

**Using Copyright to
Your Advantage!
Basics Fair Use and
other Good Stuff!**

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Some Ground Rules!

- Anything said here is not to be taken as legal advice, if you have a legal issue, please consult appropriate counsel.
- In return, it is assumed that all questions posed are hypothetical and reflect only the musings of an informed and curious mind and not the actual problem you might have.

Copyright Basics and Fair Use

- Origins and Nature
- Exclusive Rights
- Duration
- Liability Issues
- Damages
- Fair Use and (selected) Limitations on Exclusive Rights found in other sections of the copyright law, i.e., 108-122
- Online Service Provider Liability limitation of section 512 (DMCA)
- Anti-circumvention and anti-trafficking rules of section 1201 (DMCA)

Origins and Nature

- The Copyright Clause of the U.S. Constitution: art. I, sec. 8. cl. 8.
- Law and in specific copyright law: statutes, legislative history, cases (understanding precedent) and “guidelines.”
 - “[T]here is no Rosetta stone for the interpretation of the copyright statute.” *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).
- Three requirements:
 - An original,
 - Work of authorship, that is
 - Fixed in a tangible medium.

Categories: Works of Authorship

- Literary works including computer programs
- Musical works (nondramatic)
- Dramatic works (including music)
- Pantomimes and choreographic works
- Pictorial, graphic and sculptural
- Motion pictures and other audio-visual works
- Sound recordings
- Architectural works
- Compilations, collective and derivative works

Exclusive Rights: 17 U.S.C. 106

- Reproduce (photocopying, scanning, downloading a textbook).
- Public display (showing a copyrighted map or graph as part of a PowerPoint presentation on multiple workstations in the lab).
- Public performance (singing a song to a class or playing a DVD on a school bus).
- Derivative Works (writing a Star Trek trivia book or rearranging a musical score so it is easier to play by sixth graders).
- Public Distribution (“akin” to publication, includes circulation of unpublished archival material and published library content, see, *Hotaling vs. Church of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1999)).

Display Right: 106(5) vs. 109(c)

- To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.” 17 U.S.C. 101.
- “[N]otwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.” 17 U.S.C. 109(c).

Displays of Lawful Copies

- H. Rpt. No. 94-1476, 94th Cong. 2d Sess. 80 (1976), reprinted in 5 U.S.C.C.A.N. 5659, 5694 (1976).
 - Display defined “In other words, the display of a visual image of a copyrighted work *would be an infringement* if the image were *transmitted* by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere.” [display as **transmission**]
 - Display refined: Section 109(c) excludes “the *simultaneous projection of multiple images* of the work ... where each person in a lecture hall is supplied with a separate viewing apparatus.” [display as **multiple copies**]

Distribution of Lawful Copies

- 17 U.S.C. 109(a), the first sale doctrine:
“Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord *lawfully made under this title*, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”
- Impact: Allows a library to circulate (make a public distribution of) items from its collection on condition that the copy or phonorecord is “lawfully made” under the copyright law.

Distribution of Works in the Library

- But See, *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 986 (9th Cir. 2008) (“under this title” means that the copy or phonorecord must either be manufactured in the United States or if made elsewhere imported and sold here with the authority of the copyright owner), judgment affirmed by an equally divided court without opinion, 131 S. Ct. 565 (2010).
 - See also Katherine A. Chamberlain, “*Lawfully Made under This Title*”: *The Implications of “Costco v. Omega” and the First Sale Doctrine on Library Lending*, 37 JOURNAL OF ACADEMIC LIBRARIANSHIP 291 (2011).

Library Distribution of Unlawful Works

- *Hotaling v. Church of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1997).
 - Although the statute of limitations for infringement based upon unauthorized reproduction had passed (three years: know or reason to know), plaintiffs claimed distribution was on-going as the work was available to members of the public in the holdings of the library.
 - “When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.” 118 F.3d at 203.

Distribution of Works in the Library

- Library was liable for the use (distribution) of unlawful copies of copyrighted works found in its collection. *Hotaling v. Church of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1997).
 - The dissent argued that distribution (lending) should not be equated with the mere access to materials via a library's in-house collections.
 - However, the dissent remained silent on whether the check-out (actual lending under 17 U.S.C. 106(3)) of reproduced (unauthorized) materials would be an illegal distribution. 118 F.3d at 205.
 - Arguably if this were the case both the majority and the dissent might have agreed that the circulation of unauthorized or illegal reproductions would be an infringement.

Lessons from *Hotaling*

- Lending of unlawfully made copies by a library (ILL?) or handing out to students in a classroom of unlawfully made copies of a workbook is an infringing public distribution.
- Implications for library or school in-house collections such as photocopied vertical file or resource material?
- Mere holding of unlawful copy by a library (or school) in its collection may or may not be an – illegal distribution (majority and dissent disagree).
- This case is law only in the 4th Circuit, but would likely be cited by plaintiff's counsel.

Derivative Works

- The bizarre law of derivative works on the West Coast: *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (“The appellant removed selected pages from the book, mounted them individually onto ceramic tiles and sold the tiles at retail.”)
- First Sale rights apply . . . “appellant can purchase a copy of the Nagel book and subsequently alienate its ownership in that book. However the right to transfer applies only to the particular copy of the book which appellant has purchased and nothing else.” *Id.* at 1344.
- But . . . “[b]y borrowing and mounting the preexisting, copyrighted individual art images without the consent of the copyright proprietors...appellant has prepared a derivative work and infringed the subject copyrights.” *Id.* at 1343.

Derivative Works

- A more sound approach and bit closer to my home: *Annie Lee and Annie Lee & Friends Company, Inc. v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997).
- “Our district judge thought this a distinction without a difference, and we agree,” i.e. traditional mounting and displaying vs. epoxy bonding onto tiles.)
- “If the framing process does not create a derivative work, then mounting art on tiles, which serves as a flush frame, does not create a derivative work.” *Id.* at 581.
- Moral Right: “If Lee (and the ninth circuit) are right about what counts as a derivative work, the United States has established through the back door an extraordinarily broad version of authors’ moral rights, under which artists may block any modification of their works of which they disapprove. No European version of *droit moral* goes this far.” *Id.* at 583.

More 7th Circuit Derivatives Uses (or not)?

- *Ty, Inc. v. Publication International Ltd.*, 292 F.3d 512 (7th Cir. 2002) (reversing summary judgment for plaintiff: inclusion of photographs of Beanie Babies in a guide book may be fair use, use in picture books not a fair use).
- Drawing a distinction between complementary [“transformative”] and substitutional [“superseding”] copying ... the difference between parody (fair use) and burlesque (often not fair use) ... often just a humorous substitute for the original”). *Id.* at 518.
- “Ty acknowledges as it must that a collectors’ guide to a series of copyrighted works is no more derivative than a book review is.” *Id.* at 520.
- Impact in the library: constructing reviews, making critiques, etc. does not infringe upon the exclusive right of the copyright owner to make derivative works.

Works Not Protected by Copyright

- Non-Copyrightable works: facts, names and titles, scenes a faire, basic forms, etc.
- Works designated in the public domain: 17 U.S.C. 105 (“Copyright protection under this title is not available for any work of the United States Government.”).
- Works that have fallen into the public domain:
 - Failed to comply with copyright particulars (registration or renewal), when those requirements mattered.
 - Works for which the copyright has expired.
 - 17 U.S.C. 104A, restoration of copyright for selected foreign works (case pending before Supreme Court!).

The Shifting Circumstance of Photographs

- Non-Copyrightable works: transparencies or slides of photographs of works of art. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F.Supp.2d 191, 197 (S.D.N.Y. 1999):
“In this case, plaintiff by its own admission has labored to create ‘slavish copies’ of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality-indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.”
- A photograph of a painting or art object is derivative, but if the painting or object is in the public domain there is no derivative right issue.

The Shifting Circumstance of Photographs

- Copyrightable works: the original elements in a photograph.
- *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992) (emphasis original), cert. denied, 506 U.S. 934 (1992): “It is not therefore the idea of a couple with eight small puppies seated on a bench that is protected, but rather Roger’s *expression* of this idea-as caught in the placement, in the particular light, and in the expressions of the subjects-that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable.”

The Shifting Circumstance of Photographs

- Copyrightable works: the original elements in a photograph.
- *Mannion v. Coors Brewing Co.*, 377 F.Supp.2d 444, 450 (S.D.N.Y. 2005) (footnotes omitted): “But this is not always true. It of course is correct that the photographer of a building or tree or other pre-existing object has no right to prevent others from photographing the same thing. That is because originality depends upon independent creation, and the photographer did not create that object. By contrast, if a photographer arranges or otherwise creates the subject that his camera captures, he may have the right to prevent others from producing works that depict that subject.”

The Shifting Circumstance of Photographs

- *Mannion v. Coors Brewing Co.*, original elements:
 - Rendition (“copyright protects not *what* is depicted, but rather *how* it is depicted” *Id.* at 452. (both emphasis original, footnote omitted). Example: “lighting selection, angle of the camera, lens and filter selection.” *Id.* quoting, *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F.Supp.2d 301, 311 (S.D.N.Y. 2000).
 - Timing (right place, right time). Example: *Catch of the Day*, *Id.* at 453.
 - Creation of the Subject. Example, *Puppies*, *Id.* at 454.
 - “[T]o the extent that a photograph is original in the creation of the subject, copyright extends also to that subject. Thus, an artist who arranges and then photographs a scene often will have the right to prevent others from duplicating that scene in a photograph or other medium.” *Id.* (footnote omitted).

Duration of Copyright

- Determining when copyright no longer applies.
- Published 1923-1978: in general, 95 years from publication (28 years, plus renewal of 47, plus 20):
 - Works published before 1923, in the public domain,
 - published 1923-1963 with notice and renewal: 95 years, see, <http://collections.stanford.edu/copyrightsrenewals/bin/page?forward=home> (renewal records filed between 1950-1992).
 - published 1964-1977 with notice, renewal automatic: 95 years.
- Published works under the 1976 Copyright Act:
 - Created after 12/31/1977: author's life plus 70 years, or if
 - corporate, anonymous, pseudonymous: lesser of 95 years from publication or 120 from creation, but
 - through March 1, 1989, registration was required within five years of publication.

Duration: Unpublished Works

- Unpublished works:
 - created before 01/01/78 (effective date of the 1976 Copyright Act) later of 12/31/2002 or author's life plus 70, [unpublished works of authors who died before 1941 are in the public domain] . . .
 - But if created before 01/01/78 and published before 01/01/2003, then protected for the greater of author's life plus 70 years or 12/31/2047.
 - created after 12/31/1977, life plus 70, or 120 from creation for corporate, anonymous, pseudonymous.
 - When the death date of an author is unknown: 120 years from creation [unpublished works of authors created before 1891 are in the public domain].

Duration: Assessing the Impact

- COPYRIGHT INVESTIGATION SUMMARY REPORT (2008), available at www.oclc.org/programs/publications/reports/2008-01.pdf: “In this project, staff from eight partner institutions participated in copyright investigation interviews between August and September 2007 to share the ways in which their institutions currently obtain copyright permission to provide users with access to high-risk or special collection materials.”
- “From May through November 2007, University of Michigan Library staff reviewed 16,896 post-1922 – 1963 U.S. imprints for copyright status. They found: 9,719 to be in the public domain [57.5%], 4,987 to be in copyright [29.5%], and 988 to be U.S. government documents [5.8%].”

