

2019

Fair Use

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FAIR USE



Laura Quilter
UMass Amherst Libraries
New England Copyright Crew
May 31, 2019



FAIR USE : 17 USC 107

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

4 KEY POINTS

ABOUT FAIR USE

1. ANALYSIS IS
HOLISTIC AND ALL
FACTORS RELATE TO
EACH OTHER

2. THE FIRST FACTOR --
THE PURPOSE AND
CHARACTER -- IS THE
MOST IMPORTANT
QUESTION IN MODERN
FAIR USE ANALYSIS.



Kevin Lim, Orwell's Animal Farm near Bak Kut Teh shop

<https://www.flickr.com/photos/inju/4024486593>



Jeff Winger, "Community"

3. NOT INCLUDED:

SPECIFIC QUANTITIES

OF ANY SORT.

"30 SECONDS",

"10%", "2 LINES"

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4. FAIR USE IS NOT
LIMITED TO THE
LISTED EXAMPLES
("INCLUDING" AND
"SUCH AS")

THREE (3) WAYS FAIR USE
LOVES EDUCATION &
LIBRARIES.

1. PREAMBLE!

Educational uses are exemplary uses, listed in preamble.

NOTE: It's the character of the use, not the character of the institution.



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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

2. FACTOR 1

Factor 1 is all about educational uses. “Purpose and Character” mentions “nonprofit educational use” directly, and just as importantly, “public good” and “transformative” approaches to the first factor often support educational uses.

- Teaching even if non-transformative is a public good
- Criticism, commentary, scholarship are transformative
- Text and data mining for research is transformative
- Indexing & search is a public good
- Accessibility is a public good

3. DAMAGES

- Fair use is favored in damages calculations (17 USC 504(c)(2)) for educators & librarians
 - Actually believed
 - AND was reasonable to believe
 - The use was fair

The court **shall remit** statutory damages in any case where an infringer **believed and had reasonable grounds for believing that his or her use** of the copyrighted work **was a fair use under section 107**, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in [copies](#) or [phonorecords](#);

17 USC 504(c)(2)

PLUS

- Fair use is not the only tool we have. Educators have:
 - 17 USC 110 (public performances)
 - 17 USC 108 (library exceptions)
 - 17 USC 109 (first sale)
 - 17 USC 121 and 121A (accessibility)
 - 17 USC 504(c)(2) (good faith fair use)
 - Sovereign immunity (for state entities)
 - De minimis & other common sense, common law doctrines
 - Creative Commons (all licenses, including NC non-commercial uses)

TWO (2) FUN FAIR USE
FACTS FOR COCKTAIL PARTIES

PERMISSION IS NOT
NEEDED.

No, permission is not
needed.

(Permission may affect
risk assessment, relations
with rightsholder, etc.

Asking permission may
attract the notice of a
rightsholder, but not
asking permission may
annoy the rightsholder.)

HISTORIANS REVOLT. CONGRESS RESPONDS.

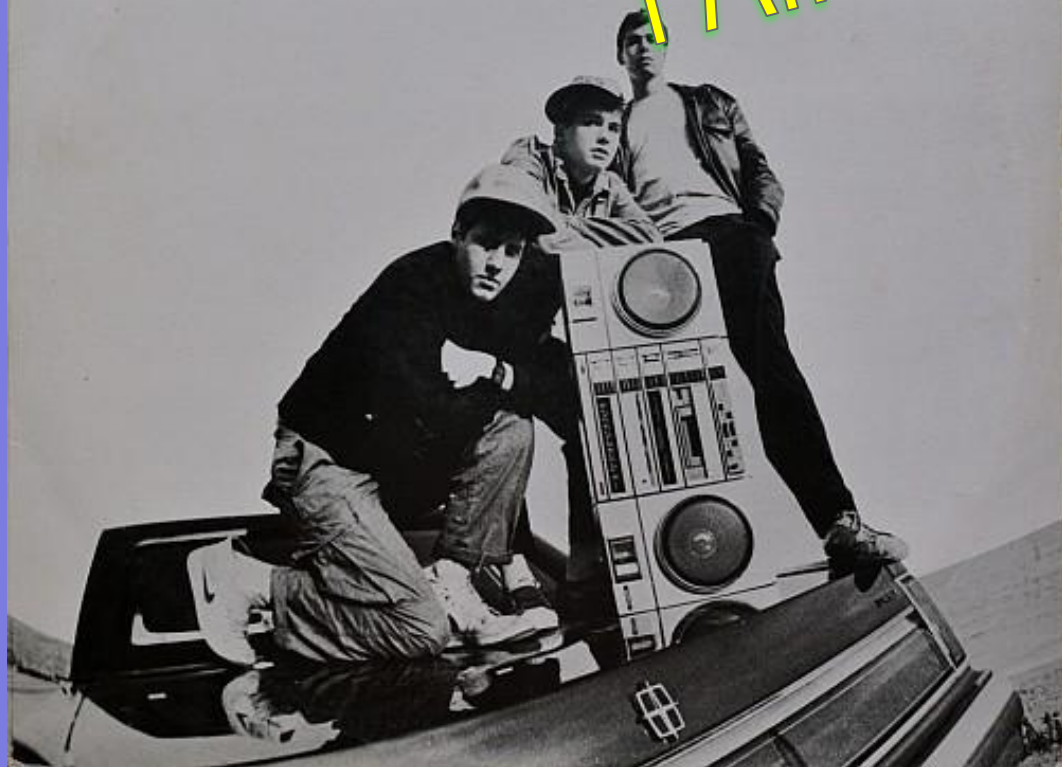
“Unpublished” works may be fair use. Historians, librarians, & others revolt against *Salinger v. Random House* (2d Cir. 1987), and Congress adds this line in 1992:

