that.

### *Nothing Personal: How Database Licenses Make Pirates of Us All*

Technically, I suppose, Barbara Fister’s [July 11, 2011](#) “Library Babel Fish” column at *Inside Higher Ed* is about licensing, not fair use—but it’s close enough to be worth including here. Fister was tracking down a “classic article” in JSTOR and *noticed* the popup box stating that you must agree to JSTOR’s terms of service before you can see an article. Here’s what she saw:

“Your use of the JSTOR archive indicates your acceptance of JSTOR’s [Terms and Conditions](#). JSTOR’s Terms and Conditions provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.”

Nothing terribly unusual about the language itself, even if most databases don’t insist on a clickthrough for every result.

I understand discouraging people from downloading massive amounts of articles and doing evil things with them, like posting them online for anyone to read or putting them up on torrent sites. I get it. I wouldn’t do that.

But even though I had clicked through that annoying pop up box any number of times, it suddenly struck me as a bit bizarre that in order to see a scholarly article in this paragon of scholarly databases, I have to swear I will do nothing with the material that might be for other than personal, non-commercial use. Does that mean I can’t write about that article I

looked up in places like this blog? This is, after all, public, and I just swore I would use the article only for personal use. Whoops! My bad.

As Fister notes, libraries haven't typically stopped you at the door to demand that you pledge that you won't profit from your visit.

We actually thought—silly us!—that libraries were meant to help you build new things and go public with ideas.

(And crazy founders! They actually thought copyright would promote science and the useful arts! But that's another story. We're talking licenses, here.)

As Fister notes, it could be worse: One database tells users to *contact the company* and pay a different rate if they're doing research for consulting. *Harvard Business Review* has bizarre restrictions on *links*—but then, it's HBR.

I include this because publishers claim that licenses trump fair use, even (or especially?) click-through licenses almost nobody actually reads. And, as Fister notes:

We agree to absurd terms of service all the time and swear we read through agreements that we haven't. It's part of modern life.

Maybe it shouldn't be. Maybe mutual respect would be worth trying. I've consistently found that (some) Big Corporations such as Safeway and Target give me the benefit of the doubt if there's an issue: They assume I'm acting in good faith. Couldn't database vendors and publishers do the same? Oh, who am I kidding?

Toward the end of the piece, there is a direct fair use connection. The first commenter offers his understanding “that although license agreements trump copyright, they do not trump fair use.” Fister responded a bit later, noting that licenses *can* be written so that they trump fair use.

In any case, why would invoking fair use mean you can say “I know I just agreed to adhering to your terms of service, but I didn't mean it—nyah nyah.” And how would that fair use assumption change what you do with JSTOR articles?

Fister regards the license limitation to “personal use” as inherently inconsistent with scholarly work—but she doesn't think fair use is the answer. (It turns out that, for JSTOR, fair use is an answer—but you have to go to the full PDF of the Terms and Conditions to find that out!) After a JSTOR person notes that they encourage and support educational use, Fister notes that JSTOR is “typically exceptionally responsive and transparent” but adds this,

which may get back to my own thought about mutual assumption of good faith and good intentions:

I am still kind of bemused that academic presses feel they need these legal protections. It does make me feel that scholars are assumed to be potential crooks unless they pledge otherwise. At the same time, I notice lots of requests on Twitter to get articles that individuals can't access either through their libraries or because they are not affiliated with a library and perhaps find it difficult to travel so they can be a walk-in library user. It seems counterproductive for academic presses to still rely on subscriptions and sales, in the process making easily-shared resources scarce because we can't yet let go of the old funding model. [Emphasis added.]

But that's another can of worms.

### *Myths About Fair Use*

Patricia Aufderheide (American University—a coauthor of the ARL study noted previously) wrote this [on August 2, 2011](#) at *Inside Higher Ed* in conjunction with publication of a book on fair use she wrote with Peter Jaszi: [Reclaiming Fair Use: How to Put Balance Back in Copyright](#).

She discusses seven myths, some specific to academia. I'll list the myths here without her takes on them (and in some cases my brief comment in italics).

I don't need fair use—educators have special privileges. (Academic exemptions are narrower than fair use.)

Fair use is too unreliable to depend on—it's all a judgment call.

Fair use is easy for an academic—I can take whatever I want because everything I do is noncommercial. (This is about as wrong as it gets.)

Fair use is too limited to me, because it's useless when I publish or otherwise commercially market the work a fairly used item appears in. (The flip side of the previous myth, and almost as wrong.)

Sure, fair use is on the books, but it's too risky—even if I'm right, I could get sued. (You can get sued for *anything*.)

Fair use is just a defense, not a right.

I don't want fair use, because I believe educational materials should be free to all, and I license all my work under Creative Commons licenses. (That doesn't necessarily help.)

Good brief discussions, well worth reading.

### *The Common Sense of the Fair-Use Doctrine*

Patricia Aufderheide again, this time [on August 21, 2011](#) at *The Chronicle of Higher Education*. She offers examples of *using* fair use such as this opening one:

While checking final edits on their new book, two media-studies scholars are informed by their publisher that they must secure permission to use a magazine cover as an illustration of one of their assertions. Instead of dropping the graphic or making cold calls to the magazine, the scholars explain their fair-use rights under copyright—and the publisher's general counsel agrees.

Aufderheide's saying something I hadn't seen said (at least this succinctly) and believe is on the money:

Twenty-five years ago, fair use was widespread and uncontroversial. Journalists, scholars, and documentarians employed it regularly. Publishers and other distributors routinely issued works rich with fair-use claims. But increasingly over the last two decades, that has changed, as large media and software companies have fought for greater copyright protections and ramped up their public-relations campaigns and legal actions. Meanwhile, their critics, including academics and artists, have often made alarmist claims about the dangers of overreach by copyright owners, causing further confusion. Many scholars, as well as members of various professional, creative, and research communities, simply misunderstand their rights, whether they seek to use or protect a work.

The first part of that paragraph says big media has *pushed* toward a permission society. The second says some of us have overreacted. I'm less sure of the second: When faced with potentially crippling legal bills, it's hard to stand on principle.

Aufderheide says codes of best practice are "returning fair use to normalcy" (and she's one of those busily writing such codes). Is that true? The codes I've looked at are vague at best, but I think they're steps in the right direction. She offers some one-paragraph "dos and don'ts" as part of what she says is "time for scholars to reclaim fair use." The bold-face points, without her commentary.

Do exercise your fair-use rights to teach and research using copyrighted materials, just as your peers are doing.

Do teach best copyright practices.

Don't mix up fair use and educational exemptions.

Don't expect to get a pass on fair use because your use is noncommercial, but don't be afraid of fair use in commercial settings, either.

Don't confuse fair use with the open-source movement or Creative Commons.

All good points, and I certainly agree with the last two sentences:

Worse, when scholars and others do not employ fair use, they shrink its effectiveness as a right. Fair use is

like a muscle; the more it is exercised, the stronger it becomes. Robust scholarship requires robust fair use.

A commenter raises the very real issue of legal costs. She points to codes of best practices, and maybe that's right. I was not impressed by a comment from "electronicmuse":

Media and software companies have been forced into hardline positions by totally unethical people who imagine that intellectual property should be "free," a position that could be maintained only by a naïf who doesn't understand just how difficult it is to generate such property.

Sorry, but I do not for one minute believe Big Media was "forced into hardline positions."

*That Would Be a No*

It's time to hear again from a librarian—Barbara Fister, writing [on September 1, 2011](#) in "Peer to Peer Review" at *Library Journal*. She notes the librarian's plight when working in faculty development activities:

This year, as workshop week winds down, I was struck by how many questions came up that have to do with copyright—and how often I was cast in the role of Queen of Negativity, with my scripted lines mainly beginning with the word "No."

This is unfair. Librarians *hate* saying no. We've been trained to think that's not an acceptable option. There must be a way to get to an answer that satisfies the patron! Yet in the past two days I often had to say to faculty things like "well, what you are proposing would actually be illegal" or "we can't do that because of copyright restrictions" or "no, unfortunately, you cannot count on your assigned books all being available in audio format for those students whose learning styles favor audio comprehension." (This one was especially awkward given a visiting workshop leader had just told an English faculty member cheerfully that absolutely every book was now available in audio format. Every single one! My head started hitting my desk involuntarily. So rude.)

We're getting beyond fair use here (but that last paragraph should convince you to go read the column if you haven't already done so). The most relevant paragraph is this one:

There is also the inevitable request when introducing new faculty to the library and how to put things on reserve. "Do you have a list that explains exactly what falls under fair use?" We could have a checklist, as many libraries do (often as part of a settlement with publishers; sometimes an exhibit in a lawsuit if it's too generous) but even if we devised some sort of list, it still wouldn't answer many of their questions. Publishers, of course would prefer that we go with



the safe option of paying permissions for everything with a blanket license—so convenient ([except when it's not](#)). And of course there is [that Georgia State decision](#) we're all awaiting, which could be a major game-changer. So we do our best to explain the process of weighing the four factors and remind them that much of life is ambiguous and we're happy to consult on a case-by-case basis. Though the answer they hear, of course, is “no.”

Fister also discusses a possibly even worse situation—the potential undermining of First Sale rights. I'm skipping that (it's important, possibly enormously important, but it's not related to fair use). I hear what Fister's saying: Librarians are *not* out to limit fair use (which Aufderheide seems to suggest in her piece just discussed) but they're in the uncomfortable position of being the front line agents who have to let faculty know that “academic use” is not a universal get-out-of-copyright-free card. That a librarian might not be aware of the *temporary* exemption to DMCA that allows *some* scholars to use high-quality clips from DVDs (not Blu-ray, and not all scholars), an example in Aufderheide's piece, seems only plausible. (That an academic library might not actually have copies of the questionably legal DRM-circumvention software that makes it possible to provide such clips: Yes, I could believe that.)

#### *What fair use is for*

Kevin Smith [on December 20, 2011](#) at *Scholarly Communications @ Duke*—related to the Authors' Guild suit against Hathi Trust. The discussion's worthwhile without engaging the specific lawsuit.

To wit, it appears that the Authors' Guild is focusing entirely on Section 108 of the Copyright Act, the “library exceptions” provision (preservation, ILL...):

The plaintiffs want the court to conclude, it seems, that this one section of the law entirely encompasses all that a library is entitled to do with copyrighted material. As they go through the points alleged in the complaint, the defendants repeatedly assert that “Section 108 of the Copyright Act is one of many limitations on copyright holders' rights” and “that plaintiffs' description of section 108 is incomplete and therefore mischaracterizes the statute.” What is left out, of course, is that section 108 states explicitly that fair use—section 107—is still available and that nothing in 108 “affects the right of fair use” (section 108 (f)(4)).

The next sentence gets to the heart of it: “Fair use, which exists for the purpose of allowing exactly the activities that Hathi is designed for—research, teaching and scholarship—will naturally be the

heart of this case, however badly the plaintiffs wish this were not so.” I might demur slightly: Fair use *should and does* exist for many purposes in addition to research, teaching and scholarship, although it's critically important to those fields. The section explicitly mentions criticism, comment and news reporting, although those are only given as examples. Still, teaching, scholarship and research are also among the explicit examples; Smith's not wrong here, just incomplete.