Duration: A Library Exception

- Under section 108(h), a qualifying library or archives (“including a nonprofit educational institution that functions as such”) may ignore the 20 year extension, of a published work. Applies to:
 - Reproduction, distribution, display or performance, but not to derivative uses published works.
- If the purpose is for:
 - “preservation, scholarship, or research”: recreational and educational (classroom) uses excluded?
- Use not allowed if, after a “reasonable investigation” any of the following exist:
 - The work is subject to “normal commercial exploitation,”
 - “a copy or phonorecord of the work can be obtained at a reasonable price,” or
 - the copyright owner or agent provides notice that either of the conditions set forth above exist.

Duration: An Effective Exception?

- “What database proprietor can rely on so limited an exemption—particularly when the phrase ‘reasonable investigation’ is so open-ended and particularly if the database has commercial, as well as non-commercial, aspects?” *Eldred v. Ashcroft*, 2003 U.S. LEXIS 751, at *114 (2003) (Breyer, J., dissenting).
- Notice mechanism (U.S. Copyright Office): section 108(h)(2)(C) “provides a formal way for a copyright owner to opt out of the exception. However, the ‘opt-out’ registry established by section 108(h)(2)(C) has never been used in the eight years since section 108(h) became law.” U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 46 (2006) (footnote to effective date of the legislation, October 27, 1998, omitted).

Liability Issues!!!

- Direct infringement (primary liability: strict) must be established before secondary liability can occur
[**Ignorance?**]:
 - access to the copyrighted material and substantial similarity.
- Contributory infringement (secondary liability, and the lesson of *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (Dist. Utah 1999):
 - 1) intermediary causes, induces, or substantially contributes to the infringement undertaken by another person, and 2) knows or has reason to know of the infringing nature of the material. [**CONDUCT**]
- Vicarious infringement (secondary liability: strict):
 - 1) intermediary has the ability to control the actions of the direct infringing actor, and 2) receives direct financial benefit from the infringing conduct. [**RELATIONSHIP**]

Court Cases: Yes, Educational!

- Text-based material: *Marcus v. Rowly*, 695 F.2d 1171 (9th Cir. 1983), teacher and district sued for reproduction (about half of the book “Cake Decorating Made Easy”) and repeat (term to term) distribution not a fair use; in excess of the “classroom” guidelines.
- Text-based materials: *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993) (“The undisputed evidence shows that defendant copied or directed her students to copy plaintiffs’ copyrighted materials as part of a “Dynamism” course which she offered for sale.” *Id.* at 632.).
- Text-based materials: *The Authors Guild v. HathiTrust*, No. 11 civ. 6351 (S.D.N.Y., filed September 12, 2011).

Court Cases: Yes, Educational!

- Audiovisual works: *Encyclopedia Britannica Educational Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978), Board of Cooperative Educational Services of Erie County sued for reproduction and distribution of off-air tapes.
- Tests and other consumables: *Chicago Board of Education v. Substance, Inc.*, 79 F. Supp. 2d 919 (N.D. Ill. 2000), aff'd 354 F.3d 624 (7th Cir. 2003), cert. denied 125 S.Ct. 54 (2004), reprinting of tests in professional education newsletter not a fair use. Accord, *Educational Testing Service v. Katzman*, 793 F.2d 533 (3rd Cir. 1986).

Court Cases: Yes, Non-Profits!

- Text-based: *Greaver v. National Association of Corporate Directors*, 1997 WL 34605245 (D.D.C., 1997) (Slip Copy) (Non-Profit defendant infringed copyright by using, without permission, materials created for a course entitled “The CFO’s Role Relating to the Board of Directors.” All four factors weighed against fair use. First factor: “Regardless of the amount of profit it earned, the Defendant stood to gain by not having to invest its own time and energy in the creation of the portions of its manual that it copied from the Plaintiff's materials without crediting him.” *Id.* at *5.).
- Clip art: *Marobie-F v. National Association of Firefighter Equipment Distributors*, 983 F. Supp. 1167 (N.D. Ill. 1997). (Clip art loaded onto web site by tax-exempt trade association was not fair use.)

Damages!!!

- Damages: actual (damages suffered, such as a loss of plaintiff's profits, and include "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages") or statutory (set by court within statutory range, \$750 up to \$30,000 awarded per infringing work, not per copy):
 - Educators and librarians: 17 U.S.C. 504, remission of statutory damages, and parallel provisions in 17 U.S.C. 1203.
 - Online intermediaries (e.g., library or educational entity): 17 U.S.C. 512, remission of monetary damages, section 512(e), institutional protection from infringing conduct of faculty.
- Injunctive relief: cease and desist orders, seizure and destruction of infringing material, disabling access.
- Courts costs and attorney fees (these are never cheap!!!).
- Penalty enhancement for willful violations: \$150,000.

Damage Limitation: A Closer Look

- 17 U.S.C. 504(c)(2), remission (general) of statutory damages: “**may** remit” to an amount not less than \$200.
 - infringer was not aware and had no reason to believe that his or her acts constituted infringement of copyright,
- 17 U.S.C. 504(c)(2), remission (specific) of statutory damages: “**shall** remit”
 - “employee of nonprofit educational institution or library,”
 - “acting within scope of employment,”
 - “believed and had reason to believe,” that the use was a
 - fair use under section 107,”
 - and infringed by reproducing the work.”

The Impact of Notice on Published Works

- 17 U.S.C. § 401(d), similar provision for phonorecords in 17 U.S.C. § 402(d): “If a notice of copyright in the form and position specified by this section appears on the *published* copy or copies to which a defendant in a copyright infringement suit had access, then *no weight shall be given* to such a defendant’s interposition of a *defense based on innocent infringement* in mitigation of *actual or statutory damages*, **except** as provided in the last sentence of 504(c)(2)”
- Impact: no innocent infringer status when work published with notice on copies to which defendant had reasonable access.
- Impact: “except” clause preserves this defense for qualifying nonprofits.

Damage Limitation: Online Settings

- 17 U.S.C. 512(j), remission of all monetary damages (applies only to online settings):
 - general provisions apply to any intermediary regarding conduit, cache, post or link,
 - **registered agent** (required for posting, recommended for caching and linking), and adoption of **repeat infringer policy**,
 - special provision for faculty of tertiary institutions, additional requirements required.
- Section 512(e) allows the institution to treat faculty or teaching students as a **third party** for conduit and cache provisions, and the **knowledge** of the infringing faculty or student shall **not be imputed** to the institution for the post and link provisions.
- Three requirements:
 - does not include access to online instructional material,
 - “full count” 3-2 clean hands rule: re notification of infringement (in the last 3 years, no more than 2 complaints regarding the same faculty member),
 - and **informational compliance program in place**.

More DMCA Damage Limitation

- 17 U.S.C. 1203(c)(5)(A), court “**may** reduce *or* remit the total award of damages”:
 - in its discretion, where
 - violator sustains the burden of proving, and the court finds, that the violator was not aware, and
 - had no had reason to believe that its act constituted a violation.
- 17 U.S.C. 1203(c)(5)(B), the court “**shall** remit damages in any case”:
 - nonprofit library, archives, educational institution, or public broadcasting entity,
 - entity sustains the burden of proving, and the court finds,
 - that the entity was not aware and had no reason to believe that its act constituted a violation.

Other Factors in Risk Assessment

- The statute of limitations for copyright infringement is three years for civil actions and five years for criminal actions. 17 U.S.C. § 507.
- A work remains unlawfully made once the statute tolls and may nonetheless limit your privileges under other provisions. The lesson of *Hotaling vs. Church of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1999).
- Registration is no longer a prerequisite but permissive. 17 U.S.C. § 408: “[T]he owner of copyright or of any exclusive right in the work *may* obtain registration ...”
- Registration within five years of publication is considered prima facie evidence of its validity in copyright. 17 U.S.C. § 410(c): “In any judicial proceedings the certificate of registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright ...”

Other Factors in Risk Assessment

- Registration is a prerequisite to litigation. 17 U.S.C. § 411: “[N]o action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made...”
- Registration must occur before infringement of an unpublished work and within three months of publication for those works published in order to obtain statutory damages and attorney’s fees. 17 U.S.C. § 412 (“[N]o award of statutory damages or of attorney’s fees ...shall be made ... [for infringement of] an unpublished work commenced before the effective date of its registration; or ... commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.”).
- You can still be sued for actual damages or non-compensatory relief!!!

Other Factors in Risk Assessment

- Legal Risk is a combination of several factors: the potential for liability, the likelihood of litigation (or threat of litigation) as well as the possibility of settlement) and the impact of that litigation (or settlement), i.e., what remedies are available to the copyright owner.
- What is the potential for liability (“can I be sued?”):
 - direct and vicarious liability are strict liability, contributory?
- How likely is litigation (“will I be sued?”):
 - Practical: How likely is it that the infringement will be discovered?
 - Legal: Is the work registered?
- What remedies are available (“what’s the bottom line?”):
 - Actual or statutory damages and the timing of registration.
 - Costs and attorneys fees and the timing of registration.
 - Enhancement of damages for willful infringement.
 - The possibility for damage remission.

The Question of State Immunity?

- *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (states cannot be sued in federal court for patent or trademark infringement)
- *Rodriguez vs. Texas Commission on the Arts*, 871 F.3d 552 (5th Cir. 2000) (11th Amendment immunity extends to claims of copyright infringement)
- Even if copyright immunity does exist, the immunity would in theory apply to a state law library, state university library, or other state actor and so on, but not to municipalities, counties, and other political subdivisions, such as a public school district, do not partake in a state's Eleventh Amendment immunity. *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977).

The Question of State Immunity?

- A rational risk-management response. “To conclude that copyright law cannot apply to your use of materials for teaching and research would be faulty for several reasons.” Kenneth D. Crews and Georgia K. Harper, *The Immunity Dilemma: Are State Colleges and Universities Still Liable for Copyright Infringement?* 50 JOURNAL OF THE AMERICAN SOCIETY FOR INFORMATION SCIENCE 1350, 1351 (1999) (jurisdiction, institution and damages, other legal liability, and ethical issues).
- Practical: should the law change again, reversing bad copyright habits may become even more difficult. It is also inconsistent with creating the climate of compliance very much of concern to Congress, expressed in the legislative structure and history of TEACH and recent P2P hearings and proposed legislation.

The Question of State Immunity?

- Ignoring copyright: A rational risk-management response? “Any such decision would be a serious mistake. It would first be a gross misreading of [sic] the law. If for no other reason, faculty librarians, and others who engage in uncontrolled copying could be charged with ‘willful infringement.’ Willful infringement can be grounds for criminal prosecution,” to which the immunity would not apply. Kenneth D. Crews and Georgia K. Harper, *The Immunity Dilemma: Are State Colleges and Universities Still Liable for Copyright Infringement?* 50 JOURNAL OF THE AMERICAN SOCIETY FOR INFORMATION SCIENCE 1350, 1352 (1999).
- Furthermore, such behavior would likely foreclose any damage remission, i.e., no innocent infringer status, for individual actors who remain liable.