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

BEASTIE BOYS

(YOU GOTTA) FIGHT FOR YOUR RIGHT (TO PARTY!)

FAIR USE



HOW TO WIN THE MOST
ANNOYING ARGUMENT
ABOUT FAIR USE.

HOW TO WIN ARGUMENTS ABOUT WHETHER FAIR USE IS A "RIGHT" OR A "DEFENSE":

1. CITE THE STATUTE.



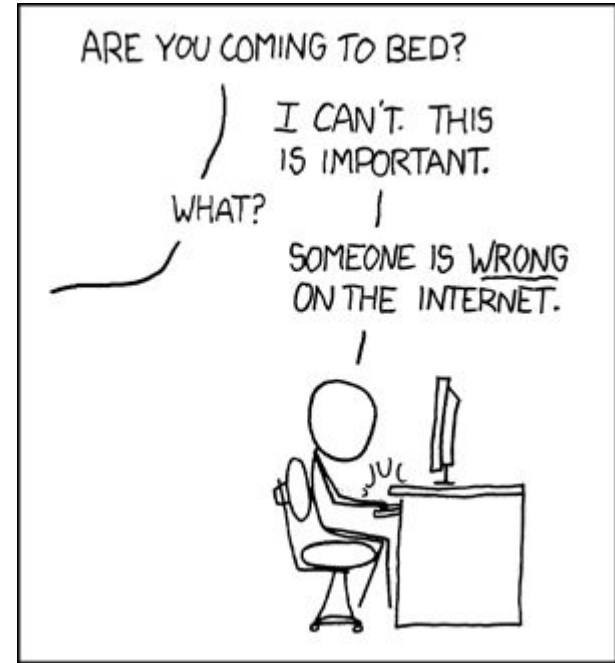
XKCD 386, "Duty Calls" - <https://xkcd.com/386/>

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HOW TO WIN ARGUMENTS ABOUT WHETHER FAIR USE IS A "RIGHT" OR A "DEFENSE":

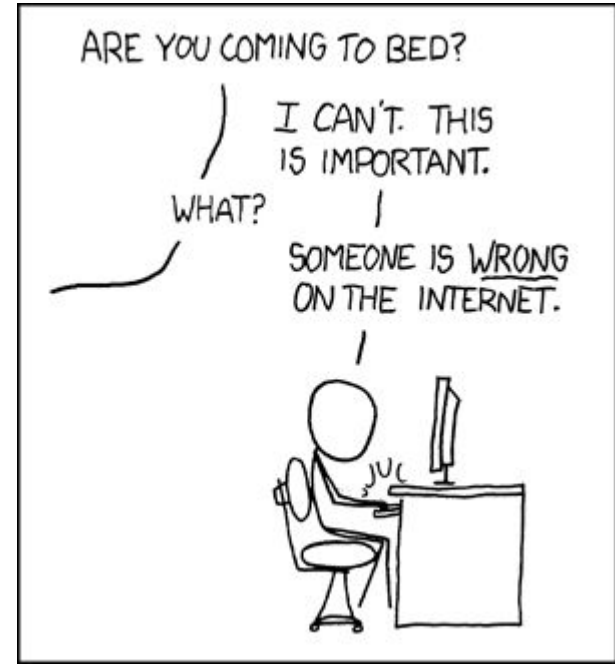
1. CITE THE STATUTE.
2. EXPLAIN THE DIFFERENCE B/W LITIGATION & RIGHTS. EXAMPLE: THE FIRST AMENDMENT.



