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Patricia Aufderheide\*

# Journalists, Social Media and Copyright: Demystifying Fair Use in the Emergent Digital Environment

## I. Abstract

Journalists exploit technologies that make communication more efficient in order to best serve their purpose of news reporting. In so doing, they constantly work at the intersection of existing copyright practice and emergent communication practices. In recent years, the opportunities and challenges have occurred most frequently in the area of social media, enabled by platforms such as Twitter, Facebook, Instagram, and Tumblr. Journalists have demonstrated eagerness to make use of the new opportunities, but also anxiety about the dangers of unlicensed quotation from social media. A 2012 study demonstrates a range of habits and attitudes regarding re-use of copyrighted material, as well as confusion, which is detrimental to the practice of journalism.<sup>1</sup> To combat such confusion journalists provided themselves with a decision-making tool that facilitates fair use decisions in social media as well as in more traditional sources of information: the Set of Principles in Fair Use for Journalism. This document will mitigate dysfunctional anxiety and its consequences for journalism.

## II. Introduction

Journalism has been undergoing a profound paradigm shift in the last decade. This change is part of a larger shift in society decentralizing information dissemination and creation, seen in everything from search engines drawing upon user preferences to Wikipedia to user forums substituting for help desks. Digital platforms and algorithms have facilitated

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1. Patricia Aufderheide & Peter Jaszi, *Copyright, Free Speech, and the Public's Right to Know: How Journalists Think About Fair Use*, CTR. FOR SOC. MEDIA (2012), <http://www.centerforsocialmedia.org/printpdf/>

1868 [hereinafter Aufderheide, *Journalists and Fair Use*].

the notion of “crowdsourcing” information and problem-solving, or finding out information or solutions to problems by appealing to the knowledge of a decentralized and largely anonymous group of people.<sup>2</sup> This option has proven so appealing to so many people that entire businesses and platforms such as Kickstarter<sup>3</sup> (a leading fundraising platform), Reddit<sup>4</sup> (the leading site to identify trending news), and most spectacularly, Google’s AdSense<sup>5</sup> depend upon it.

This paradigm shift has thrown journalists into the world of social media, both as users and practitioners. In particular, journalistic re-use of social media is nearly endemic. At the same time, it is fraught, as demonstrated by lawsuits and—much more frequently—threatening cease-and-desist letters. For instance, in *Agence France Presse v. Morel*, a Haitian photographer, Daniel Morel, with an exclusive contract with Corbis, transmitted early photos of the Haitian earthquake via Twitpic.<sup>6</sup> A photographer from the Dominican Republic claimed them, and Agence France Presse (AFP) published them as his.<sup>7</sup> AFP later sent out a “mandatory kill notice,” or correction and requirement to delete the previous material, to its customers.<sup>8</sup> The Haitian photographer and Corbis pursued litigation, which Morel continued, and the court found that there had been infringement.<sup>9</sup>

Additionally, in the case of *Associated Press (AP) v. Meltwater*, the AP claimed that Meltwater, an electronic clipping service, is basically recycling its news rather than employing fair use.<sup>10</sup> In summary judgment, the court found that Meltwater could not claim fair use, because its use was not transformative.<sup>11</sup>

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2. See Jerry Brito, *Hack, Mash, & Peer: Crowdsourcing Government Transparency*, 9 COLUM. SCI. & TECH. L. REV. 119, 144 (2008), available at <http://www.str.org/html/volume9/brito.pdf> (explaining that “crowdsourcing” involves “allow[ing] a large group of persons to create, by making small individual contributions, a[n] informational] good that would traditionally have been produced by a single individual or an organization”).

3. *Seven Things to Know About Kickstarter*, KICKSTARTER, <http://www.kickstarter.com/hello> (last visited Sept. 25, 2013).

4. *About Reddit*, REDDIT, <http://www.reddit.com/about/> (last visited Sept. 3, 2013).

5. *How it Works*, GOOGLE, <http://www.google.com/adsense/start/how-it-works.html> (last visited Sept. 3, 2013).

6. *Agence France Presse v. Morel*, No. 10 Civ. 02730 (AJN), 2013 WL 146035, at \*1 (S.D.N.Y. Jan. 14, 2013), *reconsideration granted in part*, No. 10 Civ. 02730 (AJN), 2013 WL 2253965 (S.D.N.Y. May 21, 2013).

7. *Id.* at \*2.

8. *Id.* at \*5.

9. *Id.* at \*31.

10. *Associated Press v. Meltwater U.S. Holdings, Inc.*, No. 12 Civ. 1087 (DLC), 2013 WL 1153979, at \*1 (S.D.N.Y. Mar. 21, 2013).

11. *Id.* at \*12.