If it's true that the Authors' Guild chooses to ignore the importance of fair use, that's a shame, but it's in keeping with the apparent philosophy of this Guild of a Few Authors, which could be summarized as “SHOW ME THE MONEY.” Any author who believes they've never taken advantage of fair use (at least indirectly) in order to create new books is delusional.

#### *What If We Asked the Librarians?*

That's part of the title for a brief note by Brandon Butler at *ARL Policy Notes* ([some time in late January 2012](#), as far as I can tell) introducing the [Code of Best Practices in Fair Use for Academic and Research Libraries](#). The rest: “Or, How The Librarians' Code is Different.” You will not be surprised to hear that the *Code* was developed “with help from our partners at the Center for Social Media at American University” (and AU's Law School and support from a Mellon grant).

Based on 36 hours of focus group deliberation with 90 academic and research librarians representing 64 institutions in meetings held all over the country, the *Code* is comprised of eight Principles that describe general circumstances where the groups found library uses to be fair, followed by Limitations that describe the outer bounds of the consensus and Enhancements that the groups thought represented salutary but not necessary steps to protect the interests of other stakeholders.

#### Butler focuses on

what I think is the first question that most research and academic librarians are going to ask when they hear about this *Code*: Oh, no, not another set of guidelines! How is this thing any different than all the other stuff out there?

That's an interesting question and I think it's worth quoting several paragraphs of Butler's answer:

Any librarian who has waded into the troubled waters of copyright has encountered a dizzying array of guidelines, rules of thumb, nutshells, and checklists. As Columbia University copyright guru Kenny Crews has pointed out in his [definitive study of fair](#)

[use 'guidelines'](#), the dangers that attend some of these tools far outweigh the promised benefit of greater certainty. Examples that were supposed to represent minimum “safe harbors” came to be treated, all too often, as the outer limits of legitimate action. Private voluntary standards negotiated among diverse (and even adverse) groups have gotten a patina of legal authority over time and are substituted for a flexible and dynamic application of the actual law.

We set out to avoid these pitfalls by providing a new kind of resource that is more narrowly targeted and more flexible than the tools that have come before it. And because judges care what communities of practice think and do, the librarians' *Code* can even help improve the law by revealing and shoring up the values of academic and research librarians. So the two things that make this *Code* unique are where it comes from, and how it works.

The *Code* is different because of where it comes from. As I said at the beginning, it represents a consensus of a large number of academic and research librarians, deliberating deeply together about their own problems. This advice does not come from outside experts or consultants at ARL speaking to you from our ivory towers in Washington, nor does it come from a company or trade association with a financial interest in discouraging fair use. It comes from your peers. And this consensus isn't a “lowest common denominator” based on the status quo or a survey of which practices are most common. It's based on what the academic and research librarians we spoke with came to consensus on when they had the time and opportunity to deliberate together about which practices are truly “best.”

The *Code* is also different from many of its predecessors because of how it works: it gives academic and research librarians and library policymakers flexible principles to guide their thinking in their particular circumstances, rather than one-size-fits-all rules that ignore context. Librarians using the *Code* will come to different conclusions in seemingly similar cases depending on the nature of the works they are using, the goals of the users they are serving, the ways that works are distributed or copied, and on and on. In short, the *Code* doesn't provide answers; it provides tools that help librarians ask the right questions.

That's not the whole post, and the whole thing may be worth reading. So what about the *Code* itself? Let's go to the home page (the link above: that does not take you directly to a document):

The *Code* identifies the relevance of fair use in eight recurrent situations for librarians:

Supporting teaching and learning with access to library materials via digital technologies

Using selections from collection materials to publicize a library's activities, or to create physical and virtual exhibitions

Digitizing to preserve at-risk items

Creating digital collections of archival and special collections materials

Reproducing material for use by disabled students, faculty, staff, and other appropriate users

Maintaining the integrity of works deposited in institutional repositories

Creating databases to facilitate non-consumptive research uses (including search)

Collecting material posted on the web and making it available

In the *Code*, librarians affirm that fair use is available in each of these contexts, providing helpful guidance about the scope of best practice in each.

[The \*Code\* itself](#) is a 32-page PDF (or, rather, it's instantiated in a 32-page PDF), of which pages 10 through 26 provide the primary content, with the rest as background. For each category, there's a description, principle (why fair use applies), limitation(s) and enhancements (things that will improve the case for fair use).

If you're in a library and haven't already downloaded and printed the *Code*, I'd suggest that you do so. Without discussing it further, I'm convinced it's a step forward in moving toward suitably aggressive use of fair use and away from the permission society.

The next couple of items comment on or spring from the *Code*.

### *Best Practices in Fair Use—a couple of thoughts*

That's Nancy Sims, Copyright Program Librarian at the University of Minnesota Libraries, [writing on January 27, 2012](#) at *Copyright Librarian*. Sims was part of the ARL process and offers a few comments on the results. Here's the section on Best Practices vs. Guidelines:

I really like the community-based best practices approach to talking about fair use, even though it leaves a number of things somewhat uncertain. There is simply no way to provide certainty about fair use that doesn't involve drawing lines far inside the boundaries of what fair use actually allows. And in most situations, guidelines that aim to provide certainty also overstate the bounds of fair use—“30 seconds of video is always okay, more than that is never okay” is terrible information about fair use of video in any context.

Developed with input from members of specific communities of users, these Best Practices docu-

ments articulate specific points of fair use that are of high interest to the community in question—where some idea of how to approach the problem would be particularly helpful for community members who are not well-versed in copyright concerns. But the Best Practices documents do not purport to address points (even of high community interest) where informed people don't also largely agree on principles. As the document explicitly states, “[t]he groups also talked about other issues; on some, there seemed not to be a consensus, and group members found others to be less urgent.” And those issues are not included in the Best Practices.

I was fascinated to read the [Code of Best Practices in Fair Use for Poetry](#) last year, because it articulated several fair use situations I had never considered before, but which were obviously of high interest to people in that community. If I were trying to figure out what the contours of fair use were for poetry readings, I would definitely want to know how things usually work in similar situations. Courts look to common practices to inform the “fairness” and “appropriateness” parts of fair use. Following community norms is not going to save anyone where the community norms are completely out of alignment with the law, but where community norms track reasonably well with legal considerations, they are often considered relevant by courts. As the document points out, “There are very few [fair use] cases specifically involving libraries,” so community practices are one of a very few forms of guidance available.

It is difficult to make progress across the uncertain and unlighted landscape of fair use. The bright-line/guidelines approach strongly illuminates a single, supposedly safe path - but leaves travelers entirely unenlightened about the dark areas that comprise the vast majority of the landscape. The Best Practices approach helps us become more aware of the fair use landscape as a whole, and it helps us know where other travelers similar to ourselves have gone and may be going.

I like the next section as well—where Sims responds to the hypothetical complaint that the *Code* is biased because copyright owners weren't consulted—and you should read it directly. As Sims notes, most of us are both creators and users: The chance that you don't hold copyright in anything is vanishingly small. (Ever write a blog post? Ever set your thoughts down on paper or hard disk? *Shazam*: You're a copyright holder.) I love one analogy Sims makes—to owners of land on which there's a public easement:

If there is a public easement—a public-right-of-way—over a piece of land, it would be extremely irrational to rely on a land owner to remember the

boundaries of a public easement. And if the land owner got to charge money automatically anytime someone stepped outside of the easement (as with copyright's statutory damages), the land owner's incentive to narrow the easement over time would be very very high.

Talk to owners of beachfront property in any of the many states where the beach itself is *by law* public property and must be accessible. This is no more hypothetical than the idea that Big Media has been trying to reduce legitimate uses of copyright material over the years—to narrow public rights in favor of stricter private control.

There's more. Worth reading.

### *Should Libraries Fret Over Mischievous Users?*

Another great title from Brandon Butler at ARL Policy Notes, [this one apparently posted “two months ago”](#) (I'm writing this on June 12, 2012: draw your own conclusions). He says that, while developing the *Code*,

there was one worry that we encountered over and over again, and that may be doing more damage to library practice than any other myth, concern, or misapprehension: the fear of library liability for nefarious uses of copyrighted library collections material by library users.

The level of fear, uncertainty, and doubt about this issue is *way, way out of proportion* to the actual risk of liability for any library or librarian. Put simply, it is almost impossible that you or your library, when acting on the basis of your good faith beliefs about fair use, could be held responsible for the bad acts of your patrons who abuse the access you provide. And yet every day, in libraries all around the country, decisions are being influenced by fear of liability for users' bad behavior. It's time to nip that fear in the bud.

The rest of the post is a longer version of an FAQ he added to the *Code* page responding to this question:

Are libraries who make good faith fair uses responsible for what their users do with works provided in the context of that fair use?

I'm naïve. I would have thought *every* academic librarian and damn near every public librarian would know the answer to that question: *Almost certainly not*.

Those three words (including emphasis) are the beginning of Butler's answer; the rest is explanation. Fundamentally, what a user does is the user's responsibility—with a few exceptions, such as when the library controls the actions of the user and receives direct financial benefit because the user infringes, or the librarian *knows* someone's infringing and induces or contributes to that infringement.



Such situations should be so rare as to be essentially nonexistent in libraries.

Sure, if a patron comes up to you and says “I want to find a recent photograph that I can turn into a T-shirt, and I’ll cut the library in for a share,” you could be in trouble, just as you could if a patron says “I’d like to check out this CD so I can rip it and stream it on P2P networks” and your response is “Great idea! Here’s some software to make that easier!”

If your library is full of criminals so stupid they boast of their criminality and try to engage librarians in abetting it (with the promise to cut the librarians in on the action), yes, you might be in trouble. Otherwise? Probably not.

The first comment raises the kind of issue one librarian sees others raise:

Smith is a library worker and notices a suspicious pattern of patrons checking 20 CDs out and bringing them back 5 minutes later with a request for 20 more (rinse, repeat). Smith reaches the (understandable) conclusion that the patron is copying all or part of the CDs and the further conclusion that this is in violation of the law. Smith worries that the library has a duty to intervene in some fashion at this point.

I should note that the commentator argues that it’s really not the library’s business, and I’d agree. (Also, that’s one damn fast CD ripper, but never mind. I mean, 15 seconds per CD? Really?) I love one quick response:

That patron could have a compulsion to checkout library materials very frequently. Perhaps this person loves visiting the circulation desk.

In any case, it’s not the library’s business. And unless the library *makes* it its business, the library should not be in danger.

*A safe harbor, not an anchor*

We close this section by returning to the Authors Guild/Hathi Trust case and [this April 30, 2012 post](#) by Kevin Smith at *Scholarly Communications @ Duke*. We not only get Smith, we get Smith linking to and commenting on a piece by another fine writer, Jonathan Band—a [Friend of the Court brief](#) on behalf of the Library Copyright Alliance.

In some ways it is an unlikely case in which to seek any enlightenment, since the posture and the legal theories advanced by the plaintiffs are odd, to say the least. While it is hard to see this complaint going very far, the consequences if it did, and especially if the recent motion for partial summary judgment filed by the Authors Guild garnered any credence from a court, would be catastrophic for libraries. Fortunately, Jonathan’s brief in response to that motion

is smart and, I think, devastating. And, as usual, it tells libraries some important things about themselves.