17 U.S.C. 108 and immunity

- Subsection (f)(1): no liability (contributory or vicarious) for infringement committed by patrons (students, parents, other members of the community), for
 - unsupervised use of reproducing equipment, but a
 - copyright warning statement required.
- Does not offer immunity for other acts of infringement unrelated to the reproducing equipment, e.g., allowing a public performance of a video in the library to parents.
- Arguably no application to employee as direct infringer (only to employee as contributory infringer), whose infringement is then imputed (vicarious liability) to the employer-school district, college, university, etc.
- Does not relieve the individual from liability, 108(f)(2).

17 U.S.C. 108: (libraries and archives)

- A library, not an educator's provision: open to the public, no direct or indirect commercial advantage, and notice or legend, 108(a).
- Three copy rule (copying for the library) of:
 - Unpublished works: preservation and security in your library or for research use in another 108(a) library, and material is currently in the library collection, but not to borrow and copy, 108(b).
 - Published works: damaged, deteriorating, lost, or stolen, or existing format is obsolete, and no unused replacement available at a fair price, 108(c).
 - Digital copy not made available to the public outside premises of the library, legislative history: no virtual libraries and obsolete means no longer available in primary market.

17 U.S.C. 108: (libraries and archives)

- Single copy rule: article or small part (108(d)(1)) or for entire or substantial part (fair price available copy rule) (108(e)(1)), copy must “become the property of the user,” and display copyright notice and on its “order form.”
 - No notice that it would be used for any purpose other than *private* study, scholarship or research, this would exclude public display, performance, or distribution, precluding use in an e-reserve, and standard reserve under *Intellectual Reserve, Inc.* decision
- No awareness or reason to believe, engaging in:
 - related or concerted reproduction or distribution of multiple copies of the same material under any subsection, of same material, on one occasion or over period of time, individuals or members of a group, 108(g)(1), or
 - systematic reproduction or distribution of single or multiple copies under subsection (d), article or part: interlibrary loan (ILL) allowed, i.e., the rule of five (see guidelines).

Other Useful Copyright Provisions

- Section 106(4): there is no performance right in a sound recording. Example: play a CD during a patron training session, story hour or to calm the kids down during a test (does not apply to streaming, i.e., a digital transmission!).
- Review, Section 109: make a public distribution of lawfully made copies or phonorecords and for qualifying entities public distribution of computer program. Example: circulate items from the collection, and computer programs.
- Section 110(4): make a non-commercial public performance of a musical work (other conditions apply). Example: holiday concert by the senior jazz ensemble or allow your ringtone to sound in public,

Copyright Law: A Perspective

- “If copyright law is the ‘metaphysics’ of law [], fair use is its ‘semiotics.’ Arthur R. Miller and Michael H. Davis, *Intellectual Property: Patents, Trademarks, and Copyrights* 345 (2000).
- “[T]here is no Rosetta stone for the interpretation of the copyright statute.”
Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005).

Copyright Law: A Perspective

- “If copyright law is the ‘metaphysics’ of law [], fair use is its ‘semiotics.’ Arthur R. Miller and Michael H. Davis, *Intellectual Property: Patents, Trademarks, and Copyrights* 345 (2000).
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Fair Use: 17 U.S.C. 107

- Purpose and character of the use: commercial vs. non-commercial uses; bad faith?; substitute or superseding vs. transformative uses.
- Nature of the work: thick vs. thin protection and unpublished vs. published.
- Amount and substantiality of the work taken.
- Effect of the use on potential market or value of the work: primary and secondary (derivative) markets, includes consideration of future markets (“monetize”) and educational markets.
- All four factors are considered by the courts!



Transformative: Art as Social Criticism

- *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006):
“He is known for incorporating into his artwork *objects and images taken from popular media and consumer advertising*, a practice that has been referred to as ‘neo-Pop art’ or (perhaps unfortunately in a legal context) ‘appropriation art.’” Id. at 246.
- “Koons is... using Blanch’s image as fodder for his *commentary on the social and aesthetic consequences of mass media*... in the furtherance of distinct creative or communicative objectives, the use is transformative.” Id. at 253.

Transformative: Art as Social Criticism

- Reconfirms *parody* as a good purpose Id. at 254-255.
- A Fifth Factor (or part of the first factor): Bad Faith. “We are aware of no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith.” Id. at 256.
- First Factor “strongly favors” fair use. Id. at 256. [FAIR]
- Second Factor: “Accepting that ‘Silk Sandals’ is a creative work, though, it *does not follow* that the second fair-use factor, even if it somewhat favors Blanch, *has significant implications* for our overall fair-use analysis...the second fair-use factor has *limited weight* in our analysis because Koons used Blanch’s work in a transformative manner to comment on her image’s social and aesthetic meaning rather than to exploit its creative virtues.” Id. at 257 (emphasis added). [NEUTRAL?]

Transformative: Art as Social Criticism

- Third Factor (is the amount reasonable in relation to the purpose, taking only as much as it necessary to accomplish a good purpose):
 - In light of Koons’s choice to extract the legs, feet, and sandals in ‘Silk Sandals’ from their background, we find his statement that he copied only that *portion of the image necessary* to evoke ‘a certain style of mass communication’ ... weighs distinctly in Koons’s favor.” Id. at 258. [FAIR]
- Fourth Factor: no impact on value of work or the artist in general, no evidence of derivative markets, “fourth fair-use factor greatly favors Koons.” Id. [FAIR] $+1+0?+1+1=Fair\ Use.$

The CU Program Council Presents



THE FIFTEENTH ANNIVERSARY CELEBRATION
THE GRATEFUL DEAD
WITH SPECIAL GUEST WARREN ZEVON
SATURDAY, JUNE 7TH SUNDAY, JUNE 8TH
FOLSOM FIELD HORSESHOE · HIGH NOON
TICKETS ON SALE NOW
CU STUDENTS \$12 · GENERAL \$12.70

A SUMMER OF STARS



Price includes 70¢ S-V charge and 99¢ Address Descriptive Service. Receipt will only be issued and listed general admission on the list. **AN IMPORTANT MESSAGE:** Before you see the musical stars, please read the following points carefully and give them your utmost consideration. 1. **ARRIVAL TIME:** To accommodate local students and musicians we will give you priority at the stadium on the day of the advertised game opening as possible. Please do NOT arrive at the stadium until you are notified by the CU Program Council. Most of you will already have a reserved seat which should eliminate the need to arrive early. 2. **CANS, BOTTLES AND ALCOHOLIC BEVERAGES:** As always, these items are strictly prohibited in the stadium, not only in violation of the law, but it is a danger to all concert goers. The safety of musical performers which occur at outdoor shows are usually cars and trailers from outside facilities. Also for your comfort, outside items will not be allowed as they take up seating space. 3. **PUBLIC TRANSPORTATION:** Buses will not be allowed as they take up seating space. We urge you to carpool as much as possible and to utilize the RTD system to a great extent. For additional information call 778-4600. 4. Shows will be held rain or shine.

Thank you for your cooperation.

Produced by John Scher and Feyline
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Transformative: Illustration or Example

- *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (use of seven artistic concert posters of music group Grateful Dead reproduced, reduced in size and distributed with others images in biographical book *Grateful Dead: The Illustrated Trip*).
- First Factor: “We disagree with Appellant’s limited interpretation of transformative use and we agree with the district court that DK’s actual use of each image is *transformatively different* from the original expressive purpose. Preliminarily, we recognize, as the district court did, that *Illustrated Trip* is a *biographical work* documenting the 30-year history of the Grateful Dead.” Id. at 609. [FAIR]

Transformative: Illustration or Example

- “Originally, each of BGA’s images fulfilled the dual purposes of artistic expression and promotion... In contrast, DK used each of BGA’s images as historical *artifacts to document* and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip*’s timeline.” Id. at 609.
- “In short, DK used the *minimal image size* necessary to accomplish its transformative purpose.” Id. at 611.
- “The images constitute an inconsequential portion of *Illustrated Trip* . . . the book is 480 pages long, while the BGA images appear on only seven pages.” Id. (**negative reverse proportionality?**).
- “We conclude that the **first fair** use factor weighs in favor of DK because DK’s use of BGA’s images is transformatively different ... and DK does not seek to exploit the images’ expressive value for commercial gain.” Id. at 612. [**FAIR**]

Transformative: Illustration or Example

- Second Factor: “[W]e hold that even though BGA’s *images are creative works*, which are a core concern of copyright protection, the second factor has *limited weight* in our analysis because the purpose of DK’s use was to emphasize the images’ historical rather than creative value.” Id at 612-613 (emphasis added). [NEUTRAL?]
- Third Factor: “[T]he posters and tickets were historical artifacts that could document Grateful Dead concert events and provide a visual context for the accompanying text... such use by DK is tailored to further its transformative purpose because DK’s reduced size reproductions of BGA’s images in their entirety displayed the *minimal image size and quality necessary* ... the third fair use factor does not weigh against fair use.” Id. 613. [FAIR?]

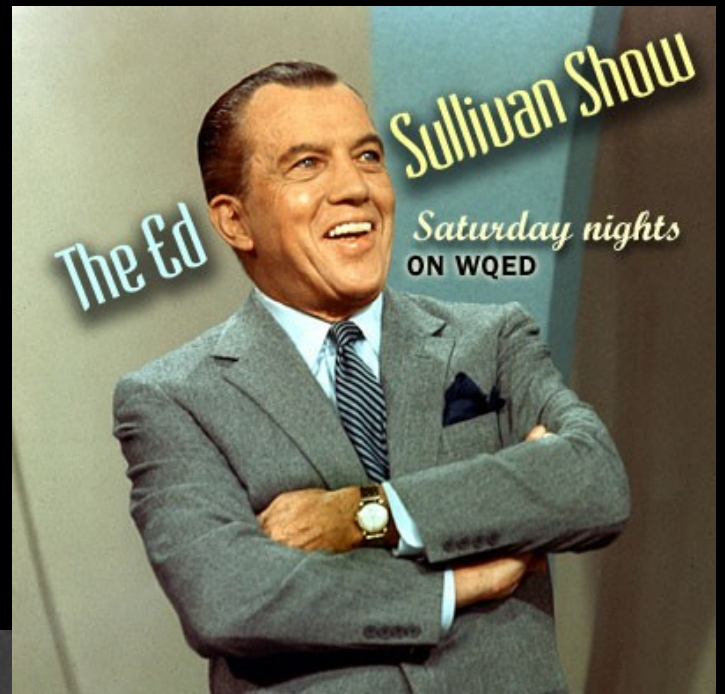
Transformative: Fair Use Markets

- Fourth Factor: “In a case such as this, a *copyright holder cannot prevent others from entering fair use markets* [vs. a derivative market] merely ‘by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.’”
Id. at 614-615.
- Since DK’s use of BGA’s images falls within a **transformative market**, BGA does *not suffer market harm* due to the loss of license fees.” Id. at 615. [FAIR] $+1+0?+1+1?=Fair Use$.
 - Not a market the owner would expect to enter.



JERSEY BOYS

The story of Frankie Valli & The Four Seasons



Transformative: Biopic Storytelling

- *Sofa Entertainment, Inc. v. Dodger Productions, Inc.*, 2010 WL 4228343 (C.D. Cal.) (use of seven second clip from Ed Sullivan Show with the host introducing the first national television appearance of musical Four Seasons in Broadway play Jersey Boys to “serve as a historical reference point” is a fair use).
- Compare, *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (clips of entire song performances not a fair use).