Furthermore in a 2013 claim against BuzzFeed, photographer Kai Eiselein claimed that BuzzFeed's collage, "30 Funniest Header Faces," infringed when it included his photograph in the collection.<sup>12</sup> The claim won headlines for its \$3.6 million price tag, but as the Electronic Frontier Foundation noted, the actual possible damages for a successful lawsuit could be under a thousand dollars.<sup>13</sup>

Copyright trolls further complicate the scenario. For example Righthaven sued internet users for infringement for copying material from newspapers, and Prenda attempted to blackmail Internet users of adult material. Both have been checked in the courts but created heartache and headache along the way for unsuspecting recipients of their correspondence.<sup>14</sup>

### III. Fair Use

Features of copyright law that provide access to copyrighted material still under a limited monopoly—the balancing features of copyright law—have grown in importance as monopoly rights have expanded. The most valuable and significant of these is the broad and flexible doctrine of fair use.<sup>15</sup> Although technically an affirmative defense, fair use is part of the legal infrastructure enabling exercise of the First Amendment right of free expression.<sup>16</sup> Under the doctrine of fair use, described in Section 107 of the Copyright Act, authors can quote copyrighted material without permission or payment in some circumstances (broadly, when social benefit is larger than individual owners' loss), though the right is of course only invoked formally if sued for infringement.<sup>17</sup> Society benefits, according to copyright policy, when more culture is made.<sup>18</sup> Fair use has received a broad embrace by judges over the last two decades. Indeed, two recent Supreme Court cases

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12. Complaint at 7, *Eiselein v. BuzzFeed, Inc.*, 2013 WL 3171845 (S.D.N.Y. June 7, 2013) (No. 13 CV 3910).

13. Kurt Opsahl, *3 Great Reasons That One Photographer's Not Getting \$3.6 Million From BuzzFeed*, ELEC. FRONTIER FOUND. (June 18, 2013), <https://www.eff.org/deeplinks/2013/06/buzzfeed-faces-36-million-copyright-suit-not-so-much>.

14. See *Righthaven, LLC v. Hoehn*, 792 F. Supp. 2d 1138, 1147 (Nev. 2011), *vacated in part*, 716 F.3d 1166, 1172 (9th Cir. 2013); see also Kashmir Hill, *How Porn Copyright Lawyer John Steele Has Made A Few Million Dollars Pursuing (Sometimes Innocent) 'Porn Pirates'*, FORBES (Oct. 15, 2012, 2:09 PM), <http://www.forbes.com/sites/kashmirhill/2012/10/15/how-porn-copyright-lawyer-john-steele-justifies-his-pursuit-of-sometimes-innocent-porn-pirates/>.

15. See Copyright Act of 1976 § 107, 17 U.S.C. § 107 (2006) (providing that "the fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright").

16. See *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003).

17. *Set of Principles in Fair Use for Journalism*, CTR. FOR SOC. MEDIA 5 (June 2013), [http://www.centerforsocialmedia.org/sites/default/files/documents/faq\\_set\\_of\\_principles\\_in\\_fair\\_use\\_for\\_journalism.pdf](http://www.centerforsocialmedia.org/sites/default/files/documents/faq_set_of_principles_in_fair_use_for_journalism.pdf).

18. See, e.g., *White v. Samsung Elecs. Am. Inc.*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing *en banc*) ("Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large.").

have recognized that fair use is now the element that allows crossly extended copyright terms to still be constitutional, and not violate the First Amendment.<sup>19</sup>

Although the law encourages users to consider the nature of the original work, the nature of the new use, the amount used, and the effect of the use on the market, it offers no further insight on how to determine whether the use is actually fair use.<sup>20</sup> This abstractness is the great strength of fair use, since unlike itemized sanctioned use exemptions such as fair dealing, it can be adapted to specific new uses.<sup>21</sup> However, this also means that fair use is subject to interpretation. Since statutory damages can be forbiddingly high, up to \$150,000 per infringement, many potential users are understandably wary.<sup>22</sup>

Because of implicit or explicit judicial resort to questions of professional context in assessing the validity of a fair use claim, the relationship between a field's practice—how new culture is generated in that area—and a fair use claim becomes significant. In several professional fields, creating codes of best practices in fair use has transformed the ability of those professionals to use their fair use rights. Documentary filmmakers, poets, English teachers, librarians, film scholars, communication scholars, creators of open course ware, and dance archivists are among the communities that have created such consensus documents, all of which are available online at the Center for Media and Social Impact.<sup>23</sup> In each case, having communities themselves specify the most common situations in which fair use is both eligible and appropriate, and defining the limits of appropriate use, has permitted easier, more efficient, and more innovative professional practice without impairing the ability of professionals within the community to make a rightful claim to their monopoly rights under copyright.<sup>24</sup> Finding the safe-harbor areas of fair use, for their particular profession, meant not only that professionals could identify the best practices but also that they knew that these best practices were available to all, including copyright

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19. *Eldred*, 537 U.S. at 219–20; *Golan v. Holder*, 132 S. Ct. 873, 890 (2012).