XKCD 386, "Duty Calls" - <https://xkcd.com/386/>

HOW TO WIN ARGUMENTS ABOUT WHETHER FAIR USE IS A "RIGHT" OR A "DEFENSE":

1. CITE THE STATUTE.
2. EXPLAIN THE DIFFERENCE B/W LITIGATION & RIGHTS. EXAMPLE: THE FIRST AMENDMENT.
3. REFER YOUR LISTENER TO THE DANCING BABY PRINCE VIDEO CASE: LENZ V. UNIVERSAL MUSIC



XKCD 386, "Duty Calls" - <https://xkcd.com/386/>

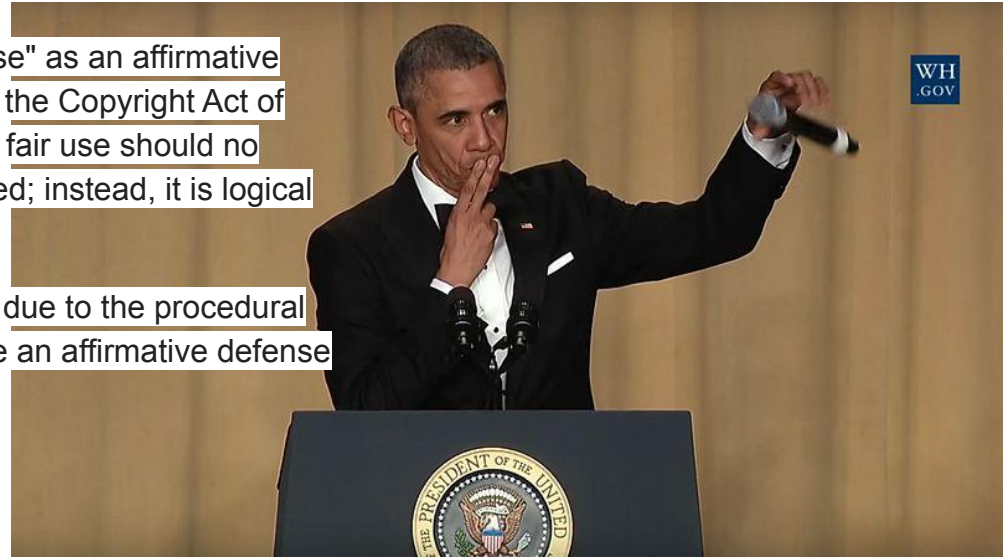
LENZ V. UNIVERSAL MUSIC, 801 F.3D 1126 (2015)

“Fair use is not just excused by the law, it is wholly authorized by the law.”

“Given that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer:

Although the traditional approach is to view "fair use" as an affirmative defense,... it is better viewed as a right granted by the Copyright Act of 1976. ... Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right.

“That fair use may be labeled as an affirmative defense due to the procedural posture of the case is no different than labeling a license an affirmative defense for the same reason.



FAIR USE IS
DETERMINED ON A CASE
BY CASE BASIS AND IS
FACT DEPENDENT.

Pro Tip:
Reading
cases is the
best way to
understand
fair use.

KEY CASES

TO IMPRESS YOUR FRIENDS
& HELP YOUR CAMPUS



Authors Guild v. HathiTrust

(2d Cir. 2014)

Why it's great:

- Appealing defendants (libraries & blind people)
- good academic / educational uses;
- excellent quotes from lower court;
- major opinion from 2d Circuit; and,
- amplified by *Authors Guild v. Google*.



Authors Guild v. HathiTrust

(2d Cir. 2014)

How to use it:

- Use for: text/data mining, metadata, accessibility
- Amplify: *Authors Guild v. Google*, *AV v. iParadigm* (“turn it in”), *Perfect 10 v. Google*, *Kelly v. Arriba*
- Compare: *Fox News v. TVEyes* (2009-2018) - Indexing & search when combined w/ distribution...



America's Most Beloved Epic Novel

GONE WITH THE WIND

MARGARET MITCHELL

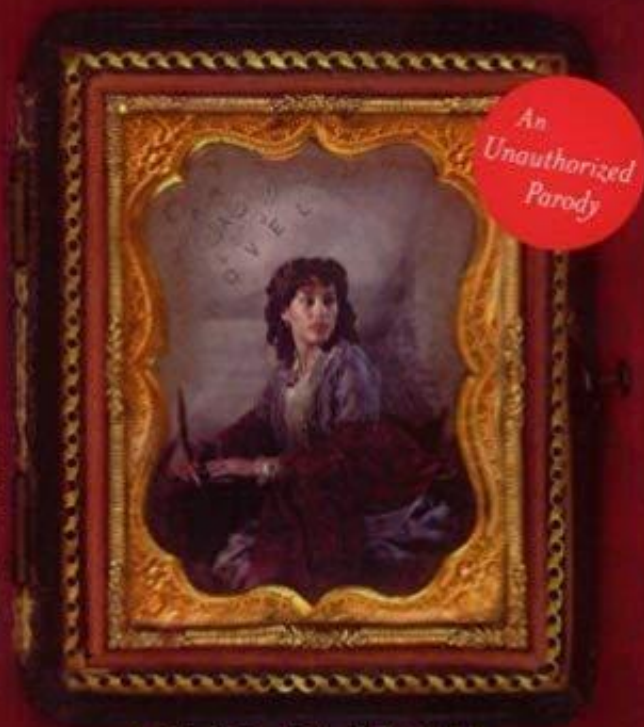
Warner Books LLC © 2003



THE NEW YORK TIMES BESTSELLER

A provocative literary parody that explodes the mythology perpetrated by a Southern classic