Transformative: Biopic Storytelling

- First Factor: “the Court finds that Defendant's use of a seven-second excerpt from the January 2, 1966 episode of *The Ed Sullivan Show* serves as a *historical reference point* in *Jersey Boys* and, as such, this aspect of the first factor weighs in favor of fair use. Id. at *7. **[FAIR]**
- Second Factor: quoting applicable precedent that television footage is a “close call” and the *creative yet newsworthy elements* of such footage the court concludes that “the second factor weighs at least slightly in favor of fair use. Id. at *8. **[slightly FAIR]**

Transformative: Biopic Storytelling

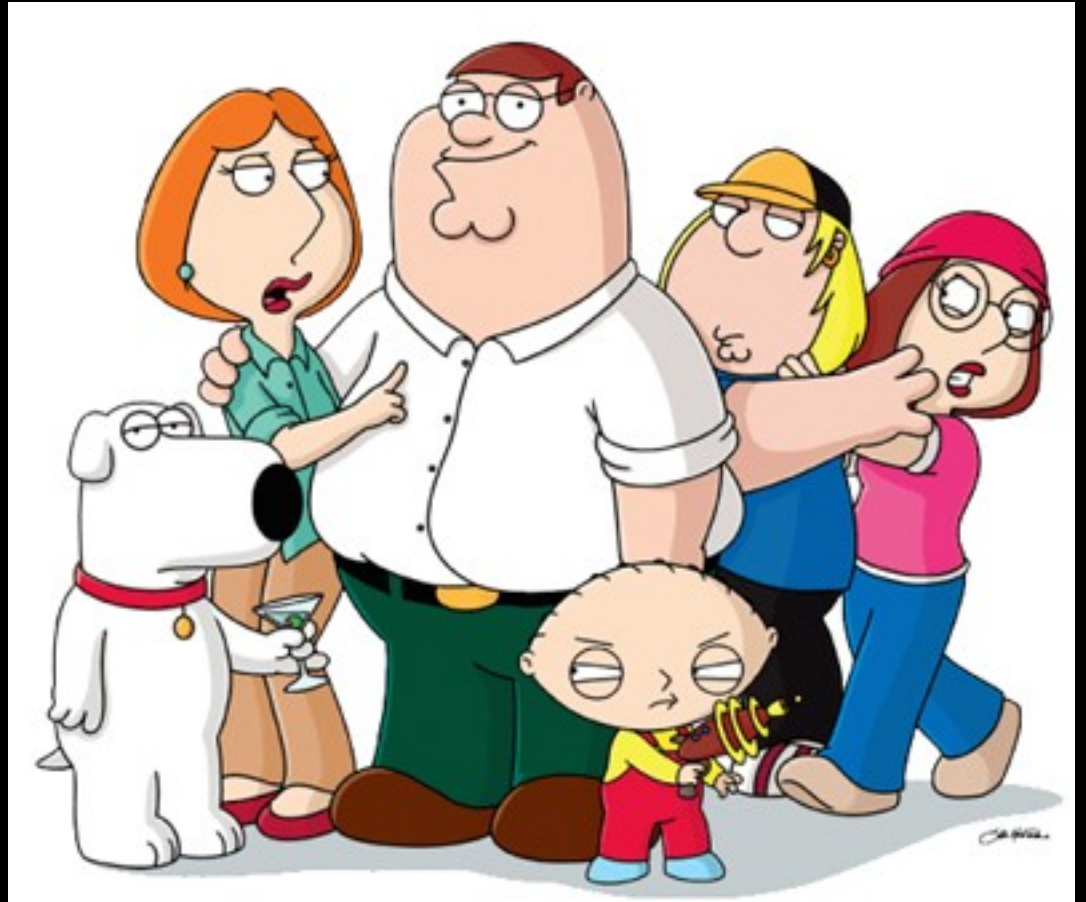
- Second Factor: clips as part of original broadcast constituted a published work. [**also FAIR**]
- Third Factor [objective test]: “Plaintiff argues that the seven-second clip is the ‘heart’ of the work because Ed Sullivan's introduction of musical acts was the heart of the *The Ed Sullivan Show* episodes in which such acts performed... the Court cannot agree...*no precedent* to support a determination that a copyright owner’s own *subjective view* of what constitutes the ‘heart’ of a particular work in any given context is dispositive.” Id. at *9.

Transformative: Biopic Storytelling

- Third Factor: “At most, the introduction by Ed Sullivan can be said to be an artery leading to the heart of the episode...actual performances... were, and are, the heart of *The Ed Sullivan Show* generally, and that is true of the episode on which the Four Seasons performed.” Id. at *9. [FAIR]
 - **Negative reverse proportionality?**: “Defendant uses the Clip as a single, brief *historical reference point* in the context of a two-hour musical production...single *historical reference point in the context* of a far longer and more elaborate story arc...factor weighs in favor of fair use.” Id. at *9.

Transformative: Biopic Storytelling

- Fourth Factor: “Plaintiff introduces no evidence demonstrating that it *currently licenses* [the present market] (*or plans to license*) [the future market] *the Clip*, and the Court agrees with Defendant that the notion that any such market could ever materialize is **speculative** at best...to the extent that any **existing or potential derivative market** is, in fact, one for *similarly transformative* uses, this factor is less likely to weigh in Plaintiff’s favor...lack of ...an existing or potential market for the Clip, this factor weighs in Defendant's favor.” Id. at *11. **[FAIR]** +1+1+1+1=*Fair Use*.



Transformative: Musical Parody

- *Bourne v. Twentieth Century Fox Film Corp.*, 602 F.Supp.2d 499 (S.D.N.Y. 2009) (parody of Disney song When You Wish Upon a Star in Family Guy episode fair use).
- First Factor: The court found that the segment “I need a Jew” was a *parody* of the Academy Award winning iconic Disney tune from the motion picture Pinocchio “When You Wish Upon A Star.” *Id.* at 504-507 (also discussing the distinction between parody and satire).
- “The Court’s finding is further supported by Defendants’ proffered evidence that the song in the Episode makes an additional comment, or ‘*inside joke*’, about the ‘widespread belief’ that Walt Disney was anti-Semitic.” *Id.* at 507. [FAIR]

Transformative: Musical Parody

- Second Factor: The court observed that while the original song fell within the core of expressive works, the second factor (nature of the work) was of little help “in separating the fair use sheep from the infringing goats in a parody case.” *Id.* at 509, quoting *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 586 (1994). [NEUTRAL?]
- Third Factor: Testimony regarding the creative process of “I need a Jew” revealed that *several notes from an earlier version of the tune were changed* to make the illusion to “When You Wish Upon A Star” more clear in the ears of the audience: “The internal, creative dispute over how much of the original to use demonstrates that Defendants were concerned about *taking just enough of the original to make their point clear.*” [FAIR]

Transformative: Musical Parody

- Fourth Factor: In discussing the market factor the court rejected a *loss of licensing revenue* as well as a “harm by association” argument. Market suppression or destruction is not a concern of the fourth factor rather the concern is market usurpation.
- “Plaintiff argues for a reading of the fourth factor that would swallow the rule entirely. *All uses* of copyrighted work *under a fair use rationale* deprive the owner of *licensing fees*. If a *parody of the original work* would usurp the market for **licensing other comedic uses** of the original work, then all parodies would fail under this prong of the analysis.” Id. at 510. [FAIR]
+1 +0? +1 +1 = Fair Use.
- **Parody ≠ a derivative (natural) market of a the owner.**

DON HENLEY

The Boys of Summer

Moderately

Words and Music by
Don Henley and Mike Campbel

Em

C

D

C

Detailed description: This block contains the piano accompaniment for the first part of 'The Boys of Summer'. It consists of four systems of music, each with a guitar chord diagram above the treble clef staff. The chords are Em, C, D, and C. The music is in 4/4 time and features a steady bass line and a melodic line in the treble.



ALL SHE WANTS TO DO IS DANCE

Words and Music by
DANNY KORTCHMAR

G

D7

Bm C D7

They're pick-'n'-up the pick-'n'-ers and

Detailed description: This block contains the piano accompaniment for 'All She Wants to Do is Dance'. It consists of several systems of music with guitar chord diagrams above the treble clef staff. The chords are G, D7, Bm, C, and D7. The music is in 4/4 time and features a steady bass line and a melodic line in the treble. The lyrics 'They're pick-'n'-up the pick-'n'-ers and' are visible at the bottom of the page.

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ANDREW BREITBART PRESENTS

BIG HOLLYWOOD

FEATURING
EDITOR IN CHIEF
JOHN NOLTE



Barbara Boxer: All She Wants to Do is Tax

by [Chuck DeVore](#)



All She Wants to Do is Tax! Music video parody of Barbara Boxer in time for the tea party rallies.

Political parody has a long tradition in the West, with the First Amendment affording significant protections for political speech. In spite of that, our political parody of President Obama, "[After the Hope of November is Gone](#)" using rocker Don Henley's "Boys of Summer" as the vehicle attracted [the](#)

FEATURED

[Can 'SEAL Team 6: The Movie' Rescue Obama from His Failed Presidency?](#)

by [Tim Slagle](#)



***UPDATE for the humor-impaired: Some hyper-alert political opponents have noticed that I make reference to Birth of a Nation in this article, and have suggested that I am denigrating the American Military. I actually meant that Hollywood has always loved the last minute rescue, regardless of who...

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'Boys of Summer' (with Apologies to Don He

by [Chuck DeVore](#)



Sung to the tune of "[The Boys of Summer](#)":

Obama overload
Obama overreach
We feel it everywhere
Trillions in the breach

Empty bank, empty Street
Dollar goes down alone

Pelosi's in the House
So we now all must atone

But we can see through-
Your broken promises oh One
You got your head cocked back and your teleprompter on, maybe
And can we tell you our love for you will still be strong
After the hope of November's gone?

We never will forget those nights
We wonder if it was a dream
Remember how you made us crazy?
Remember how we made you beam
Now we do understand what happened to our love

Barack, we're gonna cut no slack

We're gonna show you what we're made of

We can see through-
Your broken promises oh One
We see you talkin' real slow and you're smilin' at everyone
Can we tell you our love for you will still be strong
After the hope of November's gone?

Out on the road today, I saw a OBAMA sticker on a Cadillac
A little voice inside my head said, "Don't look back. You can never look back."
We thought we knew what love was
What did we know?

Parody (Work vs. Creator) vs. Satire

- *Henley v. DeVore*, 2010 WL 3304211 (C.D. Cal.) (court assumes “***parody-of-the-author***” is a legitimate transformative purpose and concludes that use of Henley song *The Boys of Summer* with some altered lyrics in political campaign promotion “reasonably perceptible” ***parody of Henley*** though a “relatively minor element” and is insufficient to demonstrate fair use, and use of Henley song *All She Wants to Do Is Dance* in similar campaign promotion ***not parody but satire*** as use “evoked the same themes of the original in order to ***attack an entirely separate subject***” not a fair use).
- *The Boys of Summer* [NOT FAIR]
- *All She Wants to Do Is Dance* [NOT FAIR]

Musical Parody vs. Political Satire

- “The **parodist** is justified in using the original work because a parody’s effectiveness necessarily springs from *recognizable allusion to its object* through distorted imitation... The parodist has no alternative but to use the work. In contrast, the **satirist** who *ridicules subjects unrelated to the work* lacks the same claim to use of the work, which the satirist “merely uses to get attention or to avoid the drudgery in working up something fresh.” Id. at *5 (citations and internal quotations omitted).
- “In many cases, the most *effective tool* of *ridiculing* a *public figure*-a time-honored, First Amendment activity-is through that person’s *own creations*. This is particularly true where a person's fame derives from that person’s expressive works, as the case often is with artists, musicians, authors, and the like.” Id. at *8.