20. 17 U.S.C. § 107 (2006).

21. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 3.

22. See Copyright Act of 1976 § 504(c)(2), 17 U.S.C. § 504(c)(2) (2006) (providing that in infringement cases, “the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000”).

23. See *Fair Use Codes & Best Practices*, CTR. FOR MEDIA & SOC. IMPACT, <http://cmsimpact.org/fair-use/related-materials/codes/fair-use-codes-best-practices> (last visited Oct. 10, 2013).

24. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 17.

holders and judges. With everyone holding the same knowledge, the risk of lawsuit sank to vanishingly low levels.<sup>25</sup>

Lowering of risk through knowledge of consensus around best practices has changed practice. In the case of documentary filmmakers, who need to take out insurance against any errors such as copyright infringement, insurers shifted from a decades-old refusal to insure for fair use claims to routinely accepting them without incremental charges.<sup>26</sup> Thus, insurers have de-facto placed a dollar figure on the cost of accepting fair use risk within the terms of the field's consensus: zero. Communication scholars have been able to persuade publishers to include unlicensed copyrighted material in their scholarship, by employing their Code of Best Practices in Fair Use for Communication Research, produced through the International Communication Association.<sup>27</sup> Much more common, however, is simply the ordinary business of generating new culture in the field with less anxiety and less time spent decision-making.

In the same time period, and without a code of best practices to guide journalistic practice, insecurity has grown about how to employ fair use journalistically, particularly in the fast-moving area of social media.<sup>28</sup> With changing and threatened business models, all large copyright holders—including publishers, the film industry, the record business, and newspapers—have demanded and won more and more monopoly rights.<sup>29</sup> These monopoly rights have not, however, protected them from changes in their business model.

Business-model crisis has amplified the insecurity and anxiety because fair use has mistakenly and erroneously been blamed for loss of revenues.<sup>30</sup> Revenues are indeed shifting from traditional journalistic outlets and media outlets are scrambling to protect their end product.<sup>31</sup> This concern has erupted in conflicts, some of which end up in headlines and some in court.<sup>32</sup> Conflicts between political campaigns and copyright

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25. *Briefing: Success of Fair Use Codes of Best Practices*, ASS'N OF RES. LIBR., <http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices/2449-briefing-success-of-fair-use-codes-of-best-practices> (last visited Sept. 4, 2013).

26. *Id.*

27. *Code of Best Practices in Fair Use for Scholarly Research*, CTR. FOR SOC. MEDIA (June 2010), <http://www.icaqd.org/pubs/reports/fairuse.pdf>.

28. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 3.

29. *Id.*

30. *Id.*

31. See Jeff Jarvis & Chris Tolles, *The Print Media Are Doomed*, BLOOMBERG BUSINESSWEEK, [http://www.businessweek.com/debateroom/archives/2008/12/the\\_print\\_media\\_are\\_doomed.html](http://www.businessweek.com/debateroom/archives/2008/12/the_print_media_are_doomed.html) (last visited Sept. 26, 2013).

32. Jennifer Jacobs, *Register Objects to Use of Story by Pawlenty Camp*, DES MOINES REGISTER, Aug. 2, 2011, at B3. See also Eriq Gardner, *Fox News Settles Lawsuit Over Interview of Michael Jackson's Ex-Wife (Exclusive)*, THE HOLLYWOOD REPORTER (July 21, 2011),

holders, including musicians and newspapers, are routine.<sup>33</sup> Similarly, a company's practices may sometimes conflict with pronouncements made by its executives.<sup>34</sup> For example, news moguls such as Rupert Murdoch are outspoken critics of the fair use doctrine, even while their own staff is openly employing it to do their daily work.<sup>35</sup>

Furthermore, copyright litigation even became a business model, if briefly and unsuccessfully. For example, the copyright holding company, Righthaven, purchased the copyright to newspaper stories from large metropolitan dailies, such as the *Las Vegas Review-Journal* and the *Denver Post* (which in 2011 opted out of what its CEO called a "dumb idea"), and without warning sued those quoting from that material.<sup>36</sup> Small-time bloggers were often intimidated into paying hundreds or thousands of dollars to Righthaven, even when they may have been correctly employing fair use.<sup>37</sup> When cases went to court, though, Righthaven's claims were summarily rejected<sup>38</sup> and Righthaven went into bankruptcy.<sup>39</sup>

Copyright holders are also trying to create micro-licensing models. More than two dozen major media companies, including the Associated Press, McClatchy, Hearst and the New York Times, launched NewsRight and are now under the umbrella of Moreover.<sup>40</sup> The service offers both licensing and analytics and, with its increased licensing efficiency, could be useful both to those who do not wish to make their own fair use determination and

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<http://www.hollywoodreporter.com/thr-esq/fox-news-settles-lawsuit-interview-213928> (discussing an example of when conflicts end up in headlines and in court).