THE WIND DONE GONE



WARNER BOOKS

ALICE RANDALL

"Candid, intimate, sexy, subversive." — *Elle*

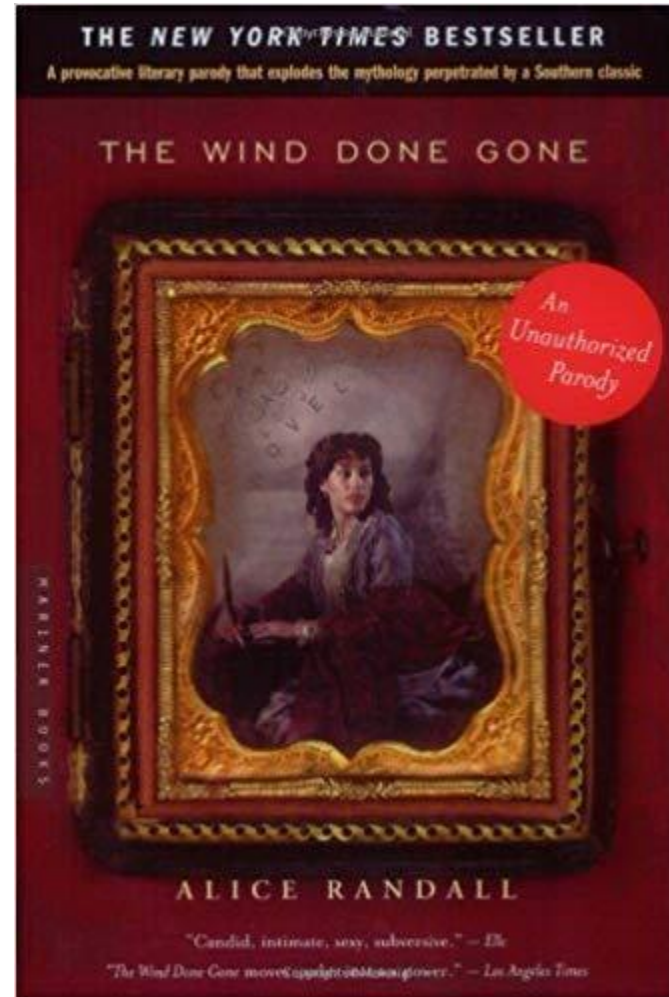
"The Wind Done Gone moves copyright into new power." — *Los Angeles Times*

Suntrust Bank v. Houghton Mifflin

(11th Cir. 2001)

Why it's great:

- Appealing defendant (mom making a critical point about famously racist book, *Gone with the Wind*)
- Good educational / transformative use