Remember what we’re dealing with: the ~~crazed~~ slightly extreme notion that the *only* copyright limitation libraries can use is Section 108, the section specifically for libraries. The suit “explicitly claims that fair use is unavailable to libraries, whose rights, it asserts, are entirely circumscribed by section 108.”

In short, the AG would transform a safe harbor included in the copyright law promote certain library services into an anchor that would restrain libraries from performing many of their day-to-day activities. Or, as Jonathan puts it, “They [the Authors Guild] seek to transform an exception intended to benefit libraries into a regulation that restricts libraries.”

Jon goes on to list many of the library activities that the public depends upon that would be of doubtful legality if the Authors Guild’s argument was taken seriously, ranging from ordinary, daily lending of materials to digital exhibits. One of his most effective arguments is based on the many portions of the Library of Congress’ American Memory project that explicitly rely on fair use. As the brief says, under the plaintiffs’ theory, the Library of Congress, in which the Copyright Office itself resides, would be “a serial copyright infringer.”

The Authors Guild case does appear to be “radical and insupportable” as Smith suggests, but in the process of countering it, Band’s brief “implicitly tells us two things about where libraries stand today that are worth noting.”

First, it reminds us that libraries are always adapting to the changing needs of their patrons, many of which today are driven by rapid advancements in technology. The ways people encounter culture shift with alarming regularity and libraries must stay abreast of these shifts. Fair use, which has existed in U.S. law for over 170 years, has always been a key part of libraries’ ability to respond to patron needs, and Congress recognized the continuing need for libraries to be able to rely on fair use when it drafted the 1976 Copyright Act...

The second, more troubling, reminder from this case and Jon’s filing is that the Authors Guild has shown itself willing to launch an extremely broad and devastating attack on libraries in order to protect some strange fantasy about how they can make more money. Libraries have always been, and should remain, the best ally of authors who seek to find readers. It is foolish and short-sighted of the Author’s Guild to turn on libraries, and to advance a theory that would cripple them, without apparently realizing how much harm those actions could do to authors.

Smith quotes a comment during a previous debate: “I don’t care about readers, I want buyers.” I’m sure that attitude is shared by some Authors Guild members, and they should be ashamed. I’m also sure it’s *not* shared by most writers, many of whom recognize that library readers *become* buyers—and most of whom write to be read, not just to be sold.

## Miscellaneous Items

It’s tag-clearing time—a few items that deal with fair use but don’t seem to fit into a neat subcategory.

*At RealDVD hearing, MPAA says copying DVDs never legal*

An oldie but a goodie: Greg Sandoval [on May 21, 2009](#) at CNET, reporting on the scene in Judge Marilyn Patel’s courtroom with MPAA suing RealNetworks over RealDVD, its software for copying DVDs to owners’ computers.

Patel raised a crucial question during the MPAA’s closing arguments. She asked Bart Williams, one of the MPAA’s attorneys, whether a consumer possesses the right to copy a DVD he or she purchased for personal use.

“Not for the purposes under the DMCA,” Williams said. “One copy is a violation of the DMCA.”

Then Patel tried again. This time she asked about a hypothetical device that sounded very much like Facet, the DVD player that Real is planning to release that copies as well as plays DVDs. Real says that the copies of movies made by Facet are locked in the box and can not be distributed illegally.

“What if Real or someone made a device that allowed for making a copy only to the hard drive that is on that machine?” Patel asked Williams. “And you can’t make another copy from that. Would that be circumvention of the DMCA? Would it in fact mean that it really was sufficient fair use under the DMCA?”

“Yes it would be circumvention,” Williams replied, “and no it would not be fair use. The only backup copy Congress envisioned was archival, that you would never use until such time when your main computer wasn’t working...Congress would not have gone through the process or have this process if you’re going to say there is some fair use rights that allows you to circumvent.”

It doesn’t help that RealNetworks had previously argued *against* fair use—when RealNetworks’ streaming services were involved. When your own lawyer says, word for word, “There is no fair use defense” against DMCA,” it makes it hard for you to claim fair use. Now, to be sure, RealNetwork’s attorney said that making a personal copy *was* fair use.

*Reminder from the MPAA: DRM trumps your fair use rights*

Jacqui Cheng’s [May 22, 2009 commentary](#) on the same case at *ars technica*. The basic message here: Thanks to DMCA, DRM *trumps everything*—nothing else matters. This is an interesting case partly because RealDVD did *not* break CSS encryption—that is, circumvent DRM. It copied the DVD bit-for-bit to hard disk, adding a *new* level of DRM.

Fair use principles obviously came before the DMCA’s anticircumvention rules, but the two are not necessarily related. Fair use is part of general US copyright law and is used when arguing cases of copyright infringement, while the DMCA’s anticircumvention rules specifically address the breaking of DRM—whether infringement occurred or not. This, according to the Electronic Frontier Foundation’s Fred von Lohmann, is the crux of the MPAA’s argument.

“The MPAA’s view is that the DMCA’s circumvention provisions stand separate and apart from general copyright infringement, so that defenses to copyright infringement are not defenses to circumvention claims,” von Lohmann told Ars. “So fair use, on their view, has no application because it’s only a defense to copyright infringement.”

Do you know that the first DVD ripping case was *twelve years ago*? MPAA’s been using the same argument ever since, although it hasn’t been fully tested in court.

Oh: You do know MPAA’s fair use solution, don’t you? To make a *legal* clip from a DVD, you point a camcorder at a TV showing the DVD. Your quality may be lousy but, hey, it’s legal (if it falls under fair use).

*Why we tweaked our copyright notice*

Here’s a charming item by Nate Anderson [posted in March 2010](#) at *ars technica*—and it’s *about* the site. There had been a previous article about overbroad copyright notices (e.g., the NFL stuff), and readers pointed out that the site itself had the kind of notice that’s fairly typical for book publishers and publisher-run websites:

The material on this site may not be reproduced, distributed, transmitted, cached or otherwise used, except with the prior written permission of Condé Nast Digital.

But that’s not true. They asked their lawyers and managed to get a change to the wording:

Except where permitted by law, the material on this site may not be reproduced, distributed, transmitted, cached or otherwise used, except with the prior written permission of Condé Nast Digital.

The concluding paragraph:

It's not a major change, and the notice doesn't alter anyone's rights under US law one way or the other. We do think it was important to make clear in such notices that there are limits to copyright law, however, and that the company's claims to its material are not so absolute as such notices can make them sound.

Good for them. The comments include an interesting multipart discussion of why *any* copyright notice at all is needed.

*"Fair use" generates trillions in the US alone*

The bad news—and I'm surprised: This April 2010 piece by Nate Anderson at *ars technica* uses the dreaded scare quotes around fair use for no apparent reason. I don't see the site saying, for example, that "mobile technology" or even "social networking" generates trillions in the US. Setting aside this editorial blunder (it's in the headline; the article inconsistently scare-quotes the phrase), it's an interesting piece, although it involves the kind of projection that can (for example) turn public libraries into multi-trillion-dollar generators.

When pressing Congress to ratchet up the legal screws on infringers, copyright holders are fond of touting apocalyptic reports about how piracy is destroying their industries—and the US economy.

But strengthening the nation's intellectual property laws isn't just a matter of cracking down ever harder, of limiting the limitations and giving increasing power to rightsholders. Fair use and other limitations on copyright themselves generate significant economic activity—\$4.7 trillion in 2007.

The [report](#) comes from the Computer and Communications Industry Association (CCIA), which includes folks like Microsoft and Google. If that amount seems absurdly high, that may be true—but the report uses similar methods to those used to assert (absurdly high) estimates of the cost of "piracy."

The method is similar to that used in several prominent piracy studies; in this case, the "fair use" industries are divided into "core" and "non-core" companies, depending on how important fair use is to their very existence. Economic activity and payroll numbers can then be crunched from this data, offering a rebuttal to any view of fair use that sees it as a mere afterthought in copyright law, one good for protecting YouTube parodies but not much more.

The report says that about one out of every eight workers in the US is "employed in an industry that benefits from the protection afforded by fair use." When you phrase it that broadly, it's pretty easy to claim extraordinarily large sums.

Anderson gets it about right here (and the current version of this report may be worth a quick read): "Doing these kinds of analyses is notoriously imprecise, in some cases amounting to little more than guesswork." As is true for Big Media's claims about the cost of "piracy" (yes, I'm deliberately scare quoting that term).

*Fair Use is only for the unrighteous*

Iris Jastram does *not* use scare quotes when talking about fair use, as in [this July 9, 2010 post](#) at *Pegasus Librarian*. The gist: The Associated Press reported on Amazon's acquisition of Woot.com, including some typical quotes. Woot.com noticed that the quotes came from Woot's blog—and that AP had earlier "cracked down" on bloggers quoting AP material, with a web form so that bloggers could pay for that use (most of which should be fair use).

The AP policy was astonishing: It was asking for payment for using as little as *five words* of a news story and issued takedown letters for items quoting as little as 39 words. Woot did its own calculation and decided that AP owed it \$17.50 for the quoted content. (There's more to [the Woot post](#)—and, unlike the AP stuff referenced here, it's still available.)

Here's what Jastram has to say about all this:

Comment: I love Woot's response because THIS IS SO DUMB! Oh, wait, that might have been my criticism. I guess I find it both hard to believe and stunningly easy to believe that the AP would have a web form that does everything it can to make you believe you have to pay \$17.50 for up to 50 words of quotation. (It does mention Fair Use, in the little pop-up you can open if you want to know more about this license, but it makes Fair Use seem like a pretty rare thing, and a risky thing for both you and your employer.)

Criticism: This post is pretty much all criticism, I suppose, but I'm particularly critical of the "It's only Fair Use if we quote you, not the other way around" and the "my lawyer is bigger than your lawyer" approaches to copyright. And then there's the AP's list of [copyright dos and don'ts](#) where all the dos are "do know about the risks of copyright infringement to you and your employer" and all the don'ts are "so don't infringe our copyright."

This isn't copyright—this is playground bullying. If you take my milk, that's stealing. If I take your milk, that's my right.

I've only included links that still work. Jastram's characterization of the do's and don'ts is on the money. If you take the document on face value, you would *always* contact the copyright holder before making *any* use of material. That dooms fair use.

### *“The Pre-History of Fair Use”*

The direct title here is for Charles W. Bailey, Jr.’s [August 26, 2010 item](#) at *DigitalKoans*—an item noting a Matthew Sag [article with the same title](#) self-archived in SSRN. If you’re interested in the history of fair use, you may find the 42-page PDF worth reading. Here’s the abstract (also quoted by Bailey):

This article reconsiders the history of copyright’s pivotal fair use doctrine. The history of fair use does not in fact begin with early American cases such as *Folsom v. Marsh* in 1841, as most accounts assume - the complete history of the fair use doctrine begins with over a century of copyright litigation in the English courts. Reviewing this ‘pre-history’ of the American fair use doctrine leads to three significant conclusions. The first is that copyright and fair use evolved together. Virtually from its inception, statutory copyright went well beyond merely mechanical acts of reproduction and was defined by the concept of fair abridgment. The second insight gained by extending our historical view is that there is in fact substantial continuity between fair abridgment in the pre-modern era and fair use in the United States today. These findings have substantial implications for copyright law today, the principal one being that fair use is central to the formulation of copyright, and not a mere exception.