33. See Jacobs, *supra* note 32, at B3 (providing an example of conflicts between political campaigns and newspapers).

34. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 3.

35. See, e.g., *id.* at 3; Jacobs, *supra* note 32; Bobbie Johnson, *Murdoch Could Block Google Searches Entirely*, *GUARDIAN* (Nov. 9, 2009, 4:08 AM), <http://www.theguardian.com/media/2009/nov/09/murdoch-google> (discussing news mogul, Murdoch, challenge to fair use administered by news aggregators).

36. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 5; see also Steve Green, *Righthaven: The Controversy Firm Uses Courts for Profits*, *LAS VEGAS SUN*, Aug. 1, 2011, at 1, available at 2011 WLNR 15353326.

37. Green, *supra* note 36, at 1.

38. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 5; see also Steve Green, *Righthaven Loses Second Fair Use Ruling Over Copyright Lawsuits*, *VEGASINC* (Mar. 18, 2011, 4:56 PM), <http://www.vegasinc.com/news/2011/mar/18/righthaven-loses-second-fair-use-ruling-over-copyr/>.

39. See Mark Friedman, *Stephens Media's Righthaven Ruled Wrong in U.S. Circuit Court*, *ARK. BUS. 20* (July 8, 2013, 12:00 AM), <http://www.arkansasbusiness.com/article/93399/stephens-medias-righthaven-ruled-wrong-in-us-circuit-court>.

40. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 5; *News Organizations Launch NewsRight*, *BUS. WIRE* (Jan. 5, 2012, 10:38 AM), <http://www.businesswire.com/news/home/20120105006047/en/News-Organizations-Launch-NewsRight>.

to those whose uses would exceed fair use.<sup>41</sup> Such services do not, of course, address situations in which a licensor might refuse to license.

Incumbent media owners have considered changes in copyright law to reinforce aging business models. One such proposal is to revive dormant case law protecting “hot news” from direct competitors as part of the United States Code.<sup>42</sup> However, the proposal is so fraught with problems—How to determine if only one source could have found out something? How could legislation be implemented while still observing the separation between facts (not copyrightable) and stories? How long is enough? What if embargoing information harms the public?—that action appears highly unlikely.<sup>43</sup>

Business executives and journalists alike have inaccurately held the doctrine of fair use responsible for destabilizing those business models, for instance such groups equate aggregation and quotation practices to stealing.<sup>44</sup> Fair use has routinely been confused with other, uncontroversial aspects of copyright policy that affect journalistic practice. For instance, facts are not subject to copyright, which means that no one can own the substance (as against the text) of a scoop or exclusive, once it has been published.<sup>45</sup> This also means that protection for individual words and short phrases (which includes many or even most headlines and ledes) is severely limited; and just referring or pointing to a copyrighted work (even by way of a web link) is not an act of infringement.<sup>46</sup> None of these propositions has anything to do with the equally time-honored concept of fair use.<sup>47</sup>

#### IV. Journalistic Practice

Journalists turn routinely to social media platforms, not only for information for breaking news, but as sources for information they incorporate into their

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41. *Get NewsRight Info*, MOREOVER TECH., <http://www.moreover.com/get-newsright-info> (last visited Sept. 8, 2013).

42. See VICTORIA SMITH EKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE 10–13 (2005); Peter Lattman, *Big Banks Lose Ruling on Research*, N.Y. TIMES (June 20, 2011, 10:54 AM), [http://dealbook.nytimes.com/2011/06/20/wall-street-bankslose-ruling-on-research/?\\_r=0](http://dealbook.nytimes.com/2011/06/20/wall-street-bankslose-ruling-on-research/?_r=0) (discussing court ruling that a bank’s research did not fall within “Hot News” doctrine); see also *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 906–07 (2d Cir. 2011) (rejecting a “hot news” misappropriation argument and concluding that “a Firm’s ability to make news . . . does not give rise to a right to control who breaks that news and how”).

43. Ekstrand, *supra* note 42, at 12–13.

44. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 3.

45. *Id.*

46. *Id.* at 4.

47. *Id.*



own reports, which often appear on many of the same platforms.<sup>48</sup> While in some cases the service itself facilitates uses (such as Facebook likes and Twitter retweets), in many cases journalists re-use material from the poster directly.<sup>49</sup> Whenever they do so, whether enabled by the platform or not, journalists must make choices, consciously or not, about whether they should license/get permission for the use, or whether the fair use doctrine allows for unlicensed use.