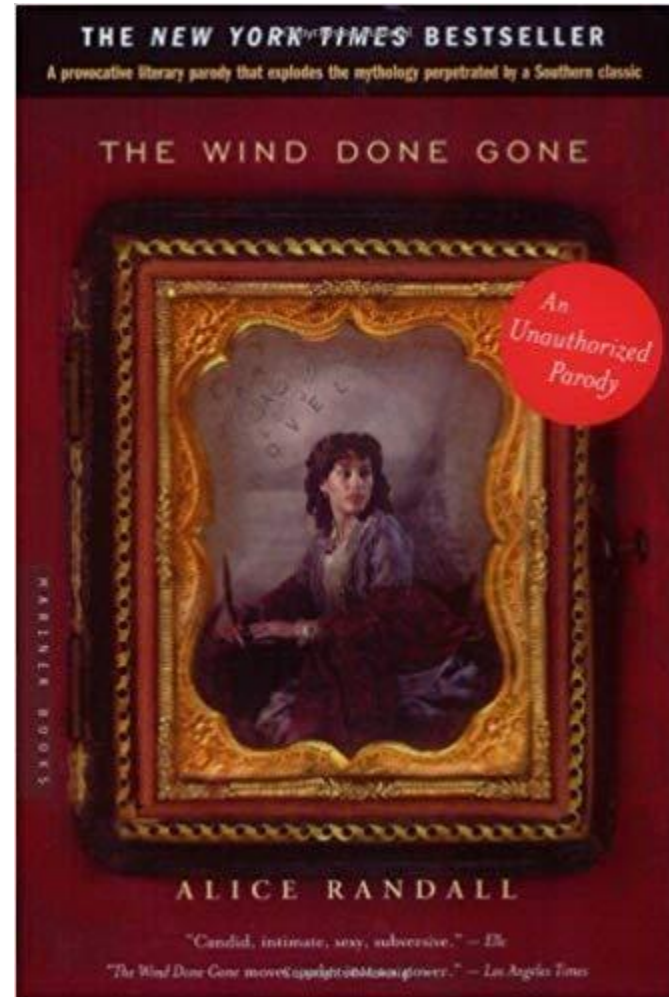


Suntrust Bank v. Houghton Mifflin

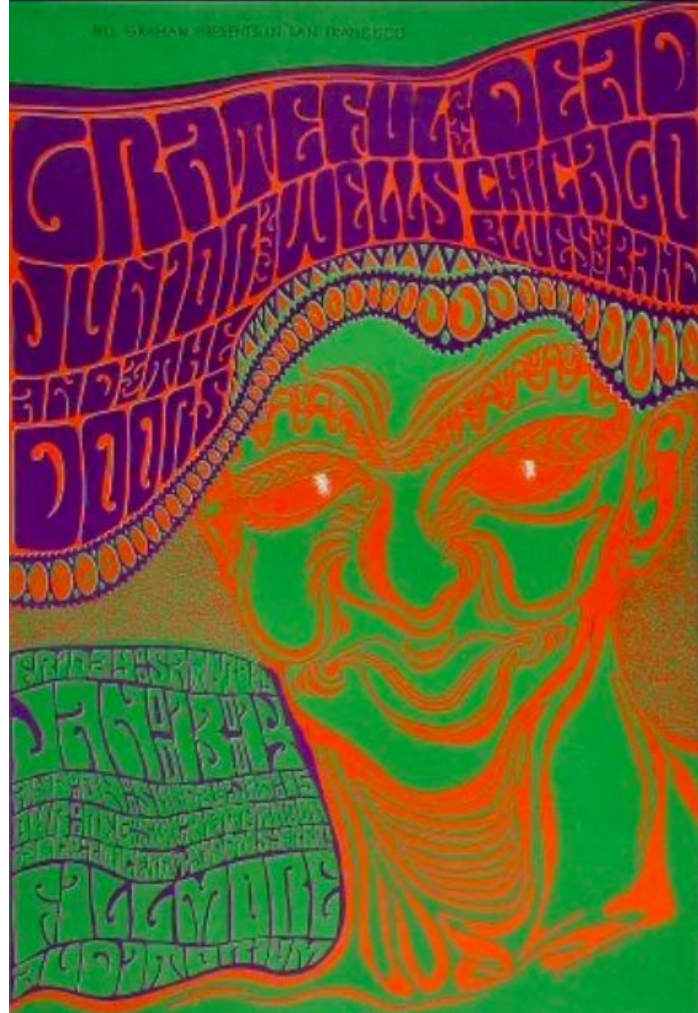
(11th Cir. 2001)

How to use it:

- Use for: Parody, criticism
- Amplify it by citing the Supreme Court in the “Pretty Woman” case, *Campbell v. Acuff-Rose*
- Comment on original needed? *Cariou v. Prince*



ALL GRAHAM GREENE'S OF SAN FRANCISCO



TICKETS

SAN FRANCISCO: THE LIGHT BROTHERS, 1014 Market Street, Room 1014, San Francisco, CA 94102. TEL: 398-1111. WWW.LIGHTBROTHERS.COM
SUNNYVALE: THE LIGHT BROTHERS, 1014 Market Street, Room 1014, Sunnyvale, CA 94089. TEL: 398-1111. WWW.LIGHTBROTHERS.COM
SANTA MONICA: THE LIGHT BROTHERS, 1014 Market Street, Room 1014, Santa Monica, CA 90401. TEL: 398-1111. WWW.LIGHTBROTHERS.COM
SANTA MONICA: THE LIGHT BROTHERS, 1014 Market Street, Room 1014, Santa Monica, CA 90401. TEL: 398-1111. WWW.LIGHTBROTHERS.COM

Graveyard Book



FOREWORD BY ROBERT HUNTER

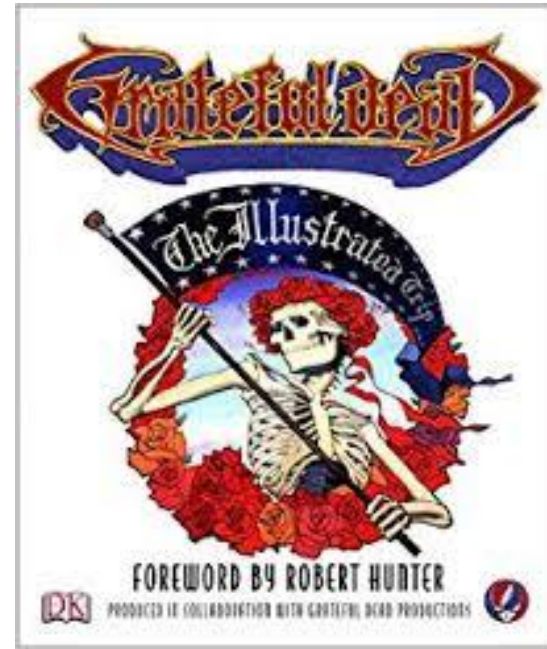
PRODUCED IN COLLABORATION WITH GRAVEYARD BOOK PRODUCTIONS



Bill Graham Archives v. Dorling Kindersley (2d Cir 2006)