The third conclusion relates to the contribution of *Folsom v. Marsh* itself. The pre-modern cases illustrate a half-formed notion of the derivative right: unauthorized derivatives could be enjoined to defend the market of the original work, but they did not constitute a separate market unto themselves. *Folsom* departs from the earlier English cases in that it recognizes derivatives as inherently valuable, not just a thing to be enjoined to defend the original work against substitution. This subtle shift is important because while the boundaries of a defensive derivative right can be ascertained with respect to the effect of the defendant’s work on the plaintiff’s original market, the boundaries of an offensive derivative right can only be determined with reference to some other limiting principle. This extension of the derivative right may well have been inevitable. It seems likely that as more and more derivatives were enjoined defensively, courts and copyright owners began to see these derivatives as part of the author’s inherent rights in relation to his creation. In other words, once copyright owners were allowed to preclude derivatives to prevent competition with their original works, they quickly grew bold enough to assert an exclusive right in derivative works for their own sake. A development which, for good or ill, bridges the gap between pre-modern and modern copyright.

The article appeared in the *Brooklyn Law Review* (76:4, 2011). As of mid-June 2012, it’s been down-

loaded from SSRN 211 times (the abstract’s been viewed more than 1,500 times).

### *Getting the whole picture*

This post by Kevin Smith [on April 18, 2011](#) at *Scholarly Communications @ Duke* isn’t entirely about fair use, but it’s still related. It has to do with YouTube’s announcement that those accused of infringement would be forced to attend YouTube’s Copyright School—and links to [a video](#) that’s part of that “school.”

You can read Smith’s piece for what’s wrong with the video in general (and comments related to the pirate-themed character), but here’s a key paragraph:

If [YouTube’s “three strikes and you’re out” policy] were not enough to show that YouTube is uninterested in being fair or accurate, their appalling treatment of fair use clinches the matter. Fair use is mentioned in a quick discussion of mash-ups, but the description of fair use is done in a sped-up voice intended to convey that this is legalese which the viewer cannot possibly understand. The clear message is that fair use is too complicated for ordinary users to even consider. The Russell character is literally crushed by the weight of the fair use screen which, interestingly, seems to be an industry written text, not the actual text of section 107 of the copyright law. It ends by recommending that one consult a lawyer whenever there is doubt. Since fair use is designed to be a balancing test rather than a bright-line rule, there is always an element of doubt, so this qualification swallows the rule. Case closed on fair use.

I watched the video. There’s no question: within a cartoon, the fair use portion is a text screen with speeded-up speech that shoves the character entirely off the screen. It’s pretty scary: Fair use must be mysterious and probably best avoided.

I was *particularly* struck by something later in the video, which Smith also mentions:

The video also discusses the notice and takedown provisions of the law. What is interesting is that there is no mention of the potential misuse of takedown notices, which is, in fact, a substantial problem. The discussion of misuse takes place only in regard to the counter-notification process, which users can employ if their work is taken down wrongfully. Here there is a stern warning against misuse, although there is little evidence that this part of the law is regularly abused, and the viewer is left with the idea that counter-notification is too risky to be used. Just do what the content owners tell you and be thankful you are not in jail.

That’s what I saw: A stern warning that misusing the counterclaim process could get you in big trouble—



with no suggestion that misusing the takedown provisions could be troublesome.

Because copyright infringement claims are so easy to abuse in the service of suppressing protected speech, it is truly appalling that YouTube, which many think of as a tool to empower free expression, has chosen to present such a one-sided and slanted picture of the law.

Appalling but not surprising. Even more appalling: A “[copyright PSA](#)” in which very young students, obviously reading from some projected text, are chanting fair use guidelines that are absolutely not the law (and extremely narrow interpretations). I like the description “zombified children.”

### *Making Sense of Fair Use*

Here’s another law review paper [archived June 29, 2011](#) on the Social Science Research Network (SSRN): Neil W. Netanel’s “Making Sense of Fair Use,” which appeared in the *Lewis & Clark Law Review*. Here’s the abstract; again, you may find it worthwhile to learn more about fair use.

Many criticize fair use doctrine as hopelessly unpredictable and indeterminate. Yet in recent empirical studies, leading scholars have found some order in fair use case law where others have seen only chaos. Building upon these studies and new empirical research, this Article examines fair use case law through the lens of the doctrine’s chronological development and concludes that in fundamental ways fair use is a different doctrine today than it was ten or twenty years ago. Specifically, the Article traces the rise to prominence of the transformative use paradigm, as adopted by the Supreme Court in *Campbell v. Acuff-Rose*, over the market-centered paradigm of *Harper & Row v. The Nation* and its progeny. The Article presents data showing that since 2005 the transformative use paradigm has come overwhelmingly to dominate fair use doctrine, bringing to fruition a shift towards the transformative use doctrine that began a decade earlier. The Article also finds a dramatic increase in defendant win rates on fair use that correlates with the courts’ embrace of the transformative use doctrine. In light of these developments, adding an historical dimension to a study of fair use case law helps to make sense of what might otherwise appear to be a disconnected series of ad hoc, case-by-case judgments and explains why current rulings might seem to contradict those regarding like cases issued when the market-centered paradigm still reigned supreme.

Should transformative use be the key determinant? That’s a different question.

### *An easy fair use ruling, but with a message*

This [August 14, 2011](#) Kevin Smith post at *Scholarly Communications @ Duke* is particularly noteworthy

for both the court decision discussed and for Smith’s commentary.

The decision involved a music video, a portion of which was used (and made fun of) in a *South Park* episode. The video’s owner sued. The case was dismissed *before trial*.

The fair use call is really pretty easy in this case; inclusion in *South Park* is virtually prima facie evidence that a work is being parodied. Indeed, the judge has little difficulty deciding that the use of less than one-third of the original music in a video featuring a different character and intended to mock the viral video phenomenon is fair use.

What is significant here is that the judge made the fair use decision before there had been a trial. He examined the pleadings and found that everything he needed to make this easy call was already before him. Then he ruled favorably on a motion to dismiss the case on the basis of those pleadings (technically a “motion to dismiss for failure to state a claim”) and dismissed the case with prejudice (which means plaintiff cannot re-file it).

Librarians and other academics are often afraid to rely on fair use, even when their arguments would be strong, because of the expense of defending a lawsuit even when you win. Content companies often encourage that fear, reminding academics that fair use is a defense that can only be decided with certainty at a trial. While this case is a little bit unusual, it invites us, I think, to look at this “chilling effect” and perhaps lend it less credence.

Unfortunately, the judge called fair use a defense—which Smith finds “a little bit misleading in this context.”

Fair use is slightly different than the typical affirmative defense. It has to be raised after a claim has been made, of course, but it does not actually involve admitting the truth of the allegation. Fair use is not a justification for an infringement; by the language of section 107 fair use is “not an infringement of copyright.” So rather than showing a reason for infringing on someone else’s right, the fair use defendant is proving a limitation of the plaintiff’s right that means that no infringement took place.

This has to be said repeatedly because those who would limit fair use never fail to say that fair use is nothing but a defense. (When, that is, they admit the existence of fair use at all...) It’s not: It’s an exception to or limitation on copyright.

I like to think of fair use as a boundary on the rights in copyright, just like physical property has a boundary. One way I could defend a claim against me for physical trespass would be to prove to the court that

I never actually stepped on the plaintiff's property. I would raise that evidence in a defense, but what it would show was that no violation of the property right ever took place—that the plaintiff had not stated any claim. That is exactly how fair use functioned in this case, and that possibility offers an important perspective on fair use.

### *Fair Use ferment*

I'll conclude this section with yet another item from Kevin Smith at Scholarly Communications @ Duke, this time [on February 2, 2012](#). Smith notes several items, including two noted here.

The first is two examples of reuse of material by Republican candidates and complaints about that reuse (without permission in either case): In one case Mitt Romney using a short clip of a Tom Brokaw news report about Newt Gingrich; in the other, Newt Gingrich using the song "Eye of the Tiger" at campaign events without a license. In the first case, Romney's people explicitly invoked fair use—and Smith believes they're right.

The news clip Romney used is a straightforward, factual report of an action taken by the U.S. Congress. So the use of the news item does seem like fair use. And Tom Brokaw may be a celebrity, but his publicity right surely cannot extend to suppress news reports if they are repeated in contexts he does not like; the messenger should not be allowed that kind of control over the message, when the message is a matter of public interest.

The other case is quite different: Gingrich was using the entirety of the song "just to amp up the energy at rallies"—and he should and could have paid performance fees for the use.

The second piece is also interesting. Patent examiners provide unauthorized copies of research articles to patent applications during the examination process—and the General Counsel of the U.S. Patent and Trademark Office

finds that this practice is clearly fair use, and argues that three of the fair use factors favor that finding, while the remaining factor, amount, is neutral, even though entire works, assuming a journal article is the entire work for fair use purposes, are at least sometimes distributed to applicants. Even more surprising, the PTO rejects consideration of a licensing market when analyzing the fourth factor, finding that such a market for the PTO's use is not "cognizable" (even though I am sure the CCC would be willing to sell such licenses)

As Smith says, that finding should be relevant to the GSU situation.

Oh, as to Smith's comments on the ARL *Code*? You should read them yourself; he points to Nancy Sims' discussion (noted earlier), and stresses that the *Code* is not legal advice. (Smith is a lawyer and was one of those who reviewed the draft.) "The *Code* is designed to facilitate careful thought about specific situations in libraries and consideration of relevant practices. It should help libraries maintain a balanced view of how fair use works in our profession, but it is not a bright line rule or final arbiter."

## Georgia State, Once Over Lightly

Part 1 of this fair use roundup included notes on developments in the copyright infringement lawsuit brought by three publishers—two of them university presses—against some *employees* of Georgia State University. (GSU itself is an arm of Georgia, and may be protected by sovereign immunity.) You'll find those notes on pages 20-24 of the [June 2012 Cites & Insights](#). Between the time I drafted that section and the time I published the issue (the weeks in between were devoted to finishing [Give Us a Dollar and We'll Give You Back Four](#)), the judge issued a decision after working on it for a year.

The decision is 350 pages long, according to those who have read it and commented on it. I haven't read it and don't plan to. People who understand the issues better than I do, and who I trust (based on experience) to provide fair and accurate commentary, *have* read it—people such as Kevin Smith, Barbara Fister, Brandon Butler, James Grimmermann, Iris Jastram and the Library Loon. This is, then, metacommentary—a few notes on some of the *commentaries* on the judge's decision, its implications and what's happened since then.

Right up front, we know the judge found all but five asserted infringements (out of 99 in the original suit, of which the judge had earlier dismissed 24 because the plaintiffs couldn't demonstrate that they owned the copyright!) to be justified as fair use (thus not infringing) or for other reasons. But that also means that she found five infringements.