Journalistic practice is evolving rapidly. A recent hallmark use of social media by journalists was in the Arab Awakening, which began in 2010 in Tunisia and has swept the Arab world.<sup>50</sup> Andy Carvin, a self-described non-journalist who works for National Public Radio and routinely practices journalism, has chronicled the process of documenting movements such as the Arab Awakening using Twitter, in *Distant Witness*.<sup>51</sup> In that book, he reproduces verbatim social media texts that he then selectively retweeted, described, or modified-tweeted.<sup>52</sup> His work became front-line reporting on the Arab Awakening. In *Distant Witness*, there are many examples of Carvin both reusing tweets without permission, doing so as part of his job to document the situation in a timely way, and also being begged by tweeters to spread news.<sup>53</sup> He often first retweeted not in order to spread news, but as part of a request to verify information.<sup>54</sup>

Twitter has become widely used as a place to look for information, some of which is not only newsmaking, but newsbreaking, as one scholar notes in detail:

*Twitter has received significant media attention in its use to disseminate information during disasters, including the 2008 Mumbai bomb blasts and the January 2009 crash of US Airways flight 1549. In the latter event, Janis Krums, a passenger on the Midtown Ferry took a picture of the downed US Airways jet floating in the Hudson and uploaded it to Twitter before news crews even arrived on the scene. Krums not only uploaded his tweet and photograph with ease, but also continued tweeting as he helped with aid efforts. In an instant, he was transformed from*

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48. *YouTube & News: A New Kind of Visual Journalism*, PEW RES. CTR.'S PROJECT FOR EXCELLENCE IN JOURNALISM 4 (July 16, 2012), [http://www.journalism.org/sites/journalism.org/files/YouTube%20&%20the%20News%20%20A%20PEJ%20Report%20-%20FINAL\\_0.pdf](http://www.journalism.org/sites/journalism.org/files/YouTube%20&%20the%20News%20%20A%20PEJ%20Report%20-%20FINAL_0.pdf).

49. *Id.* at 5 (noting that 51% of the most-watched videos are attributed to news organizations, though they appear to have been originally shot by individuals).

50. *See, e.g.*, ANDY CARVIN, *DISTANT WITNESS* xii–xvi (2012).

51. *Id.*

52. *See id.* at 3–15.

53. *See id.* at xiii–15.

54. *See id.* at 10–11.

*Florida-based businessman to both citizen journalist and emergency aid worker. During the Mumbai bomb blasts in 2008, Twitter was used to circulate news about the attacks. Seconds after the first blasts, Twitter users were providing eyewitness accounts from Mumbai. For example, on 26 November 2008, the day of the attacks, @ShriNagesh tweeted 'a gunman appeared in front [sic] of us, carrying machine gun-type weapons & started firing [. . .]' and @Dupree tweeted 'Mumbai terrorists are asking hotel reception for rooms of American citizens and holding them hostage on one floor'. Though limited to 140 characters, the information contained in these tweets was invaluable to individuals in Mumbai as well as news media outlets throughout the world. Traffic on Twitter with the #mumbai hash tag grew to such a volume on 27 November that the Indian government asked for Twitter users to halt their updates. Some reports indicated that the Indian government was worried that the terrorists were garnering inside information about the situation from internet media sites including Twitter.*

*Not only was news in these cases disseminated nearly instantaneously by citizen journalists through Twitter, but tweets often included linked photographic documentation. In the face of deep budget cuts, traditional media outlets are hard-pressed to have people on the ground picking up stories this quickly. Twitter, on the other hand, has at its disposal a virtual army of citizen journalists ready to tweet at a moment's notice from their mobile phones or mobile devices. At the time of writing, 23.5 percent of the UK population has mobile internet on their phone and, as such, are capable of sending tweets with linked photographs. Most smart phone users with a Twitter-based application could take a picture and send a tweet in under 45 seconds. This seamless convergence of photographic and textual information from everyday 'citizen journalists' made Twitter a news source during the post-election protests in Iran, the 2008 cyclone in Burma, and the elections in Moldova.<sup>55</sup>*

A Pew Research Center report from the Project on Excellence in Journalism in 2012 studied the role of online video in news and reported on the new phenomenon as a shift in news culture:

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<sup>55</sup> Dhjiraj Murthy, *Twitter: Microphone for the Masses?*, 33 MEDIA, CULTURE & SOC'Y 779, 782–83 (2001) (internal citations omitted).