Why it's great:

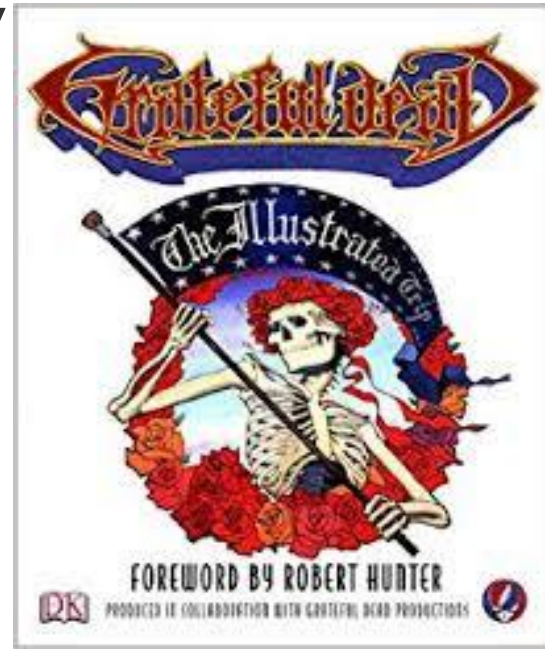
- Fun pictures (the Grateful Dead!)
- Good educational / transformative use: timelines! Contexts! Thumbnails!



Bill Graham Archives v. Dorling Kindersley (2d Cir 2006)

How to use it:

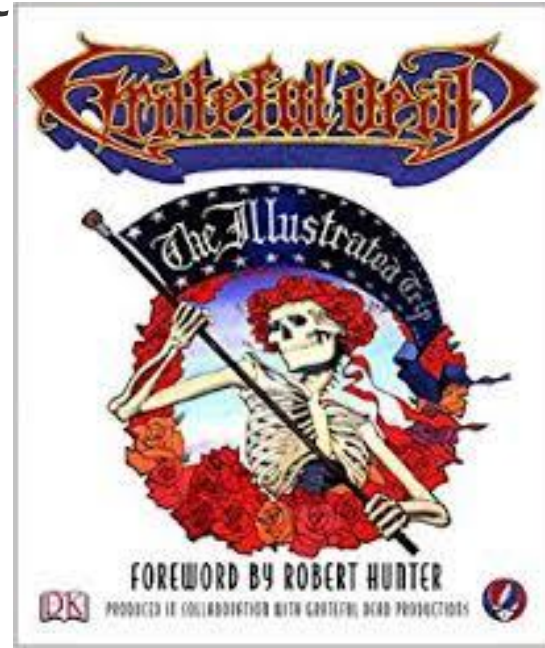
- Use for: Quotes (image thumbnails, text quotes, screenshots) embedded with context
- Amplify it by citing “Jersey Boys” case, *SOFA v. Dodger* (9th Cir 2013).



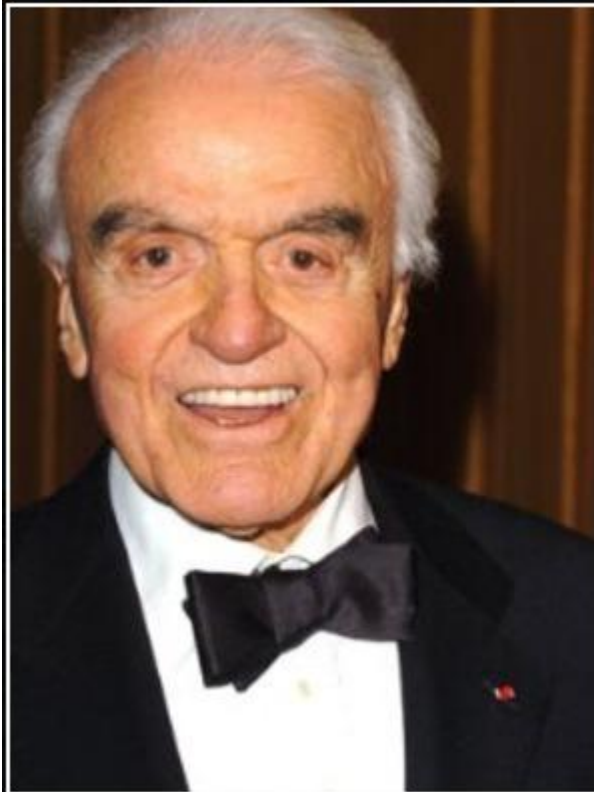
Bill Graham Archives v. Dorling Kindersley (2d Cir 2006)