Musical Parody vs. Political Satire

- “...*distinguish* ...use which directly *targets the author for holding a particular view* and a use which merely *targets a view that happens to be held by the author*...The **parodist** targeting the author may be justified in using the original work to conjure up the author, whereas the *would-be parodist* who *targets the author’s viewpoints* generally is essentially creating **satire** and therefore lacks the need to reference the author.” Id. at *9 (citations omitted).
- “Defendants’ song ‘Tax’ does not present a difficult question. [not transformative, creative, ‘entire melody’]...Defendants have also *failed* to show that *widespread use* of this and similar satirical songs would **not affect either the market for the original or potential derivatives**. ‘Tax’ is clearly not fair use.” Id. at *18.
 - *Shift of burden onto defendants to demonstrate no harm.*

Musical Parody vs. Political Satire

- **Lesson: Parody of author acceptable but do not take too much!:** “‘November’ on the other hand, presents a closer question, assuming that targeting the author is a legitimate parodic purpose. Although it primarily targets Obama, it *does, in part, lampoon Henley as an Obama supporter*. It may thus contain **some parodic element...** However, ‘November’ goes far beyond what is necessary to conjure up Henley to hold him up to ridicule... Given the *extent of the copying*, the Defendants have not met their burden of demonstrating the absence of market impact. Although the Court finds this to be a *closer question* than ‘Tax,’ the Defendants have not met their burden of demonstrating that ‘November’ constitutes fair use.” Id. at *18.
- *-1-1-1-1=Not Fair* and *-1-1-1-1=Not Fair*.



Korean War
Veterans Memorial

USA 37

2003

Nontransformative Derivatives

- *Gaylord v. U.S.*, 595 F.3d 1364 (Fed. Cir. 2010) (creation of postage stamp from photograph derivative of actual Korean War Veteran Memorial not a fair use of sculptor's original 19 statue monument, the stamp is a non-transformative, commercial use and an "identical" purpose and character of the actual memorial, even though no adverse derivative market impact: "someone seeking to take a photograph ...or otherwise create a derivative work would not find the stamp to a suitable substitute" for the memorial itself).
- Sculpture Photograph Stamp.

Nontransformative Derivatives

- First Factor: “We conclude that the *stamp does not transform* the character of The Column... Capturing The Column on a cold morning after a snowstorm-rather than on a warm sunny day-does not transform its character, meaning, or message. Nature’s decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude... Because the *stamp did not have a further purpose or different character*, and because it had a *commercial use*, we conclude that this factor weighs *strongly against fair use*.” Id. at 1373-1374. **[NOT FAIR]**

Nontransformative Derivatives

- Second Factor: “The Column is part of a national monument-perhaps the epitome of a published work-given the overall *creative and expressive nature* of the work, we conclude that this factor weighs against fair use.” Id. at 1374. **[NOT FAIR]**
- Third Factor: “We agree that the government’s use of *many of the soldiers* in the stamp weighs against fair use, however, we disagree that the weight is mitigated by the quality and importance of The Column to the stamp. The Column constitutes the focus-essentially the *entire subject* matter-of the stamp...the stamp clearly depicts an image of The Column” Id. at 1375. **[NOT FAIR]**

Nontransformative Derivatives

- Fourth Factor: “We see no clear error in the [lower] court’s determination that the *stamp has not and will not adversely impact* Mr. Gaylord’s efforts to **market derivative** works of The Column. Someone seeking to take a photograph of The Column or otherwise create a derivative work would not find the stamp to be a suitable substitute for The Column itself. Thus, we agree that *this factor favors fair use*. Weighing the factors, we conclude that the government’s use of The Column in the stamp was not a fair use.” Id. 1375-1376. **[FAIR]**

Nontransformative Derivatives

- Copyright Policy: “Weighing the factors, we conclude that the government's use of The Column in the stamp was not a fair use. Even though the stamp did not harm the market for derivative works, allowing the *government to commercially exploit a creative and expressive work will not advance the purposes of copyright* in this case..”
Id. at 1376. *-1-1-1+1=Not Fair*.
 - “Market” factor favored fair use, still no fair use!
 - The photographer (creator of this derivative work) does not have rights in derivatives of the original work, in this case a stamp of the photograph of the sculpture.



Mission

NXIVM Mission

The mission of NXIVM is to help transform and, ultimately, be an expression of the noble civilization of humans. We all have the potential to live and work together, but this potential is often cut short by opposing interests and beliefs. This ongoing struggle greatly limits our ability to experience ourselves and the world. Although it appears this struggle has thrived for as long as humanity has existed, it does not mean that it must continue to be so. As the late René Dubos wrote, "Wherever human beings are concerned, trend is not destiny."

NXIVM embodies a set of consistent and universal principles in which all humans can participate. These principles - apart from any mystical or religious notions - allow for life to persist and uphold a diversity of beliefs. By creating a new understanding, we can actualize our potential to live and work together and consequently bring human existence to a whole new level. Yet this cannot be done without first raising human awareness, fostering an ethical humanitarianism, and celebrating what it truly means to be human - and this is our mission.

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Transformative Use: Criticism

- *NXIVM Corp. v. Ross Institute*, 364 F.3d 471 (2d Cir. 2004).
- First Factor: “It is plain that, as a general matter, criticisms of a seminar or organization cannot substitute for the seminar or organization itself or hijack its market. If *criticisms* on defendants’ websites *kill the demand* for plaintiffs’ service, that is the price that, under the **First Amendment**, must be paid in the open *marketplace for ideas*.” Id. at 482. **[FAIR]** *Copyright vs. Free Speech*.
- Second Factor (nature of the work): Use of *unpublished* work favors plaintiff. Id. at 480. **[NOT FAIR]**

Transformative Use: Markets!

- Third Factor: 17 pages of 500 page total vs. 25 pages of a 191 page total: “Finally, we agree with the district court that, in order to do the research and analysis necessary to support their critical commentary, it was *reasonably necessary* for defendants to quote liberally from NXIVM’s manual. Accordingly, we find that the third factor does not favor plaintiffs.” Id. at 481.

[FAIR?]

- Fourth Factor: “That the fair use, being transformative, might well *harm, or even destroy, the market* for the original is of **no concern** to us so long as the *harm stems from the force of the criticism* offered.” Id. at 482.

[FAIR] $1-1+1?+1=Fair\ Use.$

How to break through the "brick wall" of sales resistance with remarkable new skills and techniques that can close 18 out of 20 prospects!

BIG LEAGUE SALES CLOSING TECHNIQUES

by Les Dane

SELLING SECRETS OF A "SUPER-SALESMAN" REVEALED!



Transformative Use: Course Outlines

- *Peter Letterese and Associates, Inc. v. World Institute of Scientology Enterprises, Inc.*, 533 F.3d 1287 (11th Cir. 2008): Populist sales book *Big League Sales Closing Techniques*, portions of which were incorporated into instructional materials used by the Church of Scientology (WISE).
- ***Derivative right vs. right to reproduce***: Course-packs created by WISE based on *Big League Sales* are ***not derivative***, but an issue of fact remains whether the courses are “substantially similar” to constitute infringement [of the reproduction right]. *Id.* at 1299.
- “Based on our evaluation of the course material, we find that PL&A has established a *prima facie* case of infringement with respect to Counts 1 [general course] and 3 [specific course].” *Id.* at 1302.

Transformative Use: Course Outlines

- First Factor (**commercial**: exploitation without paying the customary price): WISE charged \$75 fee for the sales coursepack and solicited a promissory note in the form of a “fixed donation” for the other courses. *Id.* at 1310.
- “The course materials do not reshape the instructional purpose or character of the book, or cast the book in a different light through a new meaning, message, or expression.” *Id.* at 1311. [**NOT FAIR**]
- First Factor? (**good faith**): “Even if we were to credit the district court’s good-faith finding... its existence here would not outweigh the commercial and superseding nature of defendants’ use.” *Id.* at 1312, n. 27.

Transformative Use: Course Outlines

- Second Factor (**character**): “*Big League Sales* is neither a derivative work nor a factual compilation. It does, however, fall roughly under the rubric of a *factual work*.” Id. at 1312... but ...
- ...“Our review of the book reveals that, notwithstanding its *informational nature*, the book contains a significant ‘proportion of fact and fancy’ ...composite characters and experiences served with a *healthy dose of fiction*.” Id. at 1312-1313.
- Second factor (*court confuses* **published or unpublished vs. out of print?**): “As for the publication status of *Big League Sales*, defendants characterize the book as *out of print*, which would tend to favor their claim of fair use...presumably it was lack of demand for the work that led to its demise.” Id. at 1313... but ...

Transformative Use: Course Outlines

- ...*Big League Sales* “is not ‘out of print’ in the typical sense, as it was the copyright *owner’s decision* to withhold the book, and not the dearth of sales, that led to its withdrawal from the market.” Id. at 1313.
- “We cannot agree ...that the publication status of *Big League Sales* favors defendants ...the semi-factual nature of *Big League Sales* neither expands nor constricts the scope of the fair use defense...therefore, we conclude that this factor *is neutral*.” Id. at 1314. [NEUTRAL]
- Third Factor (amount taken): “the portion of the copyrighted work that is taken must be reasonable” Id. at 1314.
 - “The inquiry is whether the amount taken is *reasonable in light of the purpose* of the use and the likelihood of *market substitution*.” Id. at n. 30.

Transformative Use: Course Outlines

- Third Factor (**qualitative**): “because one *could hardly imagine* that [copying] the headings and subheadings, divorced from context and any explanation, *could have a substitution effect* on the market for *Big League Sales* or derivative works.” Id. at 1315... and ...
- Third factor (**quantitative**): “Quantitatively, the amount of *verbatim copying or paraphrasing* appears to be a *small portion* of *Big League Sales*. ” Id. at 1315.
- Third Factor (**reverse proportionality?**): “Defendants therefore go astray in focusing on the argument that the copyrighted expression taken from *Big League Sales* *amounts to a small fraction of* the 127 pages of the course pack ... the 22 pages of checksheets and 250 pages of the course pack ... and the 47 pages encompassing the checksheet and sales drills.” Id. at 1315.

Transformative Use: Course Outlines

- Defendants went too far: “But the incorporation of the sales drills ... adds flesh to the organizational bones and renders the whole of defendants’ copying substantial enough that *demand for the book or derivative works* [e.g., a second edition or DVD based on the book] *might be reduced*. Thus, the amount and substantiality of the portion used slightly favors PL&A.” [NOT FAIR]
- Fourth Factor: “adverse effect with which fair use is primarily concerned is that of **market substitution**. Uses which are *complementary*, on the other hand, *are more likely to be found fair* because most authors would not want those uses to be impeded by a license requirement.”
Id. at 1315-1316.

Transformative Use: Course Outlines

- “In finding that defendants’ course materials actually *contributed to the market* for the book, the district court overlooked the crucial fact that the **control of derivative works** is part of a copyright owner’s bundle of rights. The *course materials* may be *complementary to the book*, but they may also be **market substitutes for derivative works** of the book.” Id. at 1318, n. 35.
 - A book outline or study guide would be **complementary** as well as **derivative**.
- “The question remains, therefore, whether defendants’ use, or widespread use of the same kind, would result in substantial adverse harm to the potential market for *Big League Sales or derivative works* ... With respect to the WISE Sales Course, we think it may.” Id. at 1317.
 - “The inquiry is not whether the *market for derivative works* has been *utterly* usurped; it is whether there is a *substantial market substitution* effect.” Id. at 1318, n. 35.