*[A] complex, symbiotic relationship has developed between citizens and news organizations on YouTube, a relationship that comes close to the continuous journalistic “dialogue” many observers predicted would become the new journalism online. Citizens are creating their own videos about news and posting them. They are also actively sharing news videos produced by journalism professionals. And news organizations are taking advantage of citizen content and incorporating it into their journalism. Consumers, in turn, seem to be embracing the interplay in what they watch and share, creating a new kind of television news.<sup>56</sup>*

That study found that on YouTube, an astonishing 39% of videos watched in major news events were produced by citizens, not professional journalists.<sup>57</sup> At the same time, the study noted,

*[C]lear ethical standards have not developed [among journalists] on how to attribute the video content moving through the synergistic sharing loop. Even though YouTube offers guidelines on how to attribute content, it’s clear that not everyone follows them, and certain scenarios fall outside those covered by the guidelines. News organizations sometimes post content that was apparently captured by citizen eyewitnesses without any clear attribution as to the original producer. Citizens are posting copyrighted material without permission.<sup>58</sup>*

Ordinary users, even people who see themselves as citizen journalists, may not have an expectation of payment. As a blogpost on the site of the Poynter Institute, a leading institution on journalistic practice, noted in 2011, “Citizen journalists and other users want exposure for their images. They uploaded them to share them, to have them go viral. They want to retain copyright but may not care so much about their images being reused on other sites if they’re credited.”<sup>59</sup> Janis Krums, the citizen who took the iconic photo of the plane landing in the Hudson River in 2009, noted that AP,

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56. *YouTube & News: A New Kind of Visual Journalism*, PEW RES. CTR.’S PROJECT FOR EXCELLENCE IN JOURNALISM 4 (July 16, 2012), [http://www.journalism.org/sites/journalism.org/files/YouTube%20&%20the%20News%20-%20A%20PEJ%20Report%20-%20FINAL\\_0.pdf](http://www.journalism.org/sites/journalism.org/files/YouTube%20&%20the%20News%20-%20A%20PEJ%20Report%20-%20FINAL_0.pdf).

57. *Id.* at 5.

58. *Id.* at 4.

59. Jeff Sonderman, *Twitpic Changes Reveal Conflict as Users, Journalists, Photo Sharing Services Have Competing Goals*, POYNTER (May 19, 2011, 11:58 AM, updated May 23, 2011, 10:48 AM), <http://www.poynter.org/latest-news/media-lab/mobile-media/133055/twitpic-changes-reveal-conflict-as-users-journalists-photo-sharing-services-goals-compete/>.

which among many other news outlets as well as other citizens used the photo, never paid him.<sup>60</sup> Moreover, he was not distressed by the lack of payment:

*I posted it on a public site to my 170 followers. I did not send it to CNN or FOX. I am satisfied with how everything has unfolded. A lot of good has come of this event and I can't get mad at something that I have no control over. When I took the photo my priority was rescuing the passengers of the plane and not selling the rights to one of the news organizations.<sup>61</sup>*

At the same time, he, like others including scholars cited in the Poynter Institute blog post, would like to see some way for users who want to pay to identify efficiently who to contact.<sup>62</sup>

Stefanie Gordon, a passenger on a plane who caught pictures and video of the 2011 Challenger space shuttle takeoff, which were widely and instantly disseminated both by journalists and citizens, was later paid by some news outlets.<sup>63</sup> However, she was not interested in being paid, and encouraged anyone to take her pictures and use them, so long as they credited her.<sup>64</sup> She was outraged by outlets that took her picture without crediting.<sup>65</sup>

Citizen journalist photos posted on Twitter were seized upon by major journalistic outlets in the UK, in January 2013, when a helicopter crashed in London.<sup>66</sup> The outlets did not get permission before reproducing the photos, including one from Craig Jenner, known as @craiglet on Twitter, as reported in *The Guardian*:

*An Evening Standard picture desk executive said that in the heat of the moment, the paper could not contact Jenner about its splash, but if he, or anyone else, contacts them regarding payment, they will oblige.*

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60. Janis Krums, *Lessons in Citizen Journalism*, THE BLOG OF JANIS KRUMS, <http://janiskrums.com/2010/03/15/citizen-journalism-lessons/> (Mar. 15, 2010).

61. *Id.*

62. See Sonderman, *supra* note 59; see also Krums, *supra* note 60 (discussing different ways the structure of distribution could be changed to compensate photographers for their material).

63. Sarah Kessler, *Space Shuttle Twitpic Women Gets Paid, Credited & Snubbed By Media*, MASHABLE (May 17, 2011), <http://mashable.com/2011/05/17/space-shuttle-twitpic/>.

64. *Id.*

65. *Id.*

66. Lisa O'Carroll, *Twitter Pictures Put in Spotlight Following London Helicopter Crash*, GUARDIAN (Jan. 16 2013, 1:01 PM), <http://www.theguardian.com/technology/2013/jan/16/twitter-pictures-london-helicopter-crash-copyright>.

*"All the information about the source of the photo is entered into the database and remains in our library. We've always been of the view whoever took the photo owns the copyright, and if they want payment, there is no question they will be paid," said the Evening Standard source.*<sup>67</sup>

Another neighborhood resident professed to find it ghoulish to accept payment for his photos, although he demanded credit.<sup>68</sup>

But there appears to be no stable understanding. In another incident chronicled in the same story, a citizen demanded and got payment for a photo from the London *Daily Mails* online site.<sup>69</sup> The article cited a "*Daily Mail* insider saying that before the court decision in *Morel v. AFP*, 'People used to just help themselves to stuff on Facebook or Bebo before that. That doesn't happen anymore.'<sup>70</sup>

Thus, the current environment is filled with confusing signals about the expectations even of ordinary users and citizen journalists at a time when journalists are turning increasingly to this resource.