How to use it:

- Contrast w/ *Elvis Presley v Passport* (9th Cir 2003) (Elvis Presley concert anthology) & *Harper & Row v. Nation* (1985) - Scooping soon-to-be-published memoirs of famous people causing loss of \$\$ is BAD, even if excerpts are small & newsworthy.



Sony v. Universal (Betamax) (US Sup. Ct. 1984)



The VCR is to the American film producer, as the Boston Strangler is to the woman home alone.

— *Jack Valenti* —

Sony v. Universal (Betamax) (US Sup. Ct. 1984)

Why it's great:

- Fun facts: VCRs almost illegal! Jack Valenti quote!
History completely on the side of fair use.

Use for: Personal copies, time-format-etc shifting

Another interesting full-length case: *Bloomberg v. Swatch* (2d Cir 2014) - Recorded transcripts from a shareholder meeting, published as news.

What about *Georgia State University*?

*Cambridge University Press
(+Oxford UP + Sage) v. Becker /
Patton / Albert*

- Filed 2008
- Trial 2011 (faculty on the stand!)
- 1st Dist. Ct. op. 2012
- 11th Cir. op. 2014
- 2nd Dist. Ct. op. 2016
- 11th Cir. 2d appeal 2018
- ***CURRENT STATUS: ... on remand to N.D. Ga.***



Georgia State Univ.

Useful? Useful in the negative.

- Ereserves and course mgt systems are NOT per se © infringement.
- Course pack cases do not control libraries & universities.
- “Guidelines for Classroom Copying” are not the law.
 - *Useful for “CONTU” also!*



Georgia State Univ.

Reminders for IT/libraries:

- Watch out for licensing availability.
 - e.g., Pearson chapters!
- Quantities are not fixed.
- Holistic analysis.
- Transformativeness is NOT the only plus on Factor 1. Teaching is also a PLUS.
- **Can you still use transformativeness? YES.**



THE FOUR FACTORS

WHAT THE HECK DOES "HOLISTIC" MEAN ANYWAY?

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- (2)** the nature of the copyrighted work;
- (3)** the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4)** the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

FAIR USE : HOW THE FACTORS INTERACT

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the **purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes;

Transformativeness! If it's transformative, then Factor 3 (amount taken) much less important. If it's transformative, then Factor 4 (effect on market) may be almost entirely irrelevant.

FAIR USE : 17 USC 107

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(2) the nature of the copyrighted work;

POINT 1

If your use is the same as the original intended use, then your (FACTOR 1) purpose and character is much more likely to be substitutive than transformative

which is much more likely to have a harmful (FACTOR 4) effect on the market.

POINT 2

If the work is out of print, then arguably there is no (FACTOR 4) effect on the market.

FAIR USE : 17 USC 107

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

POINT 1

“Less” is more likely to be fair use is the simple gloss. The real test is “what is reasonably necessary to accomplish your (FACTOR 1) purpose?”

POINT 2

“Heart of the work” doctrine generally applies in (FACTOR 1) commercial circumstances where the use seems (FACTOR 4) exploitative or particularly harmful -- for instance, in Harper & Row v. Nation.

FAIR USE : HOW THE FACTORS INTERACT

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(4) the **effect** of the use upon the **potential market** for or value of the copyrighted work.

POINT 1

If the (**FACTOR 1**) use is highly transformative, then no market effect is relevant.

POINT 2

If it's highly edited, cropped, screenshotted, then you're arguably either (FACTOR 1) TRANSFORMING it or (FACTOR 2) TAKING LESS & are very unlikely to have a market effect. (See also *de minimis*.)

POINT 3

First Amendment freebie: If the effect on the market / value is because you have negatively reviewed it, critiqued it, etc., that doesn't count !

THE FOUR FACTORS

LIGHTNING ROUND AKA CHEATSHEET VERSION

1ST FACTOR: PURPOSE & CHARACTER

the **purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes

- “Transformative” or “Substitutive” is the key inquiry
 - Transformative: Changing the *purpose* of the use, or changing the actual work itself.
 - Substitutive: Substituting for the rightsholder’s original intended use, which is more likely to cause *market harm*
- Public good purposes
 - accessibility, search engines, nonprofit education

2ND FACTOR: NATURE OF THE WORK

- Creative or factual? Not very relevant unless close to the 102(b) line or you're only taking the factual (not the creative) part of the work -- the ideas but not the expression
- Published or unpublished? Not very relevant unless you're hurting the market for an unpublished (about to be published) work.
- Out of print? Possibly relevant if there are no reasonably available versions.