Transformative Use: Course Outlines

- Fourth Factor (general course): “Defendants have provided *insufficient evidence* in support of their claim that the **Sales Course** *is unlikely to adversely affect* the potential market.” Id. at 1318.
 - *Impact on derivatives!*
 - *Shift of burden onto defendants to demonstrate no harm.*
- Fourth Factor (specific, internal church course): “*same is not true*, however, with respect to the **CSI courses**... derivative works developed by PL&A (or developed by others pursuant to a license) would not be utilized by CSI...not derive from Hubbard’s writings.” Id. at 1318.
 - “PL&A’s derivative works would not be market substitutes for CSI’s courses, and vice versa.” Id. at 1319.
 - *No impact on derivative markets!*

Transformative Use: Course Outlines

- First and third factors favor plaintiff “to some degree.”
- Second factor is neutral.
- Fourth factor (general course) favors plaintiff:
“Defendants have therefore failed to prove their entitlement to summary judgment based on fair use with respect to Count 1.” Id. at 1319. [**NOT FAIR**]
- Fourth Factor (specific, i.e., for church administrators):
“use of *Big League Sales* in CSI’s courses does *not have a substantially adverse substitution effect* on the potential market for derivative works ...the fourth factor strongly favors defendants... Upon consideration of the factors in the aggregate, we find that defendants are entitled to summary judgment as to Count 3.” Id. [**FAIR**]
- **Impact: market factor can tip the balance for or against a finding of fair use!!!** $-1+0-1-1$ vs. $-1+0-1+1$.

Google

perfect 10

Search

Advanced Search

SafeSearch: Moderate ▾

Web > Images Show options...

Results 1 - 18 of about 198,000,000 for perfect 10. (0.11 seconds)

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350 x 289 - 8k - jpg



Webcomic Fedora:
600 x 300 - 136k - png



Perfect 10 Obtains
177 x 150 - 8k - jpg



A Perfect 10
402 x 269 - 318k - bmp



6.0 Perfect Ten
800 x 600 - 44k - jpg

The Recent Google Case Law

- *Perfect 10 v. Google, Inc.*, 487 F.3d 701, 2007 WL 1428632 (9th Cir. 2007).
- First Factor (**public benefit**): Relying on *Kelly*: “Google’s use of thumbnails is highly transformative.” Id. at *11. “[w]e must weigh Google’s *superseding and commercial uses* of thumbnail images against Google’s significant *transformative use*, as well as the extent to which Google’s search engine promotes the purposes of copyright and serves the *interests of the public*.” Id. at *12.
- Impact of a transformative use: “We conclude that the *significantly transformative* nature of Google’s *search engine*, particularly in light of its *public benefit*, outweighs Google’s superseding and commercial uses of the thumbnails in this case.” Id. at *13. [FAIR]

Fair Use of Thumbnails on the Web

- Second Factor: “Accordingly the district court did not err in holding that this factor weighed only slightly in favor of Perfect 10.” Id. at *13. [NOT FAIR]
- Third Factor: “Because the same analysis applies to Google’s use of Perfect 10’s image, the district court did not err in finding that *this factor favored neither party.*” Id. at *14. [NEUTRAL]
- Fourth Factor: “As we discussed above, the district court did not make a finding that Google users have downloaded thumbnail images for cell phone use. This potential harm to Perfect 10’s market remains hypothetical. We conclude that *this factor favors neither party.*” Id. at *14. [NEUTRAL] +1-1+0+0=Fair Use!

But Google could still be Liable!

- Factual disputes remain regarding “adequacy” of both notices from Perfect 10 and responses of Google. *Id.* at *19. Remand: section 512 issues too.
- Factual disputes over “*whether there are reasonable and feasible means for Google to refrain from providing access to infringing images.*” *Id.*
- “Therefore, we must remand ... for further consideration whether ... Google was *contributorily liable for in-line linking to full-size infringing images* under the test enunciated today.” *Id.*

Secondary Liability and In-line Links

- “Applying our test, Google could be held contributorily liable if it had *knowledge* that infringing Perfect 10 images were available using its search engine, could take *simple measures to prevent further* damage to Perfect 10’s copyrighted works, and failed to take such steps.” Id. at *19.
- Elements of **vicarious liability** include a “legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.” Id. at 19. “Without image-recognition technology, Google lacks the practical ability to police the infringing activities of third-party websites.” Id. at *20.

Prevent the browser from Caching a page

of using the Meta tag to prevent caching, by browser or proxy, of an individual page of a sensitive nature as in a "form page for submittal" and the creator of the page is not to be used twice.

Update on this, M.S. just had to do things differently.
Just put the following between the <head> and </head>

```
<META Http-Equiv="Cache-Control" Content="no-cache">  
<META Http-Equiv="Pragma" Content="no-cache">  
<META Http-Equiv="Expires" Content="0">
```

that will do it.. IE needs the expires. View source of this page for example.

Further Update on this, M.S. messed up badly.

<http://support.microsoft.com/support/kb/articles/Q222/0/64.ASP?LNG=ENG&SA=AL>

kinda funny page there. They recommend you put another head meta and /head at the end of the page. If anyone do what they say, it is totally non sensical and will break netscape and other version of browsers.

All the gory details...

Just place this line: <META Http-Equiv="Pragma" Content="no-cache"> between the <head> and </head> tags. It is so that when you are returned the browser says "ahh, I cannot cache this page, I must reload the page you see is the updated page without hitting "reload" after. You can use the "Expires" tag to prevent caching however it will also prevent Search engines from indexing the page if the date is too far in the future. According to the IETF, it is better to do <META Http-Equiv="Expires" Content="0"> using "0" for the date because therefore it is not cachable.

Note: I do not de-cache my guestbook nor my links page, as below, anymore because I am using over 17 gigs a month now as it is.

More Google Fair Use on the Web

- *Field v. Google, Inc.*, 412 F.Supp.2d 1106, 1116 (D. Nev. 2006). “[U]ndisputed testimony of Google’s Internet expert, Dr. John Levine... Web site publishers typically communicate their permissions to Internet search engines (such as Google) using ‘meta-tags.’ A Web site publisher can instruct a search engine not to cache... the ‘no-archive’ meta-tag is a highly publicized and well-known industry standard. Field concedes he was *aware* of these *industry standard mechanisms*, and *knew* that the presence of a ‘no archive’ meta-tag on the pages of his Web site would have informed Google not to display ‘Cached’ links to his pages.” *Id.* at 1116 (citations omitted).

More Google Fair Use on the Web

- First Factor (**public benefit**): “The fact that the owners of billions of Web pages choose to permit these links to remain is further evidence that they do *not* view Google’s cache as a *substitute* for their own pages. Because Google serves *different and socially important purposes* in offering access to copyrighted works through ‘Cached’ links and does not merely supersede the objectives of the original creations, the Court concludes that Google’s alleged copying and distribution of Field’s Web pages containing copyrighted works was *transformative*.” Id. at 1119. “The transformative purpose... means the first factor of the analysis weighs heavily in favor of a fair use finding.” Id. at 1120.

[FAIR]

More Google Fair Use on the Web

- **Good Faith vs. Bad Faith:** “Google’s *good faith* is manifest ... Field did not include any information on the pages of his site to instruct Google not to provide ‘Cached’ links to those pages. Google only learned that Field objected to the ‘Cached’ links by virtue of discovering Field’s Complaint in this litigation... Field took a variety of *affirmative steps to get his works included* in Google’s search results, where he knew they would be displayed with ‘Cached’ links to Google’s archival copy and he *deliberately ignored the protocols* that would have instructed Google not to present ‘Cached’ links. Comparing Field’s conduct with Google’s provides further weight to the scales in favor of a finding of fair use.” Id. at 1122-1123. **[FAIR]**

More Google Fair Use on the Web

- Second factor: “Moreover, Field added a ‘robots.txt’ file to his site to ensure that all search engines would include his Web site in their search listings. Field thus sought to make his works available to the widest possible audience for free. Accordingly, assuming the works at issue are *creative*, as in *Kelly*, the ‘nature’ of the works weighs only slightly in Field’s favor.” Id. at 1120. [NOT FAIR]
- Third factor: “Google uses *no more of the works than is necessary* [entire website]...the third fair use factor is neutral, despite the fact that Google allowed access to the entirety of Field’s works.” Id. at 1121. [NEUTRAL]
- Fourth Factor: “[N]o *evidence* that Google’s ‘Cached’ links had any impact on the potential market ... the fourth fair use factor weighs strongly in favor of a fair use determination.” Id. at 1122. [FAIR] $1-1+0+1 = \textit{Fair Use}$.

More Google Fair Use on the Web

- Alternative Defense of *Implied License*: “Despite this knowledge, Field chose not to include the no-archive meta-tag on the pages of his site. He did so, knowing that Google would interpret the absence of the meta-tag as permission to allow access to the pages via ‘Cached’ links. Thus, *with knowledge* of how Google would use the copyrighted works he placed on those pages, and *with knowledge that he could prevent* such use, Field instead made a *conscious decision to permit it*. His conduct is reasonably interpreted as the *grant of a license to Google for that use*. Accordingly, the Court grants Google’s motion that it is entitled to the *defense of implied license...*” Id. at 1116 (Citations omitted.).



Transformative: Guide and Trivia Books

- *Twin Peaks Productions, Inc. v. Publications International Ltd.*, 996 F.2d 1366 (2d Cir. 1993) (plot/series guide is derivative and not a fair use).
- *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132 (2d Cir. 1998) (Seinfeld Aptitude Test trivia book is unfair derivative work).
- *Warner Brothers Entertainment, Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D.N.Y. 2008) (The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Material is an unfair reproduction, but is not a derivative work).



The **Harry Potter** Lexicon

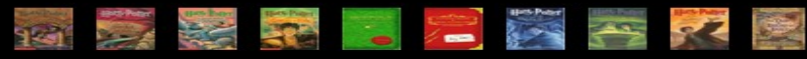
The most complete and amazing reference to the wonderful world of Harry Potter!

Including magical spells, potions, maps, lists of wizards of all manner of magical items and devices.

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Transformative: Guide and Trivia Books

- *Warner Brothers Entertainment, Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D.N.Y. 2008).
- “The Lexicon is an A-to-Z guide to the creatures, characters, objects, events, and places that exist in the world of *Harry Potter*. As received by the Court in evidence, the Lexicon manuscript is more than 400 type-written pages long and contains 2,437 entries organized alphabetically. The first few pages contain a list of abbreviations used throughout the Lexicon to cite to the original sources of the material.” *Id.* at 524.
- Question: is such resource derivative?
 - Derivative works defined (Section 101): “based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be *recast, transformed, or adapted.*”

Transformative: Guide and Trivia Books

- Guide (study, collector's, reference) books: “[T]he Lexicon fits in the narrow genre of *non-fiction reference guides* to fictional works. As Defendant’s expert testified, the *Harry Potter* series is a multi-volume work of *fantasy literature*, similar to the works of J.R.R. Tolkien and C.S. Lewis. Such works lend themselves to *companion guides or reference works* because they reveal an elaborate imaginary world over thousands of pages, involving many characters, creatures, and magical objects that appear and reappear across thousands of pages.” Id. at 526.