### **Study of Journalistic Habits and Attitudes**

Journalists' attitudes about and habits in use of social media, given this confusing picture, were illuminated in a 2012 study conducted at American University, supported by the Robert R. McCormick Foundation.<sup>71</sup> Researchers interviewed 82 journalists (49 men and 33 women) with at least five years of full-time experience, the majority of whom were on the Eastern seaboard, on a range of platforms and in varied kinds of journalism.<sup>72</sup> In order to assure frankness, interviews were wholly anonymous and confidential, with interview notes deleted upon completion of the research.<sup>73</sup>

Overall, researchers discovered a dramatic difference in journalists' behavior in relation to copyright between familiar and unfamiliar situations. In situations that involve text rather than images or video and are standard to newsrooms—for instance, quoting from corporate or non-profit documents, or drawing upon previous journalism to update a story—journalists routinely accessed copyrighted material without permission, payment or even apparently asking themselves about the propriety of doing

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 1.

72. *Id.* at 6.

73. *Id.*

so.<sup>74</sup> They regard this behavior as so basic to journalism that many think of it as simply part of the freedom of the press.<sup>75</sup>

However, in untraditional situations, including dealing with audio or audio-visual information, web-based information, or social media, journalists in interviews showed no such regular patterns.<sup>76</sup> They no longer associated using unlicensed materials with press freedoms.<sup>77</sup> They spent more time justifying their uses as necessary.<sup>78</sup> They also often expressed anxiety or confusion about their own choices.<sup>79</sup>

Journal Register Company Editor-in-Chief, Jim Brady, noted in an interview for our study, which he wanted to be on the record,

*Before the Web, this type of thing fell on the business side of things with lawyers. It's something that we never really had to think of. But once the web happened, every average journalist has to deal with it. The reasons journalists all need to worry about this now is that every one of them can publish in the new world, so they all need to be aware of what constitutes – or what we think constitutes – fair use.<sup>80</sup>*

One TV producer said, “In the past years, it’s become tougher [to employ fair use]. The culture has changed as . . . more eyeballs are watching.”<sup>81</sup>

Journalists expressed both enthusiasm for the access to information provided by new platforms and confusion about the right thing to do with material.<sup>82</sup> Sometimes they were even confused about whether this material was copyrighted at all.<sup>83</sup> Some had read the Terms of Service of Facebook and Twitter with great care, while others had not.<sup>84</sup> One interviewee believed that material on YouTube was copyright-free.<sup>85</sup> Others mistakenly referred to material generated in social media as in the “public domain” because they understood it simply to be out there.<sup>86</sup> Some believed that

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74. *Id.* at 9.

75. *Id.*

76. *Id.* at 11–12.

77. *Id.* at 12.

78. *Id.* at 13–14.

79. *Id.* at 12, 14.

80. *Id.* at 4.

81. *Id.*

82. *Id.* at 11.

83. *Id.* at 9–10, 13.

84. See Lauryl Fischer, *Privacy Check: Social Media Changes Highlight Importance of Terms and Conditions*, PENDULUM (Feb. 24, 2013), <http://www.elonpendulum.com/2013/02/privacy-check-social-media-changes-highlight-importance-of-terms-and-conditions/>.

85. Aufderheide, *Journalists and Fair Use*, *supra* note 1, at 13.

86. *Id.* at 10.

individuals who posted material on social media, including Facebook, Twitter, and YouTube, implicitly gave permission to others to use that material—even in some cases inviting that use.<sup>87</sup> Some believed that simply crediting Facebook or YouTube or Twitter in a caption satisfied their obligations.<sup>88</sup>

The use-before-licensing approach accords with BBC policy.<sup>89</sup> In 2011 Chris Hamilton, for BBC News editors, described a situation in which pictures from social media had been posted without attribution or permission, and explained the BBC's policy:

*[I]n exceptional situations, where there is a strong public interest and often time constraints, such as a major news story like the recent Norway attacks or rioting in England, we may use a photo before we've cleared it.*<sup>90</sup>

Overall, journalists showed some confusion over correct practices in re-using copyrighted material on social media for news-making. They carried over some habits and principles from analog media, including an assumption that professionals should be paid, and they also sometimes treated social media as a copyright-free zone. They betrayed confusion about copyright law, including their rights under fair use.

