



# Long Arm of the Law, Indeed

Charleston Conference, Nov. 7, 2014 - Laura Quilter



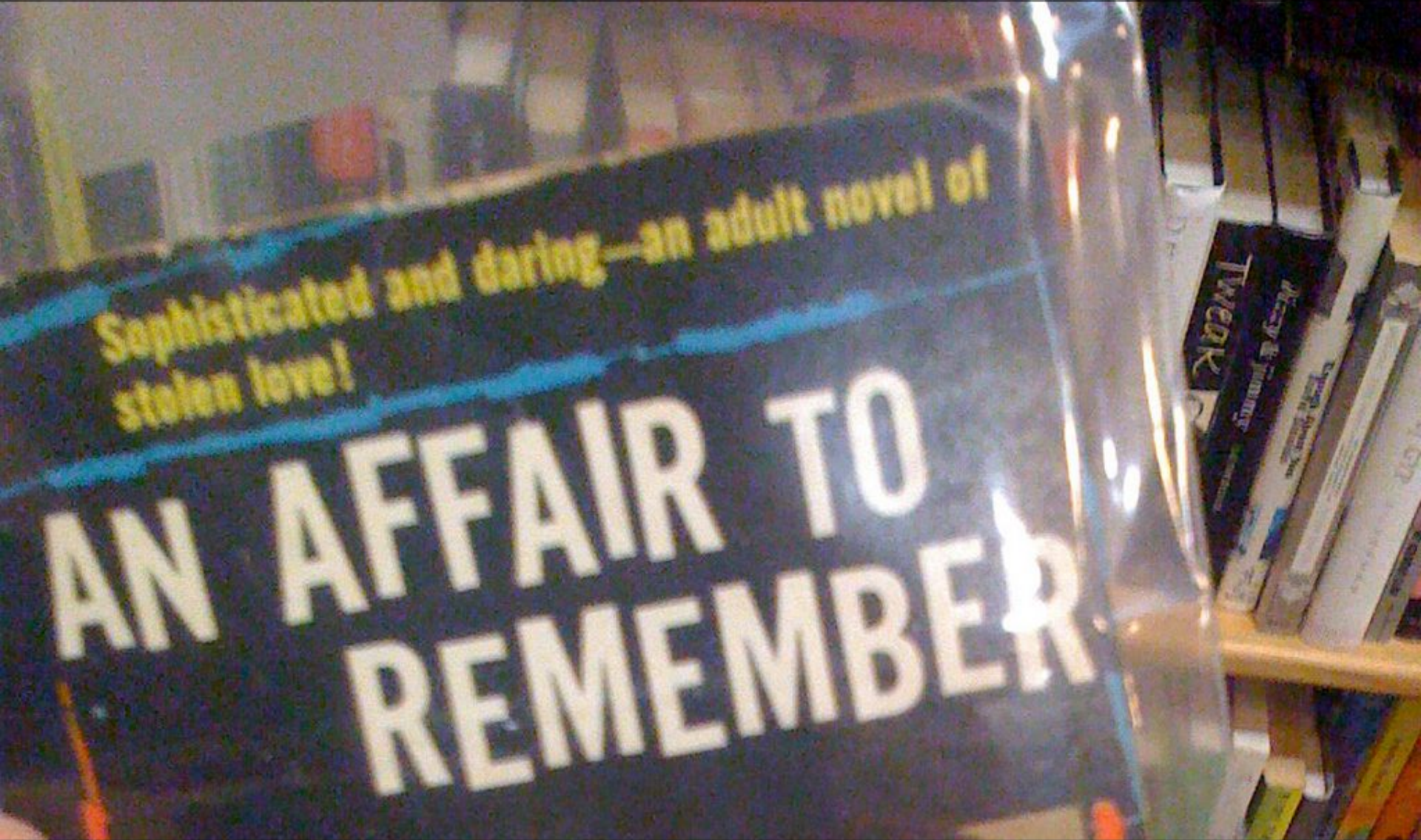
# Copyright

two jokes & one transformation in analysis

first sale

17 USC 109

true love torn asunder by licensing



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announcement  
\* boycott (300+  
law profs)  
\* retrenchment  
\* next moves?



Q: When is an  
electronic good a copy?

A: When it's electronic.  
(ReDigi)

# Capitol Records v. ReDigi (SDNY 2013)

- Apple iTunes MP3s -- no prohibition on resale
- ReDigi encrypted marketplace
- HELD: Digital goods are copies, so 109 inapplicable
- ReDigi 2.0: Download thru ReDigi for copy control
- 

RECYCLED DIGITAL MEDIA

# future of first sale

- textbook & ebook experiments
- secondary markets -- electronic & real
- licensing -- EULAs & negotiated
- Relax, Congress is on it. (gulp)

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"BY ENTERING THIS ROOM,  
YOU AGREE TO FORFEIT YOUR  
OWN SOUL RATHER THAN  
NEGOTIATE WITH THE MORTAL  
RESIDING THEREIN..."  
WAIT, YOU CAN'T—

TOO LATE.

xkcd 501  
Faust 2.0

MEPHISTOPHELES ENCOUNTERS THE E.U.L.A.



fair use

17 USC 107

# transformativeness triumphant?

- Leval, Campbell v. Acuff-Rose, SunTrust Bank
- history & coffee table books: Bill Graham, SOFA v. Dodger
- search engines: Perfect 10 v. everybody; HathiTrust, Google
- art, appropriative & otherwise: Cariou v. Prince
- news: Swatch v. Bloomberg

# not so fast!

- What is "transformativeness" anyway? (HathiTrust 2d Cir; others)
- Even if not transformative, PURPOSE can be important.
- PURPOSE interacts with all other factors; "holistic analysis"
- Market effect still important! (Sconnie Nation 7th; GSU 11th)





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SMITH**

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**FRANCY  
SIMS**

“Fair Use Emotional Rollercoaster”

**BRANDON**

**BUTLER**

**PARKER**

**SARAH**

# GSU (Cambridge UP v. Patton)

- F1: non-transformative
- F1: nonprofit ed is a +factor
- F2 "nature": close read
- F3 amount taken: it depends
- F4: licensing relevant!

# White v. West (SDNY 2014)

- HELD: briefs in law database is fair use
- F1 diff purpose: legal search tool; + metadata & annotations
- F2 nature of the work: publicly filed documents
- F4 market: substitutability (i.e., purpose shifts market)
- F4 market: transaction costs

# More indexing/awareness fair uses!

- indexing TV news for commercial news service = fair use (Fox v. TV Eyes)
- sharing recording of business briefings = fair use (Swatch v. Bloomberg)
- law firm patent filings = fair use (AIP v. Schwegman, Winstead v. Wiley)
- indexing is "quintessentially transformative" & fair use (HathiTrust 2d)
- accessibility is not transformative but is a ++ purpose anyway (HT 2d)

# Key Points of Cases

- Minimal "transformation" of content
- Different purpose / audience [F1/F2/F4]
- indexing/awareness, education, accessibility
- 100% not a problem in any of these
- hypothetical or impractical markets

# transformative != purpose

- Maybe we've been too hung up on the word "transformative"; it's the PURPOSE
- and PURPOSE plus HOLISTIC ANALYSIS
- F2 "nature of the work": Public data? Intended audience?
- F3 "amount taken": Even 100%, depending on purpose
- F4 market important but focus on substitutions, realism, & non-circular

# UPSHOT?

Transformativeness is not the only way to get a + on F1. "Purpose" interacts with all other factors, whether tf or not.



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