3RD FACTOR: AMOUNT TAKEN

“the amount and substantiality of the portion used in relation to the copyrighted work as a whole”

- Simplistic: More is less fair and less is more fair
- Actual test: **Are you taking what is “reasonable for your purpose”?**
100% might be fair (indexing, *Sony v. BetaMax*). Only a few words might not be fair (*Harper & Row v. Nation*).
- “Heart of the work”: Relevant if you’re effectively scooping or unfairly benefiting commercially. Not relevant for studying, commenting, critiquing, parodying, news, etc.

4TH FACTOR: MARKET SUBSTITUTION

“the effect of the use upon the potential market for or value of the copyrighted work.”

- Back to 1st factor: Is the use transformative (a different market) or substitutive (the original market)
- Consider:
 - Textbooks
 - Licensed chapters
 - Commercial document delivery services

THE FOUR FACTORS

EXPANDED VERSION

1ST FACTOR: PURPOSE & CHARACTER

the **purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes

- “Transformative” or “Substitutive” is the key inquiry
 - Transformative: Changing the *purpose* of the use, or changing the actual work itself.
 - Substitutive: Substituting for the rightsholder’s original intended use, which is more likely to cause *market harm*
- Public good purposes
 - accessibility, search engines, nonprofit education

1ST FACTOR: PURPOSE & CHARACTER

Examples of “Transformativeness”

- Search engines & Data mining: *Perfect 10 v. Google*, *Authors Guild v. HathiTrust*, *Authors Guild v. Google*, *AV v. iParadigm* (turn-it-in)
 - Not handing out full copies: *TVEyes v. FoxNews*
- Parodies: *Campbell v. Acuff-Rose*, *Suntrust Bank v. Houghton Mifflin*

1ST FACTOR: PURPOSE & CHARACTER

Examples of “Transformativeness” , *continued*

- New contexts: *Bill Graham Archives v. Dorling Kindersley*, *Bloomberg v. Swatch*

1ST FACTOR: PURPOSE & CHARACTER

- Georgia State University case: ereserves / LMS is “non-transformative” but plus for “nonprofit educational”
- Can ereserves / LMS be transformative?
 - Depends on use.
 - Engagement with the material instead of consumptive use
- Can ereserves / LMS be fair use even if NOT transformative?
 - Depends on licensing, amount ...
 - *UCLA v. AIME* case: No substitution

2ND FACTOR: NATURE OF THE WORK

- Creative or factual? Not very relevant unless close to the 102(b) line or you're only taking the factual (not the creative) part of the work -- the ideas but not the expression
- Published or unpublished? Not very relevant unless you're hurting the market for an unpublished (about to be published) work.
- Out of print? Possibly relevant if there are no reasonably available versions.

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“the amount and substantiality of the portion used in relation to the copyrighted work as a whole”

- Simplistic: More is less fair and less is more fair
- Actual test: **Are you taking what is “reasonable for your purpose”?** 100% might be fair (indexing, *Sony v. BetaMax*). Only a few words might not be fair (*Harper & Row v. Nation*).
- “Heart of the work”: Relevant if you’re effectively scooping or unfairly benefiting commercially. Not relevant for studying, commenting, critiquing, parodying, news, etc.

3RD FACTOR: AMOUNT TAKEN

“the amount and substantiality of the portion used in relation to the copyrighted work as a whole”

My approach:

- **(1) What does my purpose need?**
- **(2) Is the amount you're taking, in the way that you're using it, enough to substitute for some reasonable commercial use that the rightsholder is or might make?**

4TH FACTOR: MARKET SUBSTITUTION

“the effect of the use upon the potential market for or value of the copyrighted work.”

- Back to 1st factor: Is the use transformative (a different market) or substitutive (the original market)
- Consider:
 - Textbooks
 - Licensed chapters
 - Commercial document delivery services

COMMON FAIR USE Qs IN EDUCATION

- Ereserves / LMS text readings
- Film screenings / music performance in the classroom
 - 17 USC 110(1) for the performance; DMCA, 107 for the digitization
- Film screenings / music performance in distance ed
 - 17 USC 110(2)
- Film screenings / music performance in ereserves / LMS

Continued ...

COMMON FAIR USE Qs IN EDUCATION

... continued

- Personal research copies:
 - 17 USC 108(f) and 17 USC 107 (fair use)
- Linking (to YouTube, ResearchGate, etc): Linking (including embedded links) is neither a reproduction nor distribution, so it is not per se a copyright infringement concern. But it is a good practice to be sure it's a "lawful" copy.
- Replacement copies:
 - 17 USC 108 (library), 17 USC 117 (computer software)