## V. Principles in Fair Use for Journalism

Given the confidence that journalists typically have about the application of fair use in their professional practice—even though they may not recognize the term “fair use” as they work—it would seem that they have values, habits, ethical standards and expectations that they could port over to a social media environment, if they understood what copyright law permits, encourages, and discourages. In the social media space, copyright law applies with the same logic as in the most traditional analog environments of journalism, particularly in the area of fair use. Terms of service may offer new wrinkles, but the basic challenge of matching practice to the law's highly flexible but abstract fair use doctrine remains.

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87. *Id.* at 11.

88. See Molly Siems, *Copyright Rules: Attribution is Not Enough*, INNOVATION INSIGHTS (Feb. 13, 2013, 12:30 PM), <http://insights.wired.com/profiles/blogs/copyright-rules-attribution-is-not-enough#axzz2fMz9kjHd> (pointing out that while attribution helps one avoid plagiarism, is “actually has nothing to do with copyright law” and has no impact on infringement).

89. *Editorial Guidelines: Pictures from Social Media Sites*, BBC, <http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidance-social-media-pictures> (last updated Oct. 2010).

90. Chris Hamilton, *Use of Photographs From Social Media in our Output*, BBC (Aug. 15, 2011, 5:23 PM), [http://www.bbc.co.uk/blogs/theeditors/2011/08/use\\_of\\_photographs\\_from\\_social.html](http://www.bbc.co.uk/blogs/theeditors/2011/08/use_of_photographs_from_social.html).

As a result of the study's conclusions and the recommendations of a group of senior journalistic scholars and journalists, throughout 2012 Prof. Peter Jaszi, other legal scholars and I facilitated the creation of a Set of Principles in Fair Use for Journalism, released in June 2013 with ten signatories.<sup>91</sup>

The Principles bridge the gap between traditional practice and the current noisy and confused digital environment, not by specifying digital practices but rather by identifying core journalistic activities and the logic and limits of fair use within them.<sup>92</sup> In this, the Principles follow in a succession of consensus documents created by professional communities, with facilitation from Peter Jaszi and me at American University.<sup>93</sup>

Journalists found seven common situations in which unlicensed uses would be fair, within the limits they specify in the Principles: incidental use, as proof, in cultural journalism, as illustration, for historical reference, to trigger or expand discussion, and to advance the story.<sup>94</sup> In each of these situations, journalists specified how fair use is applicable, and what the limits to its applications should be under best practice.<sup>95</sup>

For instance, if a reporter takes video at a protest rally where singers are chanting from a John Lennon song, a journalist can turn to the first situation in the Principles: "incorporation of copyrighted material captured incidentally and fortuitously in the process of recording and disseminating news."<sup>96</sup> The reporter could then turn to limitations, and ask himself, did he already agree with anyone not to film any part of the Lennon song at the event? Did he ask the protesters to sing that song? Did he specifically film the Lennon song performance in order to give listeners the pleasure of a musical experience? Should he attribute? When the reporter knows his answers to these questions, he can make an informed decision.<sup>97</sup>

A reporter doing a story on the introduction of food trucks into a downtown area might find Twitpics from consumers and want to illustrate her story with them. Situation Four specifies: "Fair use applies to illustration in news reporting."<sup>98</sup> Since she has a transformative purpose of illustrating a news story, and it matches the principle, she turns to the limitations.<sup>99</sup> Will those photos enhance the journalistic purpose of the story, rather than

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91. *Fair Use for Journalism*, *supra* note 17.

92. *Id.* at 1.

93. *Id.* at 3.

94. *Id.* at 10–15.

95. *Id.* at 1.

96. *Id.* at 10.

97. *Id.*

98. *Id.* at 12.

99. *Id.*



serving as eye candy? Is she using an appropriate amount of material?<sup>100</sup> Is she taking these photos from a service that sells photographs to journalists?<sup>101</sup> Is she providing attribution?<sup>102</sup> Answering these questions lets her know if her use is within the consensus of the field about appropriate fair use.

The Set of Principles in Fair Use for Journalism does not prescribe or offer guidelines, since no authority can remove from any individual journalist the responsibility inherent in First Amendment exercise of making a case-by-case judgment.<sup>103</sup> But providing an understanding of the consensus of a journalistic community allows journalists to understand when they are in the heart of acceptable practice and when they are moving into an area that is more risky.<sup>104</sup>

## VI. Conclusion

The destabilizing forces of a decentralized digital information environment have created an enormous amount of confusion about acceptable copyright practice.<sup>105</sup> They also have, by precipitating the creation of the Set of Principles in Fair Use for Journalism, forced journalists to understand and articulate, sometimes for the first time, what their rights to fair use within copyright are.<sup>106</sup>

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100. *Id.* at 13; *see also* Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605, 613 (2d Cir. 2006) (recognizing that photographs are often an example of a situation in which using the entirety of a work can be appropriate fair use).

101. *Fair Use for Journalism*, *supra* note 17, at 13.

102. *Id.*

103. *Id.* at 1.

104. *Id.*

105. *Id.* at 6.

106. *Id.* at 1.