Transformative: Guide and Trivia Books

- The Lexicon (encyclopedia style guidebook) is not derivative: “First, as mentioned earlier, the portions of the Lexicon that encapsulate plot elements or sketch plotlines bear *no comparison with* the guidebook in *Twin Peaks* [more like a study guide or outline], whose plot summaries giving ‘elaborate recounting of plot details’ were found to constitute an ‘abridgement’ of the original work...
- “By condensing, synthesizing, and reorganizing the preexisting material in an A-to-Z reference guide, the Lexicon does *not recast* the material in another medium to retell the story of *Harry Potter*, but instead gives the copyrighted material another purpose... Under these circumstances, and because the Lexicon does *not fall under any example of derivative works listed in the statute*, Plaintiffs have failed to show that the Lexicon is a derivative work.” *Id.* at 539.

Transformative: Guide and Trivia Books

- First Factor (nature of use re the Potter books): “The purpose of the Lexicon’s use of the *Harry Potter* series is transformative... The Lexicon, on the other hand, uses material from the series for the *practical purpose of making information* about the intricate world of *Harry Potter* readily *accessible* to readers in a reference guide.” Id. at 541. [FAIR?]
- First Factor (nature of use re the companion books): “The Lexicon’s use of Rowling’s companion books, however, is *transformative to a much lesser.*” Id. at 541. “Although the Lexicon does not use the companion books for their entertainment purpose, it *supplants the informational purpose of the original* works by seeking to relate the same fictional facts in the same way.” Id. at 542. [FAIR?]

Transformative: Guide and Trivia Books

- Reference (but not all guidebooks) works are transformative works!: “The best evidence of the Lexicon’s *transformative purpose* is its demonstrated value as a *reference source* ...Its function as a reference guide *distinguishes* the Lexicon from the *secondary work at issue in Castle Rock*, a 132-page book of trivia about the events and characters depicted in *Seinfeld*. Despite its specious claims to critique and expose the *Seinfeld* series, the trivia book served no purpose but ‘to satiate *Seinfeld* fans’ passion’ for the series and simply ‘repackage[d] *Seinfeld* to entertain *Seinfeld* viewers.’” Id. at 543.
- First Factor (**public benefit**): “To the extent that Defendant seeks to provide a useful reference guide to the *Harry Potter* novels that *benefits the public*, the use is fair, and its commercial nature only weighs slightly against a finding of fair use.” Id. at 545. [FAIR?]

Transformative: Guide and Trivia Books

- First Factor (**Bad Faith**): “Finally, in evaluating the purpose and character of a secondary use of a copyrighted work, courts will consider the ‘subfactor’ of whether the defendant acted in *good or bad faith*.” Id. at 545.
- First Factor (**Bad Faith**): “This subfactor weighs only slightly in favor of Plaintiffs, as the Court finds that Defendant *reasonably believed* its use was ultimately fair.” Id. at 545-546.
- Second Factor: “Such highly *imaginative and creative fictional works* are close to the *core* of copyright protection, particularly where the character of the secondary work is not entirely transformative... the second factor favors Plaintiffs ” Id. at 549. [**NOT FAIR**]

Transformative: Guide and Trivia Books

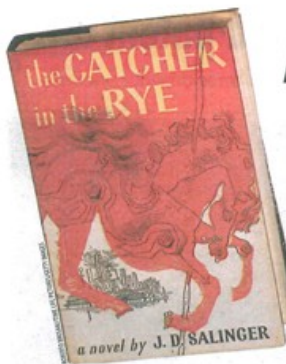
- Third Factor (amount of books taken re books):
“While it is difficult to draw the line at each entry that takes more than is reasonably necessary from the *Harry Potter* series to serve its purposes... the Lexicon *disturbs the balance and takes more than is reasonably necessary* to create a reference guide. In these instances, the Lexicon appears to retell parts of the storyline rather than report fictional facts and where to find them.” Id. at 549. **[NOT FAIR]**
- Third Factor (amount of companion books taken):
“The Lexicon’s use of copyrighted expression from Rowling’s two companion books presents an easier determination. The Lexicon *takes wholesale* from these short books... As a result, the amount and substantiality of the portion copied from the companion books weighs more heavily against a finding of fair use.” Id. at 548-549. **[NOT FAIR]**

Transformative: Guide and Trivia Books

- Forth Factor (impact on market for books): “*no plausible basis to conclude* that publication of the Lexicon would *impair sales* of the *Harry Potter novels*... unlikely that a publisher ... would produce the *Companion to Narnia*, which reveals storylines, plot twists, and the ultimate fates of the characters in C.S. Lewis’s original works, if it expected the publication would reduce sales and enthusiasm for the original works.” Id. at 550. [FAIR?]
- Forth Factor (impact on market for companion books): “publication of the Lexicon *could harm sales* of ... two *companion books*. Unless they sought to enjoy the companion books for their entertainment value alone, consumers who purchased the Lexicon would have *scant incentive to purchase* either of Rowling’s companion books ... information ... in these short works has been incorporated into the Lexicon almost wholesale.” Id. at 550. [NOT FAIR]

Transformative: Guide and Trivia Books

- Conclusion (**reference guides are transformative and fair use if you do not take too much!**): “The fair-use factors, weighed together in light of the purposes of copyright law, fail to support the defense of fair use in this case. The first factor ... is *not consistently transformative*. Without drawing a line at the amount of copyrighted material that is reasonably necessary to create an A-to-Z reference guide, many portions of the Lexicon take *more of the copyrighted works than is reasonably necessary* in relation to the Lexicon’s purpose. Thus, in balancing the **first** and **third** factors, the balance is tipped *against a finding of fair use*. The creative nature [**second**] of the copyrighted works and the harm to the market [**fourth**] for Rowling’s *companion books* weigh in favor of Plaintiffs.” Id. Books: +1?-1-1+1=*Fair?*. Companion: +1?-1-1-1=*Not Fair*.



A losing case for the fair use defense

'Salinger' found no critique of the original work, and thus no parody.

sequels and adaptations. 17 U.S.C. 106. But to ensure that copyright law does not "stifle the very creativity which [it] is designed to foster," § 107 of the Copyright Act codifies a "fair use" defense to copyright infringement. See

Campbell, 510 U.S. at 577; 17 U.S.C. 107. Section 107 does not expressly define fair use. Rather, it sets forth illustrative, but not exclusive, examples of fair use—"criticism, comment, news reporting, teaching... scholarship, or research"—and enumerates four "factors to be considered" in determining whether a work has made fair use of the copyrighted original: the purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. 107. Courts repeatedly counsel against a "rigid application" of the fair use factors, which "are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 577-78.

The first fair use factor—the "purpose and character" of the allegedly infringing work—is critical to the analysis. In assessing the first factor, courts focus on "whether and to what extent the new work is 'transformative,'" that is, whether the new work "adds something new, with a further purpose or different character," or whether it "merely supersedes...the original creation." *Id.* at 579.

In *Campbell*, the Supreme Court, for the first time, held that a parody is a form of comment or criticism that may have a transformative purpose by "shedding light on an earlier work, and, in the process, creating a new one." *Id.* To that end, the Court defined "parody" as a work that "use[s] some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work." *Id.* at 577.

Not every parody is a fair use. Rather, a parody, like any other purported fair use, "has to work its way through the relevant [fair use] factors, and be judged case by case, in light of the ends of the copyright law." *Id.* at 581. If the purported

parody "has no critical bearing on the substance or style of the original composition," but is a pretext "which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes...[if it does not vanish]." *Id.*

SEQUEL OR PARODY?

The *Salinger* case presented the question of whether Fredrik Colting's book, *60 Years Later: Coming Through the Rye*, written under the pseudonym "J.D. California," was protected parody or an infringing sequel to J.D. Salinger's *Catcher*. The star of *60 Years* is a 76-year-old Holden Caulfield, the rebellious (then-16-year-old) protagonist from *Catcher*. Indeed, Colting had touted *60 Years* as the sequel to *Catcher*, declaring that Holden Caulfield "deserve[d] to have



cited Salinger's appearance in *60 Years* as a character who repeatedly tries, but fails, to kill off the elderly Caulfield.

The court rejected Colting's arguments as mere "post-hoc rationalizations," finding that *60 Years* was neither parody nor fair use. At the outset, the court observed that, to qualify as a parody, it is not enough that the purported parody uses the original to make a point about the original's "general style, the genre of art to which it belongs, or society as a whole." *Id.* at *4 (citing *Campbell*, 510 U.S. at 579). Rather, as *Campbell* teaches, the parody must present a critique that "specifically targets" the original work. *Id.*

60 Years did not. Unlike the parody at issue in the U.S. Court of Appeals for the 11th Circuit's decision in *Suntrust*—a "specific criticism of...the depiction of slavery and the relationships between blacks and whites in *Gone With the Wind*"—*60 Years* contained "no reasonably discernable...specific criticism of...*Catcher*." *Id.* at *5 (quoting *Suntrust*, 268 F.3d 1268-69). Rather, *60 Years* is merely a "tool...with which to criticize and comment upon the author, J.D. Salinger, and his supposed idiosyncrasies, rather than on the work itself." *Id.* at *8.

Although the court found that *60 Years* was not a parody, it considered nevertheless whether the work qualified as a fair use. Turning first to the purpose and character of the new work, the court acknowledged that *60 Years*—which served an undisputed commercial purpose—contained some new, nonparodic, transformative elements, including the *Salinger* character. But because the *Salinger* character played only a limited role in the work, and because *60 Years* borrowed heavily from *Catcher*, the first factor tipped in *Salinger*'s favor. As the court observed, "just because a work recasts, transforms, or adapts an original work into a new mode of presentation, thus making it a derivative work under 17 U.S.C. 101, does not make the work transformative in the sense of the first fair use factor." *Id.* at *10.

SEE BARBARO, PAGE 16

BY LYNN B. BARBARO AND NADER R. HASAN

Fifteen years ago, in *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994), the U.S. Supreme Court—considering whether 2 Live Crew's song "Pretty Woman" infringed the copyright in Roy Orbison's 1964 classic rock ballad "Oh, Pretty Woman"—held that parody could qualify as a "fair use" under the Copyright Act of 1976. *Salinger v. Colting*, No. 09-cv-5095, 2009 WL 1916354 (S.D.N.Y. July 1, 2009), is the latest decision to put the parody defense to the fair use test. In *Salinger*, the court enjoined the publication of an unauthorized sequel to J.D. Salinger's classic, *The Catcher in the Rye*, ruling that it did not constitute fair use parody. *Salinger* is the latest in a line of cases following *Campbell* that have grappled with whether a variety of uses of copyrighted works—from an O.J. Simpson spin on Dr. Seuss' *The Cat in the Hat* to a Leslie Nielsen mimic of a famous photograph, and from a recast version of *Gone With the Wind* to a trivia book on *Seinfeld*—constitute fair use parody. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (*The Wind Done Gone*, which retold *Gone With the Wind* from another perspective to criticize the original's depiction of slavery, was a fair use parody); *Castle Rock Entertainment v. Carol Publishing Group Inc.*, 150 F.3d 132, 141-42 (2d Cir. 1998) (trivia book on the *Seinfeld* television series was not fair use); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 111 (2d Cir. 1998) (advertisement featuring a pregnant-looking Leslie Nielsen was a fair use parody of the celebrated *Vanity Fair* cover photograph featuring a pregnant Demi Moore); *Dr. Seuss Enters, L.P. v. Penguin Books USA Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997) (short story about the O.J. Simpson trial, told in the style of Dr. Seuss' *The Cat in the Hat*, was neither parody nor fair use).