If you're already giving up on this roundup as too long, I can suggest a much shorter piece that offers the key factors: Iris Jastram's "A practical guide to the Georgia State eReserves Copyright Case for Librarians," posted [on June 7, 2012](#) at *Pegasus Librarian*. It's a fine job, summarizing the case, important facts and "what we can learn from the decision." I find a few comments here that I haven't seen elsewhere, more than enough to suggest that you read

Jastram's concise discussion (which ends by quoting Section 107, always a good inclusion). For example:

We still don't have documented examples of dealing with fiction or verse, which are more creative in the eyes of the law and therefore would be more protected under this factor.

We still have no precedent for dealing with articles since all the works in this case were books.

Jastram's major disappointment with the decision is the extent to which it's likely to increase the permissions market—but read her paragraph for more detail.

If you still patience for more, here's a relatively brief set of notes on other early comments.

### *Immediate Commentaries*

The earliest discussion I encountered was "The GSU decision—not an easy road for anyone," [posted May 12, 2012](#) at *Scholarly Communications @ Duke* by Kevin Smith. He wrote his post "at four in the morning on a Saturday" before leaving for vacation.

For the publishers who brought the suit...there are some bitter disappointments. Judge Evans explicitly rejects the Guidelines for Classroom Copying as the standard to be applied. She also found the two major cases on which plaintiffs relied, *American Geophysical Union v. Texaco* and *Princeton University Press v. Michigan Document Services*, to be inappropriate analogies for the situation before her.

One holding that is certain to generate much discussion is Judge Evans' rejection of the so-called "subsequent semester" rule, which had evolved from the Classroom Copying guidelines and led many institutions to assert that a liberal interpretation of fair use was permissible once but that permission had to be sought for subsequent uses of the same text. Judge Evans found this restrictive approach to be "an impractical, unnecessary limitation" (p. 71).

Perhaps most distressing for publishers is the Judge's statement that permission fees are "not a significant percentage of Plaintiff's overall revenues" and that their loss through the assertion of fair use does not threaten the publishers' business. She calls this latter argument "glib" (p. 84).

But all is not sweetness & light for libraries and universities. The judge applied a strict standard for the portion of a work permissible under fair use for e-reserves: 10% or a single chapter. "This is a less flexible standard than many libraries would like, I think, and it seems too rigid to be a good fit with the overall structure of fair use." She also looks at the percentage of publisher revenue for a given title that comes from permissions fees as key to her

fourth-factor analysis. Since libraries won't *know* those figures, this tends to assume that the fourth factor (economic impact) favors publishers—especially for works where licensed digital excerpts are available.

Hard as it may be to be told to make this assumption, even though the judge has found it not to be the case in most of the instances before her, we should pay attention to her qualification of it. The permissions we should look for are those available for digital excerpts. In another place she asserts that she will consider the permissions market in the fourth factor analysis only when a license is "readily available" at a "reasonable" price for a "convenient" format (p. 89)

The judge did find that GSU was acting in good faith, that its policy was not a sham. She also looked at hit counts in a manner suggesting that plaintiffs need to show not only that material is in an ereserve system—but that somebody's actually read it.

So here is the bottom line on the fair use analysis Judge Evans has outlined (pp. 87–89 of the opinion). The first factor—purpose and character of the use—heavily favors fair use because it is for non-profit teaching and research. She mentions the section 107 reference to "multiple copies for classroom use" and she does not employ a "transformational" approach. She finds that the second factor also favors fair use, since all of the works at issue were non-fiction and educational in nature. The third factor can go either way, depending on whether or not the excerpt is less than 10% or a single chapter. The fourth factor is where the difficulty lies; Judge Evans finds that it "heavily favors" the plaintiffs IF a license for the appropriate format is readily available at a reasonable price. There is lots of room to debate this part of the analysis, and lots of uncertainty, I think, about how it can be applied.

The remedies phase may go on for a while. The judge gave the publishers a month to propose a new injunction, and GSU can object to their proposal.

In general I expect librarians to be happy about the outcome of this case. It suggests that suing libraries is an unprofitable adventure, when 95% of the challenged uses were upheld. But there will also be a good deal of hand-wringing about the uncertainties that the Judge has left us with, the places where we need information we cannot reasonably obtain, and the mechanical application of a strict percentage. We will spend considerable time, I think, debating whether and how to implement Judge Evans' rules into our own copyright policies. In the meanwhile, of course, the ruling is nearly certain to be appealed.

The Library Loon (never mind the pseudonym, this bird's worth listening to) also hopped to the long



reading task right away and offered “Pragmatic responses to Georgia State” [later on May 12, 2012](#) at *Gavia Libraria*. The Loon observes that, because several claims failed because there was no indication that students actually read the material, people running e-reserve and course management systems *shouldn't keep logs of reading usage*.

As a librarian, the Loon delights in this solution; libraries have protected their patrons from various kinds of legal interference through purposeful non-record-keeping for decades. As an instructor... she finds it irksome, because it's nice to know that students are at least clicking links, but if not tracking student reading is the price of kicking out greedy nosy publishers, she's in favor. Students can always click from the syllabus.

As I'm sure I've noted before, I worked at an institution where we *knew* the FBI wanted to look at old circulation records, were—at the time, before California adopted a suitable privacy clause—not legally able to prevent them, and were informed that we were not obliged to keep those records. Which we didn't. Ever since then, I've been somewhat of a fanatic on the idea that libraries simply *should not retain information* on what borrowers have read. Period. Not that this has much to do with GSU, but...

Of course, as the Loon notes, it's likely that publishers would say that such systems must be *required* to maintain and preserve reading logs, and hopes that there will be strong privacy defenses against such a requirement.

One successful claim (claim 72, if you care to check the opinion) succeeded because of a “heart of the work” finding. (If a book has a short section of self-spoilers, reproducing that section creates significant disincentive to buy the book, weighing against a fair-use finding. This doctrine is a good bit older than this case.) The Loon suggests, perhaps a bit wildly, that a “heart of the work” database of infringement claims succeeding on this argument be built and maintained. This will enable patrons and libraries to avoid known work-hearts, and will discourage publishers from claims that a given book has more hearts than a Time Lord.

The decision seems likely to push publishers to digitize their nonfiction works and make segments of the digital work easily licensable, since that speaks to the few cases where infringement was found. But, as the Loon points out, that may not make them much money:

Publishers aren't making *spit* on excerpt licensing, and the no-logging loophole suggests to the Loon that this

opinion won't actually be a giant licensing bonanza for them. The Loon's sense, though, is that publishers act out of hurt self-righteousness at least as often as they do economic sense, so they'll throw themselves at the Copyright Clearance Center on the instant.

There's more about the issues and how libraries might react (including a possible “wrong, short-sighted, stupid, but tempting” rush to pay off the Copyright Clearance Center to avoid any hassle); you should read the rest in the original.

James Grimmelmänn offered “Inside the Georgia State Opinion” at 11:25 a.m. [on May 13, 2012](#). It's a thoughtful discussion that includes key details, such as some of the reasons 24 claims were dropped for lack of standing and the uniform result.

The court was unsympathetic: no documented chain of title, no lawsuit. There's a looming e-rights mess, loosely akin to the robo-signing mess around ownership of securitized mortgages: in both cases, the putative owners don't have all their papers in order. This opinion either recognizes or contributes to the mess, depending on your point of view.

You can't sue if you can't prove standing: That's widely used to throw out class-action lawsuits and it seems only reasonable that it should be applied to companies as well as individuals.

Then there are the 1976 Classroom Guidelines:

On the third factor, the amount copied, the court repudiated the [Classroom Guidelines](#), calling them “not compatible with the language and intent of § 107.” It noted that the numerical limits in the Guidelines are so stringent that not one of the excerpts at issue in the case would fit within them. It was particularly uninterested in the Guidelines' position that copying not “be repeated with respect to the same item by the same teacher from term to term,” which the court described as “an impractical, unnecessary limitation.”

In fact, while publishers *love* the Classroom Guidelines and would like to see them as stating the maximum allowable, here's the second paragraph of the Guidelines:

[T]he following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in § 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

Not one of the excerpts at issue in the GSU case falls into the narrow Guidelines, which says more about the Guidelines than about GSU's practices. I hadn't looked at the (very brief) guidelines in a long time,

if ever. I think it says a lot about copyright balance that the signatories are from the Authors League of America, AAP and the House Copyright Committee. Educators? Librarians? Nowhere to be seen. In any case, the decision in the GSU case pretty much undoes these guidelines, and that's almost certainly a good thing.

Grimmelmann notes likely effects of the judge's emphasis on availability of a digital license:

On the one hand, it suggests that libraries may have a freer hand to make expanded uses of orphan works, since by definition, no one will be licensing them. And on the other, the court didn't consider photocopying licenses to be a suitable substitute for digital licenses. This will put significant pressure on publishers to turn on digital licensing.

Grimmelmann thinks the decision is "mostly a win for Georgia State and mostly a loss for the publishers," but also that the big winner is the Copyright Clearance Center. As for likely actions by universities, here's his take:

[T]he operational bottom line for universities is that it's likely to be fair use to assign less than 10% of a book, to assign larger portions of a book that is not available for digital licensing, or to assign larger portions of a book that is available for digital licensing but doesn't make significant revenues through licensing. This third prong is almost never going to be something that professors or librarians can evaluate, so in practice, I expect to see fair-use e-reserves codes that treat under 10% as presumptively okay, and amounts over 10% but less than some ill-defined maximum as presumptively okay if it has been confirmed that a license to make digital copies of excerpts from the book is not available.

A great commentary, just as you'd expect from Grimmelmann. I've quoted small portions; go read the rest.

Also on [May 13, 2012](#), Jennifer Howard offered a good journalistic summary of the decision and early responses (mostly from library people) in a *Chronicle of Higher Education* story "Long-Awaited Ruling in Copyright Case Mostly Favors Georgia State U." It's a good quick overview and includes quotes from and links to a couple of people I haven't noted here. Interesting that the second comment is from "the author of a 700 page casebook published by a major publisher" that includes one key chapter, who laments that this ruling seems to mean "it can be copied for free" (which isn't the case). "So it goes. Guess that's why I've only made 197 bucks from it." Wow: Somebody wrote a 700-page book for a "major pub-

lisher" and only got paid \$197? And I thought I was doing badly with self-publishing through Lulu... In any case, as Barbara Fister notes in a comment on the comment, the judge *specifically* noted that it's not fair use to copy the "kernel" of a book, even if it's only one chapter. A number of other folks comment on that 700-page situation, not always kindly. In some ways, although the report itself is well done, it's the comments that make this piece worth going to a couple of months later.

The next day, [May 14, 2012](#), Barbara Fister's "Library Babel Fish" column in *Inside Higher Ed* featured a remarkable stream-of-consciousness piece (based on tweets) about the process of reading the decision and the thoughts she had: "The GSU E-Reserves Decision: First Thoughts." It's also (at least indirectly) about the value of Twitter itself. There is no way I can do justice to Fister's column except by [pointing to it](#) and saying, "Go. Read." I can, however, quote the final two paragraphs:

In the end, it's really up to the academy. There's no question these publishers add value. They do good work. But is the value they add worth hassling over every assigned reading and choosing different readings if permission can't be obtained? Is it worth making knowledge a pay-per-view proposition? Is it why we write this stuff in the first place? Could we put up with a package that's a little less shiny, burnished with a little less automatically-generated prestige, if it meant we could freely teach and students could freely learn?