ORIGINS OF THE DEFENSE

The Copyright Act grants copyright owners several exclusive rights, including, among others, the rights to "reproduce the copyrighted work" and "to prepare derivative works" such as

The court held that '60 Years' is merely a tool with which to criticize the author rather than his work.

another life than just his 16 years." 2009 WL 1916354, at *7 n.3.

Salinger sued Colting for copyright infringement, claiming that *60 Years* was an unauthorized sequel that violated *Salinger*'s exclusive rights in the copyrights both to *Catcher* and the Holden Caulfield character. Colting maintained that *60 Years* was a fair use parody of *Catcher* because *60 Years* was a comment and critique of *Salinger* and his tortured relationship with Holden Caulfield, his most famous creation. In support, Colting

Sequels

- *J.D. Salinger v. Colting*, 2009 WL 1916354 (S.D.N.Y.), *aff'd on other grounds* 607 F.3d 68 (2d Cir. 2010) (use of Mr. C. character in 60 Years not a fair use of the Holden Caulfield character from *Catcher in the Rye*).
- First Factor: In fact, it can be argued that the contrast between Holden's authentic but critical and rebellious nature and his tendency toward depressive alienation is one of the key themes of *Catcher*...It is hardly parodic to repeat that same exercise in contrast, just because society and the characters have aged." *Id.* at p. *6. **[NOT FAIR]**

Sequels

- Second Factor: The nature of the Salinger book placed the work *with creative* in the “*core*” of protected expression, so the second factor weighed against a finding of fair use. **[NOT FAIR]**
- Third Factor: “Because Defendants have taken *much more* from Salinger’s copyrighted works *than is necessary* to serve their alleged critical purpose [“Salinger as an object of criticism or ridicule”], the third factor weighs heavily against a finding of fair use.” *Id.* at *14. **[NOT FAIR]**

Sequels

- Fourth Factor: The court observed that the right to enter derivative markets belongs to the copyright owner. Even if Salinger chooses not to enter the market—Salinger for years denounced writing a sequel—the court observed that the copyright law allows an author to change his or her mind.
- Fourth Factor: “because it is likely that the publishing of *60 Years* would harm the potential market for *sequels or other derivative works* based upon *Catcher*, the fourth factor weighs, albeit only slightly, against fair use.” *Id.* at *15.
[NOT FAIR] -1-1-1-1 = *Not Fair*.

Sequels

- Fourth Factor: The court observed that the right to enter derivative markets belongs to the copyright owner. Even if Salinger chooses not to enter the market—Salinger for years denounced writing a sequel—the court observed that the copyright law allows an author to change his or her mind.
- Fourth Factor: “because it is likely that the publishing of *60 Years* would harm the potential market for *sequels or other derivative works* based upon *Catcher*, the fourth factor weighs, albeit only slightly, against fair use.” *Id.* at *15.
[NOT FAIR] -1-1-1-1 = *Not Fair*.

Fair Use in the U.S.: Summary

- *Social commentary* and *parody* are transformative and likely fair use.
- *Satire* is fair use but do not take too much!
- *Illustration, example, historical reference point* are fair use even if 100% is used (depends on facts).
- *Criticism, review*, etc. are fair, but again do not take too much!
- *Archiving* is a good purpose even if 100% is taken (must be necessary to achieve the good purpose, facts matter!).
- Avoid **derivatives** (and derivative markets): **translation, prequel/sequel**, etc.
- The following are *not derivative*: *book review, outline, guidebook, lexicon*, etc. (but do not take too much!).

Fair Use in the U.S.: Concluding Thoughts

- Most cases arise in **commercial settings**, i.e., subpart of first factor favors the plaintiff, still many cases are fair use.
- **Relationships** between factors is important: first and *third* (take only as much as you need to accomplish your “good” purpose) and *third* and fourth (the less you take the less likely you will impact the market).
- Non-Derivative uses (good) and complementary (good) vs. Derivative markets (bad)...!
- Choices! Nature of the work (no, unless you pick another work). The particular use made of the work and the amount of the work (yes). Factors one three can impact the market and may represent a priori-effect, i.e., it may difficult to overcome the logical impact of the initial facts.

Performances and Displays in the Classroom: 17 U.S.C. 110(1)

- Applies to any category of work, such as audiovisual works, e.g., a videotape (playing the tape for the class).
- Face-to-face teaching activities: simultaneous presence in same general area, systematic instruction, not for recreation or entertainment.
- Nonprofit educational institution.
- Classroom or similar places devoted to instruction.
- Lawfully made copy rule only applies to use of audiovisual works: a Good Faith test (“knew or had reason believe [the copy] was not lawfully made”) imposed on the person (educator, guest speaker or student) responsible for the performance or display.

New Law: Revised TEACH 110(2)

Action:	Category of Work	Limitation	Example
performance	nondramatic literary works	none	reading from a text
performance	nondramatic musical works	none	singing a song
performance	all other categories of works to which the performance right applies	“reasonable and limited”	showing a clip from a film, video or DVD
display	any work to which the display right applies	“an amount comparable to that which is typically dis- played in the course of a live classroom session”	showing a map or chart from an article on reserve, but not necessarily the entire article

TEACH 110(2): General Requirements

- 1) Teaching Moment: “[I]ntegral part of a class.”
- 2) Teaching Supervision: can be asynchronous.
- 3) Teaching Activity—Mirrors “live” Teaching: MIA (mediated instructional activities: integral part, supervision, and analogous to “live classroom”).
- 4) Accreditation Requirement: for primary and secondary schools (“applicable state certification or licensing procedures”), and for tertiary entities (CHEA or DOE).
- 5) Teaching Content: not for entertainment or as unrelated background material: relevance and materiality.
- 6) Student Space: Replaces the concept of physical classroom with a new concept of virtual, any-time, anywhere view of distance education.

TEACH 110(2): Material Excluded

- 1) Curricular Materials: Excludes “work produced or marketed primarily for performance or display as part of mediated instructional activities [MIA] transmitted via digital networks.”

“The exclusion is not intended to apply generally to all educational material or to all materials having educational value... limited to material whose primary market is the digital network environment, not instructional materials developed and marketed for use in the physical classroom.” H. Rpt. 107-685.

- 2) Supplemental Materials: TEACH does not apply to “supplemental or research materials in digital form, such as electronic course-packs, e-reserves, and digital library resources.” H. Rpt. 107-685.

- 3) “Bootleg” material: TEACH excludes use of material where the “accredited nonprofit education institution knew or had reason to believe [it] was not lawfully made and acquired” copy or phonorecord.

TEACH 110(2)(D)(i): Compliance Requirements

- a) Copyright Policy Requirement: “policies regarding copyright.”
- b) Copyright Outreach: “provides informational materials to faculty, students, and relevant staff members that accurately describe and promote compliance with, the laws of the United States relating to copyright.”
- c) Copyright Notice: “provides notice to students that materials used in connection with *the course* may be subject to copyright protection” (emphasis added), a section 110(2) course only, or does it apply to all courses offered by the institution?

TEACH 110(2)(D)(ii)(I) and (II): Digital Compliance Requirements

- The institution must “appl[y] technological measures that reasonably [(an objective standard)] prevent” . . .
 - aa) Further retention: “retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session,” (TEACH 110(2)(D)(ii)(I)(aa)).
 - bb) Further Dissemination: the “unauthorized further dissemination of the work in accessible form by such recipients to others,” (TEACH 110(2)(D)(ii)(I)(bb)).

TEACH 110(2)(D)(ii)(I) and (II): Digital Compliance Requirements

- The institution must “appl[y] technological measures that reasonably [(an objective standard)] prevent” . . .
 - “[T]he technological protection measure in subparagraph (2)(D)(ii) refers only to retention of a copy or phonorecord in the computer of the recipient of a transmission,” (S. Rpt. 107-687), in accessible form, e.g., unencrypted.
 - cc) An “Anti-circumvention” Provision?: the institution may “not engage in conduct that could reasonably be expected to interfere with technological measures” used by copyright owners to prevent aa) or bb), (TEACH 110(2)(D)(ii)(II)), incongruence with damage remission provision of section 1203? Damage remission (17 U.S.C. 1203(c)(5)(B)) provision might be triggered by lack of knowledge but you would still lose rights under TEACH 110(2).

Completing the puzzle: TEACH 112(f) and the ephemeral recording provision

- Reproduction, i.e., loading a copy onto the institution's server in order to facilitate access by students, as a precursor to an authorized TEACH section 110(2) performance or display:
 - 1) of a work that is in digital form, that is loaded onto the institution's server (i.e., an ephemeral recording) to facilitate twenty-four—seven access by students, or
 - 2) of a work in analog form, that first requires digitalization (i.e., the ephemeral recording) before a TEACH 110(2) use can be made of it, TEACH 112(f)(1).

Completing the puzzle: TEACH 112(f)

- General Requirements (applying to all works, i.e., those that are already in a digital format and those that must be converted):
 - 1) General Rule: “retained and used solely by body or institution that made them,” e.g., could not transfer digital copy to another institution, TEACH 112(f)(1)(A).
 - 2) Reproduction Limitation Rule: “and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2),” e.g., could not use second copy as an e-reserve in another course, at the same institution, TEACH 112(f)(1)(A).
 - 3) (Secondary) Use Rule: copies “used solely for transmission authorized under section 110(2),” e.g. could not use the copy as an e-reserve, TEACH 112(f)(1)(B).

Completing the puzzle: TEACH 112(f)

- Digitalization (conversion) of analog. Do not view TEACH 112(f) as authorization for “the conversion of print or other analog version of works into digital formats,” (S. Rpt. 107-31), two specific requirements:
 - 1) Portion Limitation Rule: any digital conversion is limited “to the amount of such works authorized to be performed or displayed under section 110(2).
 - 2) Availability Rule: conversion (digitalization) only if either of the two conditions exist:
 - a) “no digital version of the work is available to the institution,” TEACH 112(f)(2)(A), or
 - b) “the digital version that is available to the institution is subject to technological protection measures,” TEACH 112(f)(2)(B).
 - The legislative history is silent as to what the phrase “available to the institution” means, both a narrow (ownership) view or as well as a broad “availability” view (e.g., via interlibrary loan or purchase) are possible.

Additional Digital Issues: DMCA (Digital Millennium Copyright Act)

- Online Service Provider Immunity (OSP):
17 U.S.C. 512, and in particular 512(e)
affecting institutions of higher education (see
handout, time permitting).
- Anti-Circumvention and Anti-Trafficking
Rules: 17 U.S.C. 1201 (see handout, time
permitting).

Remember to Ask these Questions!

- Is the content protected by copyright?
- Is my use in conflict with an exclusive right?
- If so, is there a specific exception to allow for the use?
- If not, can fair use apply?
- If not, are other options available (contract or permission)?
- If risk of infringement remains, is my use subject to the reasonable belief standards of section 504, i.e., damage reduction or remission is possible, or other risk-mitigation?

Questions and Answers
now or later . . .

Your one free phone call!

THANK YOU!

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