I'm not suggesting scholarship is ever going to be without cost. But considering how much in-kind support goes into writing things that have earned publishers \$12.36 in six years, and how much each academic library pays to sustain the current system, the costs are much, much higher when we lock this stuff up and demand a fee every time a student tries to read it. These publishers aren't suing over \$12.36. They're suing over what our future will be. That's really up to us.

#### *More Early Commentaries*

Nate Anderson reported on the ruling in a [May 14, 2012](#) *ars technica* story, "Fair use (mostly) triumphant: Judge exonerates campus 'e-reserves.'" The subtitle's a little too glib: "When it comes to course reserves, one chapter good, two chapters bad." Once again, although not consistently, Anderson or his editor finds it appropriate to scare-quote fair use. Otherwise, it's a plausible (if not terribly illuminating) story, although Anderson misses the key exception to "one chapter"—that is, the "kernel of the work" note.

Jennifer Howard wrote “Publishers and Georgia State See Broad Implications in Copyright Ruling” on May 14, 2012 at *The Chronicle of Higher Education*, following up on her earlier story by providing more sources. As she notes, the publishers “made the best of it” by playing up the points where they won. For example, Oxford University Press said it “marks a significant first step toward addressing the need for clarity around issues of copyright in the context of higher education” and that it was “pleased” the judge recognized that its “flawed 2009 copyright policy resulted in infringement of our works.” Georgia State praised the judge’s work and called the ruling “significant not only for Georgia State University, but for all educational fair use in general.” And then there’s the Association of American Publishers, which helped pay for the actual suit. Quoting Howard:

It described the court’s fair-use analysis as “legally incorrect in some places,” and warned that publishers’ ability to publish scholarly work could be at risk. “Contrary to the findings of the court, if institutions such as GSU are allowed to offer substantial amounts of copyrighted content for free, publishers cannot sustain the creation of works of scholarship,” the association said.

I’m impressed that AAP can simply tell a judge she’s wrong on the law. [Here’s the actual AAP statement](#), including this frankly astonishing paragraph (after praising the judge for the small portions of the decision that find GSU at fault) [emphasis added]:

At the same time, we are disappointed with aspects of the Court’s decision. Most importantly, the Court failed to examine the copying activities at GSU in their full context. Many faculty members have provided students with electronic anthologies of copyrighted course materials which are not different in kind from copyrighted print materials. In addition, the Court’s analysis of fair use principles was legally incorrect in some places and its application of those principles mistaken. As a result, instances of infringing activity were incorrectly held to constitute fair use. Publishers recognize that certain academic uses of copyrighted materials are fair use that should not require permission but we believe the Court misapplied that doctrine in certain situations.

Whew. “When you agree with us, you’re brilliant. When you disagree, judge, you *don’t know the law*.” Sounds about right to me, right out of the little-known *Big Media Guide to the Law: Heads We Win, Tails You Pirates Lose*. [Reality check: as far as I can tell, there is no book or document entitled *Big Media Guide to the Law*. Yet.]

Brandon Butler prepared “Issue Brief: GSU Fair Use Decision Recap and Implications” for the ARL [on May 15, 2012](#). The eight-page PDF is a good fast overview from an academic library perspective. The second paragraph of the executive summary may be enough to quote here:

Although the decision is certainly not perfect (the use of bright line rules for appropriate amount under factor 3 is particularly troubling), Judge Evans has written a thorough and thoughtful analysis of the issues, and her opinion represents an overwhelming victory for Georgia State individually, a major defeat for the plaintiff publishers and for the AAP and CCC, and overall a positive development for libraries generally. The substance of the opinion is not ideal, but it is far more generous than the publishers have sought, it establishes a very comfortable safe harbor for fair use of books on e-reserve, and libraries remain free to take more progressive steps.

[A press release](#) from Cambridge University Press emphasizes that “The University has been held liable for five copyright infringement claims,” uses scare quotes around fair use and, quoting CUP’s Corporate Affairs Director, seems to assert that making extensive use of fair use makes it unfair (I’ve retained British spelling and punctuation):

In particular, we are disappointed at the failure of the Court in this case to recognise that GSU’s conduct amounted to systematic and industrial-scale unauthorised reproduction of our authors’ works. Such large-scale use cannot, in our view, be held to be “fair”.

There is *nothing* in Section 107 that says “you can only use fair use once in a while,” but apparently CUP believes there should be.

#### *A Little Bit Later*

These commentaries (doubtless among many others) appeared after May 15 and before the publishers actually proposed an injunction.

Meredith Schwartz wrote “Georgia State Copyright Case: What You Need to Know—and What It Means for E-Reserves” [on May 17, 2012](#) at *Library Journal*. Schwartz uses the 75-case number rather than the original 99. (Not that *LJ* is favoring the publishers’ angle, but Schwartz repeats “70 to five math” later in the article, where most library-related commentators call it 94-to-5 math.)

Schwartz quotes a variety of people and groups involved in the case, with interesting and telling perspectives. The publishers basically ignore the fact that they lost in roughly 95% of their assertions and fault the court for choosing to ignore a claimed Big-Picture.

On the AAP's conference call, however, plaintiffs' lead counsel Rich said, "The court early on expressed hostility to the analogy that you also need to look at the broader pattern of practice," he said, sounding as though it was less that the judge failed to consider the argument as that she considered it and found it unpersuasive. That inference is supported by the text of Evans's judgment, which reads in part, "The argument that Plaintiffs might be forced out of business is glib. It is unsupported by evidence. The argument that Plaintiffs might be forced to cut back on scholarly publications is speculative and unpersuasive on this record."

Rich continued, "If you allow a given professor to take up to 10 percent, or one chapter, of up to 30 different works, without any other textbooks, you could fulfill an entire course load of required reading. You're creating a customized anthologized course book in competition with custom textbooks. That's deeply troublesome to the AAP and the publishing community. The whole is greater than the sum of its parts, as it were, in terms of the negative impact on the publishing process," he said, making an implicit call for a limit on the total number of unlicensed works that could be used for a particular course, in addition to the limit on the number of pages or chapters of each.

Given that AAP *clearly* does not have standing to bring suit directly, it's interesting that an AAP lawyer talks about taking the pulse of AAP's broader membership before deciding whether to...oh, wait, it can't be an AAP suit...provide more money to certain publishers in order to keep pursuing this action. All in all, a good overview, probably worth reading.

An EDUCAUSE Policy Brief, "A Case for Fair Use: The Georgia State Decision," was prepared by Joan Cheverie and issued [on May 15, 2012](#) (although the three-page PDF says "May 15, 2011," only plausible if Cheverie is psychic). I like the judge's explicit reference to the Constitution's basis for copyright:

Judge Evans dug deep into the questions surrounding fair use and concluded—after thorough analysis—that copyright was meant to promote the writing of more books. She wrote, "There is no reason to believe that allowing unpaid, nonprofit academic use of small excerpts in controlled circumstances would diminish creation of academic works." This is a positive outcome for the higher education enterprise.

Cheverie's bottom line: "The opinion represents a victory for GSU, a defeat for the three publishers, and a strong statement in support of fair use." The EDUCAUSE brief is a useful and very brief summary.

Kevin Smith came back from vacation and found that he had a little more to say, resulting in "More on GSU and the publisher response," [posted May 22, 2012](#) on *Scholarly Communications @ Duke*. He apologizes for possibly-redundant comments (!) and points to Brandon Butler's ARL brief as a must-read. Then Smith looks at the judge's four-factor findings.

First, she finds that the first two factors—the purpose and character of the use and the nature of the original—always favor fair use in regard to the specific use and the specific works before her. This is true even though she declines to hold that the provision of short course readings is transformative, which is the key determinant in most fair use rulings over the past few decades. Instead, she sees this activity as at the heart of what fair use is intended to be, according to its own express terms. On the nature of the original, she holds that the works in question were all published and factual in nature.

I suspect lawyers understand this better than I ever will, but this strikes me as significant: "Transformative" isn't really part of the fair use law, and getting back to other purposes seems like a very good thing.

Smith notes that the judge's rule on portion copied is fairly narrow—but spends some time pointing out that it's a one-way test. That is: If it's short enough, *it's fair use*—but if it's longer, it *may* be fair use, depending on other factors. I am taken with Smith's comments on the statements from publishers and the money behind the suit:

Overall their objections are quite vague. Several of the responses refer to legal or factual "errors" in the ruling, but they do not specify what they are. The AAP does disagree with the Judge's finding that the loss of permission revenues because of fair use imperils their business; they repeat this absurd claim even after the Judge pointed out, based on figures supplied by the plaintiffs themselves, that these publishers made less than one quarter of one percent of their 2009 revenues from academic book and journal permissions.

All of the publishers assert that there is error in the judge failing to consider what the AAP calls the "full context" of the activities at GSU. Sage and Oxford (who issued identical statements) suggest a "pattern and practice" of infringement, while Cambridge refers to "systematic and industrial-scale unauthorized reproduction." It is hard to know what to make of these assertions, other than that they arise out of sheer frustration. Since the Judge has just found that only five of the excerpts before her were infringing, "systematic" and "pattern" seem like inappropriate words. The Judge had to decide the case based on the specific allegations and evidence before her, and the plaintiffs



were the ones who produced those allegations. So if only five out of 99 (or 75, depending on where you start counting) were infringing, no pattern of systematic infringement has been proved. [Emphasis added.]

Good stuff.

Kevin Smith asked the musical question “Does It Pay To Sue Libraries?” in a [May 24, 2012](#) “Peer to Peer Review” column for *Library Journal*. It’s an interesting discussion—and a good one, given that “libraries traditionally have received favored treatment from both Congress and the courts,” as well they should. Smith notes that the judge pretty clearly recognized who the *actual* plaintiffs are here: AAP and CCC.

The CCC, of course, has a direct monetary interest in pushing universities to pay more for licensing, and the AAP seems to simply have the strong, if misguided, conviction that, since copyright is a Good Thing, an unlimited expansion of copyright (and a diminution of the fair use provision that is part of U.S. law) is always desirable.

What of the economics of the suit itself, given the assumption that several million dollars have been spent by the plaintiffs to date? Smith notes the judge’s estimate that lost revenue for the five excerpts found to be infringing was \$750. There’s no missing “K”—that’s less than a thousand dollars, or probably an hour of a lawyer’s time (depending on the lawyer).

From that perspective, it seems that the costs of the case represent a terrible waste. And the judge reinforces this sense of waste when she points out that “permissions income is not a significant percentage of Plaintiffs’ overall revenues.” Her calculation is that in 2009 permission income represented “less than one quarter of one percent” of the three publishers average revenues for that year. She is, therefore, entirely dismissive of the suggestion that a finding in favor of fair use by the university could jeopardize the ability of these publishers to remain in business (pp. 84-86)

So why bring the case—and why appeal? Maybe because CCC makes most of its \$215 million gross revenues from permission fees. “It certainly seems that it is their business model, rather than a genuine business need on the part of the publishers, that underlies the decision-making process that led to this case.” But will the ruling lead to *more* licensing payments from libraries to the CCC? Smith offers three reasons that might not be the case—and I’m going to point you [back to Smith’s article](#) for that discussion.

My point is that libraries still have a lot of control over their practices and their budgets; this decision

does not, in fact, automatically demand that libraries pay more licensing fees. That is something that the plaintiffs and the CCC should take into account as they decide whether the expense and ill-will they have generated with this lawsuit are worth what they can gain from continuing it. The most interesting possibility is that the three actual plaintiffs could potentially disagree with the CCC, which bankrolled the case, about whether it is worthwhile to appeal.

I’ve wondered for some time whether Big Media understands the concept of good will at all. Two university presses and one commercial publisher have now pretty much explicitly targeted university libraries as enemies, just as the RIAA and MPAA have made it fairly clear that they regard their customers as evildoers. Is that really the best way to conduct business? (What do prison commissaries and Big Media have in common? You know the answer.)

### *Three Later Comments*

Here are three final items that appeared *after* the publishers filed a proposed injunction and supporting material: Two commentaries on the proposed injunction and a recent “practical guide” that’s probably a much more useful summary than what I’m doing here.

Kevin Smith posted “Publishers file response to GSU ruling” [on June 1, 2012](#) at *Scholarly Communications @ Duke*. He read the proposed injunction and the [memorandum of law](#) offered in support of the proposal.

First a couple of comments about the memorandum of law. There is a statement in it which asserts that the May 11 order found enough infringement to justify imposing the original injunction the publishers suggested back before the trial. This is wishful thinking indeed, considering how many points the Judge has found in favor of GSU since that sweeping proposed injunction was offered. And remember, the Court found only 5 instances of infringement out of the 75 excerpts examined or 5 out of 95 if we count the ones consider at trial and subsequently withdrawn by the plaintiffs. But this hardly seems like a serious hope on the part of the three publishers, and the rest of the memorandum is spent explaining and defending the alternate proposal they offer, which is, they say, more narrowly tailored to track the Court’s fair use analysis.

The second item is an assertion that the GSU policy “did nothing” to limit GSU’s copying to “decidedly small” excerpts. He says that’s technically true but seems to misrepresent the judge’s exact words and their implications (especially since the judge said

the GSU policy was a good faith attempt to comply with the law).

So what do the publishers want?

They want GSU to be enjoined from ever using any excerpts from Sage, Oxford or Cambridge works without permission unless a strict set of conditions is met. Those conditions include meeting all of the fair use factors (it would no longer be a balancing test), as they have been defined by the Judge, although the injunction combines factors three and four into a single set of requirements. The proposal says that, to be used by GSU without payment, any excerpt from these three publishers must be “strictly without charge for nonprofit educational purposes” AND be “narrowly tailored” to “fulfill a legitimate purpose in the course curriculum” AND not be the heart of the work AND not be more than 10% or a single chapter, whichever is less. Alternatively, if a digital license is not available from either the CCC or directly from the publisher (they want GSU to pursue both options), the excerpt must still be sufficiently small “as not to cause actual or potential market harm to the work.”

Whew. It gets worse:

The proposed injunction goes on to impose additional requirements on GSU, which look very like what was suggested in the publishers’ first proposal. GSU would have to rewrite its policy to conform with the publishers’ reading of Judge Evans’ ruling, and state explicitly that the fair use checklist had been superseded. They would have to document extensively, including evidence of an inquiry about a license made to both the CCC and the publisher for every excerpt. Faculty would be required to see the entire proposed order every time they tried to upload anything, and to be threatened with sanctions if they disobey it in any particular. The Provost would have to certify compliance to the Court each semester for the next three years. And perhaps most objectionably, GSU would be required to provide the publishers with access to its course management system so that they could verify compliance. [Emphasis added.]

I’ve skimmed through the 29-page memorandum (the injunction doesn’t seem to be attached), and it sure seems like Smith’s comment here is right:

The proposed order is clearly intended to humiliate GSU and to make fair use as difficult as possible for them. It reads to me like a party who actually won very little at the trial still trying to spike the ball in the other parties’ face. I hope the Judge will see it as yet another attempt to overreach the evidence on the part of the publishers.

Meredith Schwartz offered “GSU Ereserves Plaintiffs Propose Injunction” [on June 1, 2012](#) at *Library Journal*. She links to [a copy of the proposed injunction](#).

Smith did not at all exaggerate the extent to which the proposal turns near-defeat into attempted total victory by turning ORs into ANDs and ruling out *any* unlicensed use of materials that doesn’t fall within the narrowed set of tests. Schwartz does add a little more detail in what is generally a good quick report.

Finally—arriving after I drafted this roundup but before I closed the issue—there’s “Sorry she asked?” [posted June 19, 2012](#) by Kevin Smith at *Scholarly Communications @ Duke*. Smith writes this just after GSU responded to the publisher’s proposed new injunction. And it turns out that, in one key way, GSU’s response is like the publishers:

Where the publishers suggest that their original, pre-trial, “throw the book at them” injunction would still be appropriate, the defendants assert that no injunction at all is called for. It is probably not unusual for the two sides to have such divergent views about the remedy even after a ruling, but one has to think that, given that she has now been presented with the full range of options that were before her in the first place, Judge Evans wonders if it was worthwhile even to ask the parties in the first place.

One key difference: GSU appropriately points out that very little infringement was actually found, making the publisher’s claim of “systematic and widespread” infringement a little suspect. Given what the judge actually found, “The defendants point out that not only is this not systematic and widespread infringement, it is not even the pattern of ‘ongoing and continuous violation of federal law’ that is necessary to justify any injunction in this case.”

GSU argues against *any* injunction.

Instead, GSU essentially asks for a “declaratory judgement,” which is a binding statement from the court that establishes the rights of the parties without providing any enforcement mechanism. The basis for this request is that GSU has [already modified their copyright policy](#) in accord with the May 11 ruling. In these amendments they have addressed the two aspects of the 2009 policy that the Judge criticized in her decision. First, the revised policy now limits the amount of a work that can be used for digital course readings to 10% or one chapter, whichever is less. Second, they built in the idea that if a digital excerpt license for the work is readily available from the publisher or the Copyright Clearance Center, that availability weighs the fourth factor against fair use, and it tips the balance if more than 10%/one chapter is being used.

Smith thinks this idea makes a great deal of sense, finding it the “sensible and prudent course. And,

naturally, it will set up the next stage of the case—the inevitable, I believe, appeal by the publishers.”

That’s it for now. Unless the judge’s decision is entirely overturned on appeal, this case seems likely to strengthen fair use—but not in a way that’s necessarily easy or cheap for academic libraries and institutions to apply. And, of course, it’s not over until it’s over. If it ever is.

## The Back

# What a Thing to Come Home To, Eh?

That’s the last half of the last sentence of the blurb—you can’t really call it a review—for the Focal Utopia III Maestro Loudspeaker in the January 2012 *Home Theater*. The speakers are roughly five feet tall and weigh 256 pounds. As shown, the cabinet is high-gloss “Imperial Red” on the sides (you can also choose Black Laquer or Carrera White), some other color on the front, and oddly shaped (three subcabinets are tilted differently), with—of course—exposed speakers, since grills are for wusses.

This is one of the *cheaper* Focal Utopia III models, “two models down” from the flagship model. That’s why it costs a mere \$45,000 a pair (the really good ones are \$180,000 and stand 80" tall). The first half of that last sentence: “Sure, you may have to trade in your luxury sedan to get a pair”—although I’m not sure what class of luxury sedan would bring \$45,000 as a trade-in. What fascinated me was this flat statement: “And it’s actually beautiful enough to put on display in a multipurpose living space.” To which I can only say beauty is in the eye of the beholder. I’m guessing most spouses (of whatever gender) would be appalled at having these hulking “unfolding accordion” beasts in the living room.

I’m equally interested in *why* this blurb takes up two-thirds of the first editorial page in the issue, with a nice big picture. It’s not a review: There’s not a word about the actual sound, unless you count “But there’s no denying the performance or the elegance...” (I’ll deny the elegance of these beasts, by the way.) They’re not brand new—this magazine’s sister magazine *Stereophile* reviewed them in July 2010. The subheading above them is “Premiere Design,” so I guess this is what *Home Theater* regards as great design.

You can judge for yourself. [This link](#) should take you to *Stereophile*’s image of the speaker, or you

can Bing it. Maybe I’m wrong. Maybe everybody with proper aesthetic sensibilities thinks these things—they’re actually 57.9" tall by 17.9" wide by 30.3" deep—are handsome as all get-out. If you want an in-depth review with measurements, [here’s that July 2010 \*Stereophile\* piece](#), by John Atkinson, the magazine’s editor and one of its most sensible writers. Personally, I think they’re pretty ugly even for industrial chic, but what do I know?

## Getting it Wrong

The same January 2012 *Home Theater*, still in the “Perfect Focus” up-front section, has a half-page piece “The Netflix Soap Opera Continues” that would be amusing if it wasn’t so misleading. Portions of the story are OK, if (as usual) slanted to make Netflix look incompetent and on the verge of failure. But here’s the kicker: The story says that the contract with Starz for movies from Disney and Sony will (did) expire in February 2012, and the way that’s stated is “If you want to Netflix that stuff, do it before February 2012.”

What’s that? Netflix didn’t have Disney and Sony flicks available after February 2012? In the real world, that’s not true. Netflix *streaming* may have lost these flicks, but for those of us with disc-only or combined memberships, the movies continue to be available. And for those of us who appreciate Blu-ray quality, discs continue to be the only option.

Speaking of “getting it wrong,” the January *Sound & Vision* includes a blurb about an Altec Lansing “wireless boombox” that includes a “4-inch subwoofer.” *There is no such thing as a 4-inch subwoofer*. This speaker may have a 4-inch lower-midrange or upper-bass speaker, but it ain’t no subwoofer.

I’m always amused by scare quotes. Al Griffin uses them around the word *lossless* in mentioning FLAC, a lossless audio compression format. He also gets it wrong, saying that FLAC squeezes audio files down to a reduced size without tossing out any data. Earth to Griffin: If you don’t toss out *any* data, you can’t reduce the size. What FLAC or any other true lossless compression scheme can do is toss out *redundant* data—data that can be perfectly recreated based on other data. The scare quotes make no sense unless Griffin has some reason to believe that FLAC is not a legitimate lossless compression format.

## Heresy?

I was bemused by Steve Fox’s “Techlog” editorial in the January 2012 *PC World* entitled “Tablets Enter



Their Adolescence.” It points to a feature article (and cover story) about the range of Android and other tablets (including, of course, the iPad). But what I found bemusing (if probably correct) was Fox’s assertion that *all* of today’s tablets really are in their adolescence and aren’t very polished. “If we could fast-forward to late 2012 and put today’s iPad or Galaxy Tab through its paces, we’d probably laugh at the crudeness.”

And the next paragraph, which I’ll quote in full (emphasis added):

This point was driven home for me when I pulled a first-generation iPad out of the bottom of my desk drawer the other day. What a clunker! It felt heavy, bulky, and sluggish. I was nonplussed: So this was the gizmo that sold 300,000 units the day it was introduced (April 3, 2010) and was hailed in the press as the Next Big Thing. Many early iPads are still in use; but plenty of others are now \$500 paperweights.

Is that true? Based on Fox’s track record, I can absolutely assert that he’s no Apple “hater,” but he’s also not an iDiot (or is that iDolater?).

## The New Groupthink

In this case, I’m *not* being snarky about Susan Cain’s [January 13, 2012](#) “The Rise of the New Groupthink” (*New York Times Sunday Review*), but it feels as though these notes belong in THE BACK anyway.

Solitude is out of fashion. Our companies, our schools and our culture are in thrall to an idea I call the New Groupthink, which holds that creativity and achievement come from an oddly gregarious place. Most of us now work in teams, in offices without walls, for managers who prize people skills above all. Lone geniuses are out. Collaboration is in.

But there’s a problem with this view. Research strongly suggests that people are more creative when they enjoy privacy and freedom from interruption. And the most spectacularly creative people in many fields are often introverted, according to studies by the psychologists Mihaly Csikszentmihalyi and Gregory Feist. They’re extroverted enough to exchange and advance ideas, but see themselves as independent and individualistic. They’re not joiners by nature.

I don’t claim to be spectacularly creative (although I’ve had my moments). I do see myself in much of this, however. I lost points with one manager because I wasn’t enough of a group person—I didn’t spend enough time going to other people’s cubicles to chat with them, even though my contributions to the projects couldn’t be faulted. I did (and still do) my best work alone. And, to be sure, I’m somewhat

of an introvert: I can enjoy group activities but find them draining after a while.

Mostly, though, my preferred methods were becoming less and less acceptable over the last few years of my so-called career. Would I still have a full-time job if I was more of a team player? Dunno. In any case, this is an interesting opinion piece. For example, Cain notes that the great outpouring of stuff after Steve Jobs’ death seems to overlook that kindly introvert, Steve Wosniak, “who toiled alone on a beloved invention, the personal computer.” Yes, he needed the collaboration with Jobs and others to make it all work—but he did a lot of it “alone. Late at night, all by himself.”

That does seem like an outmoded concept, as do single-person offices or even cubicles. (Cain, who’s written a book about introverts, says the average amount of space allotted to each employee has shrunk from 500 square feet in the 1970s to 200 square feet in 2010, putting most people in “open-plan offices” where there’s no real possibility of working alone.) She offers other examples of groupthink, some of which astonish me. (Creative writing as a committee project? Really?) And live brainstorming sessions seem to be the norm despite their questionable success.

[M]ost humans have two contradictory impulses: we love and need one another, yet we crave privacy and autonomy.

To harness the energy that fuels both these drives, we need to move beyond the New Groupthink and embrace a more nuanced approach to creativity and learning. Our offices should encourage casual, cafe-style interactions, but allow people to disappear into personalized, private spaces when they want to be alone. Our schools should teach children to work with others, but also to work on their own for sustained periods of time. And we must recognize that introverts like Steve Wozniak need extra quiet and privacy to do their best work.

Yes, I need to read Cain’s book (*Quiet*). No, I am not surprised that many of the comments (at least the ones I could read—the site wouldn’t let me see anything but the “NYT picks”) disagree with Cain, asserting that only groups are natural, that only teams really work, that open offices *encourage* creativity—and, to be sure, that *we’re all* inherently group players (and probably extroverts).

## Where’s the Lytro?

Remember the Lytro? It was “due in early 2012” starting at \$400, and it would solve all the problems

of digital cameras because you could focus your picture *after* you took it. The strangely shaped camera got—well, not as much hype as the iPad, but hundreds of laudatory stories, including one in the January 2012 *PC World*.

And then? It's out—as far as I can tell, available only by direct order from the manufacturer. Most of the early reviews I've looked at say the same thing: The technology is (or may be) revolutionary (which for some reviewers is all that matters)...but the camera and photos aren't so hot. Which may be what you'd expect for the first product using an entirely new technology. (The Mac-only limit—you have to have a Mac to be able to use the photos—that's interesting.) The general sense is that it's a moderately expensive toy that might signal better things to come—a bit less Instantly Revolutionary than the hype. Which is how life usually works out.

## It's Tough for the 1%

John Scalzi's title for [this February 17, 2012 post](#) at *Whatever* is "Not Being Able to Scrape By With \$200k is Usually Your Own Fault." He starts with a *Gawker* link to [an article in Toronto Life](#) about making ends meet in Toronto if you're only earning \$196,000, the minimum to be in the 1% in Canada. The title of that article is "Almost Rich: an examination of the true cost of city living and why rich is never rich enough." It's an interesting piece, with profiles of several Toronto-area families scraping by on \$200K.

The first profile certainly made me sympathetic for a couple that "usually find they have nothing left" at the end of the month after paying their bills. This is with scraping by (for two adults and two young children) on only \$1,000 a month for groceries, \$400 to \$500 a month for wine, \$400 for dining out, \$280 for phone/cable/internet, and \$2,500 for daycare. No investments or savings. The second couple is in their early 80s and buys a brand-new Mercedes once every three years—and spends \$15,000 a year on four months in Myrtle Beach each year. How about a 37-year-old single man in a one-bedroom apartment who somehow has trouble getting by on \$165,000 a year? This poor fellow can only afford \$800/month for wine—for one person—and \$1,400 on groceries and dining out, plus \$1,000 *per month* for clothes. Oh, and \$10K/year for travel.

Some of the families profiled are *not* wealthy, in the sense that they don't have substantial savings. But they are most assuredly comfortable and making some

choices some of us wouldn't be able to make or at least wouldn't choose to make. (\$800 a month for wine and \$1,000 per month for clothes? For one man?)

Scalzi chooses this as the seminal "bring the revolution!" paragraph:

Then there's the stuff that fills our houses—the calibre of which is the subject of intense, unspoken competition among my peers and neighbours. During my entire childhood, spent in a comfortable lower-upper-middle-class neighbourhood of Montreal, I am quite sure that my mother did not waste a single moment worrying about replacing her laminate kitchen counters with granite or marble. There was no such thing as a \$1,000 Bugaboo stroller, or anything like it. You could host a casual weekend party without spending a fortune on artisanal cheeses. Living the good life simply wasn't the full-time, across-the-retail-spectrum pursuit it has now become.

So *your neighbors* are forcing you to spend outrageous sums? Truly? Bullshit. If that's true, you need different neighbors.

As Scalzi points out, "the 1%" are a heterogeneous lot. People with household incomes of a mere \$200,000 a year look at Wall Street bankers and hedge fund managers with seven-figure or eight-figure annual incomes and feel poor by comparison.

The 99% of the 1% do not have helipads and super-models and dormitories or libraries named after them at their elite school alma maters; they have mortgages and expenses and their kids' educations will be a non-trivial percentage of their total net worth. So if you're on the bottom rung of society's topmost ladder, you're going to feel you have more in common with the middle class than with the stinkin' rich, because as a practical matter you do.

But, as Scalzi says, that doesn't mean you're actually middle class—and when you're complaining about making ends meet and spend \$1,000 a month on clothes, people who really are middle or lower class are going to look at you funny.

Scalzi offers four bits of good advice for people getting by on a mere \$200K: Learn how to budget, stop competing with your neighbors, "when in public, please *shut the fuck up* about how difficult your life is"—and if you really *are* having trouble, well, learn how to budget.

Now, you might say, hey, the people of the 99% are as clueless about my financial issues as I am to theirs, so why is it that I'll get crap for it and they don't? *Because they have less money*, stupid. They are suffering every *other* economic penalty imaginable; it's not *unreasonable* for the social penalty for economic cluelessness to be just about the only thing that vectors

upward. The fact you can brood about this at the lake house over the weekend should put this problem of yours in perspective.

## The 4K Scam

Finally got an HDTV you're happy with? Are you one of those who *can* tell the difference between Blu-ray's true 1080p resolution and lower-resolution sources (e.g., most TV at 1080i or 720p, DVDs at 480p)? Well, according to those out to make sure you're always *au courant*, such as John Sciacca in the January 2012 *Sound & Vision*, "If your system isn't rocking nearly 10 million pixels, then you're about to fall behind the cutting-edge curve." That's right: *You gotta have a 4K projector.*

Never mind that there are no 4K sources unless you happen to own a movie theater. Never mind that 4K units cost a fortune and that you'll need to upgrade your screen as well, since upsampled 2k (1080p, which is what you'll actually be watching—and that only from Blu-ray) shows more "screen artifacts like shimmer, color shifts, hotspotting and mottle." Never mind that you have to have a huge screen and be sitting close to it for the difference between 1080p and 4K to be visible. Apparently, the ideal situation has you sitting six feet from a 100" diagonal screen. (Go measure how far from your 42" or 54" screen you sit. Now think about a 100" screen...*six feet from your face.*) Otherwise, well, since you won't see any difference, you're spending money because, you know, you're loaded.

It's not just *Sound & Vision*. The February 2012 *Home Theater* blasts "4K COMES HOME!" on the cover with an exclusive review about Sony's 4K projector launching a "resolution revolution" and two more stories about this wondrous advance—15 editorial pages in all, which is a *lot* out of an 82-page issue that's half (or more) advertising. (The Sony projector with the feature review is a cheapo home unit: It only costs \$25,000.)

## It Was Funny the First Two Times...

The "Lirpa Labs" products reviewed in April issues of *Sound & Vision*: Slightly over-the-top "products" described fairly seriously, just close enough so you'd get a few readers wondering why they couldn't find them.

The joke started getting a little old after a while, just as *Sound & Vision* itself started hollowing out—that process by which a good print magazine becomes a bunch of pictures, a little text, lots of ads and links to the *real* text (online). It hit rock-bottom this year, with "Celeb Bait." *Four full pages*, roughly

one-tenth of the total editorial space, devoted to "celebrity headphones"—except that these are neither clever nor subtle. They're just stupid.

As are the renewal tactics of a magazine that I've probably subscribed to for at least two decades, maybe longer (maybe *much* longer under various names)—one I don't think I'll be renewing. Why not? Well, there's the hollowing out and dumbing down, as the magazine offers more pretty pictures, fewer in-depth articles and dumber columns.

But the kicker is this: A renewal notice—the *first one I received*—indicating that this might be the last of many notices and offering me a price of \$16/year. For a monthly that now only appears eight times a year. And that rarely has much of anything worthwhile in those eight issues. The combination—telling me they sent notices that they didn't send and overcharging for what's left of the magazine—doesn't sit well.

I love print magazines, but it has to be mutual. There's no question (in my mind) that print magazines will continue—roughly as many new ones are starting up as old ones are disappearing, and there are more than 300 million magazine subscriptions in the U.S. alone. But I suspect *Sound & Vision* will be a victim of one trend I *have* seen elsewhere: Being the also-ran in a category with too many entrants. Not that they're necessarily direct competitors, but I pay \$10/year for 12 issues of *Stereophile* and about the same for *Home Theater*, also for 12 issues. Neither one's *worse* than what's left of *S&V* and *Stereophile* is, for all its failings and orientation to the 0.1% of us, better written and more interesting. I believe I've received my last issue of *Wired* and looks like *S&V* will disappear in September. Maybe I'll get to where I'm only 6 weeks behind on magazines.

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## Masthead

*Cites & Insights: Crawford at Large*, Volume 12, Number 6, Whole # 150, ISSN 1534-0937, a journal of libraries, policy, technology and media, is written and produced irregularly by Walt Crawford.

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