

# Fair Use: Misconceptions and Examples

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# The plan

- Context
- Fair use
- Misconceptions, and some examples with which you can combat them
- Questions
- Hypotheticals
- Wrap-up



# Context

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# Context: Copyright law

1. Is the work protected by copyright?
2. Who owns the copyright? Have they already made any licenses that would permit your use?
3. Would your use violate one of the exclusive rights given to copyright owners?
4. Do any of the exceptions to copyright, such as fair use, apply?



# If no exceptions apply

- Get a license.
- Use a different work.
- Change how you plan to use the work so you can take advantage of an exception, such as fair use.



# Fair use

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# Statutory language

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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.



# Preamble

- “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”
  - Favorable to academic uses, but difficult to apply.





# The four factors

1. purpose and character
  - transformativeness, commerciality, bad faith, preambular purposes (including education)
2. nature of the copyrighted work
  - creative/factual, unpublished
3. amount and substantiality of the portion used
  - amount, “heart of the work,” necessary to purpose
4. effect on the market
  - substitute/complement

# Misconceptions & examples

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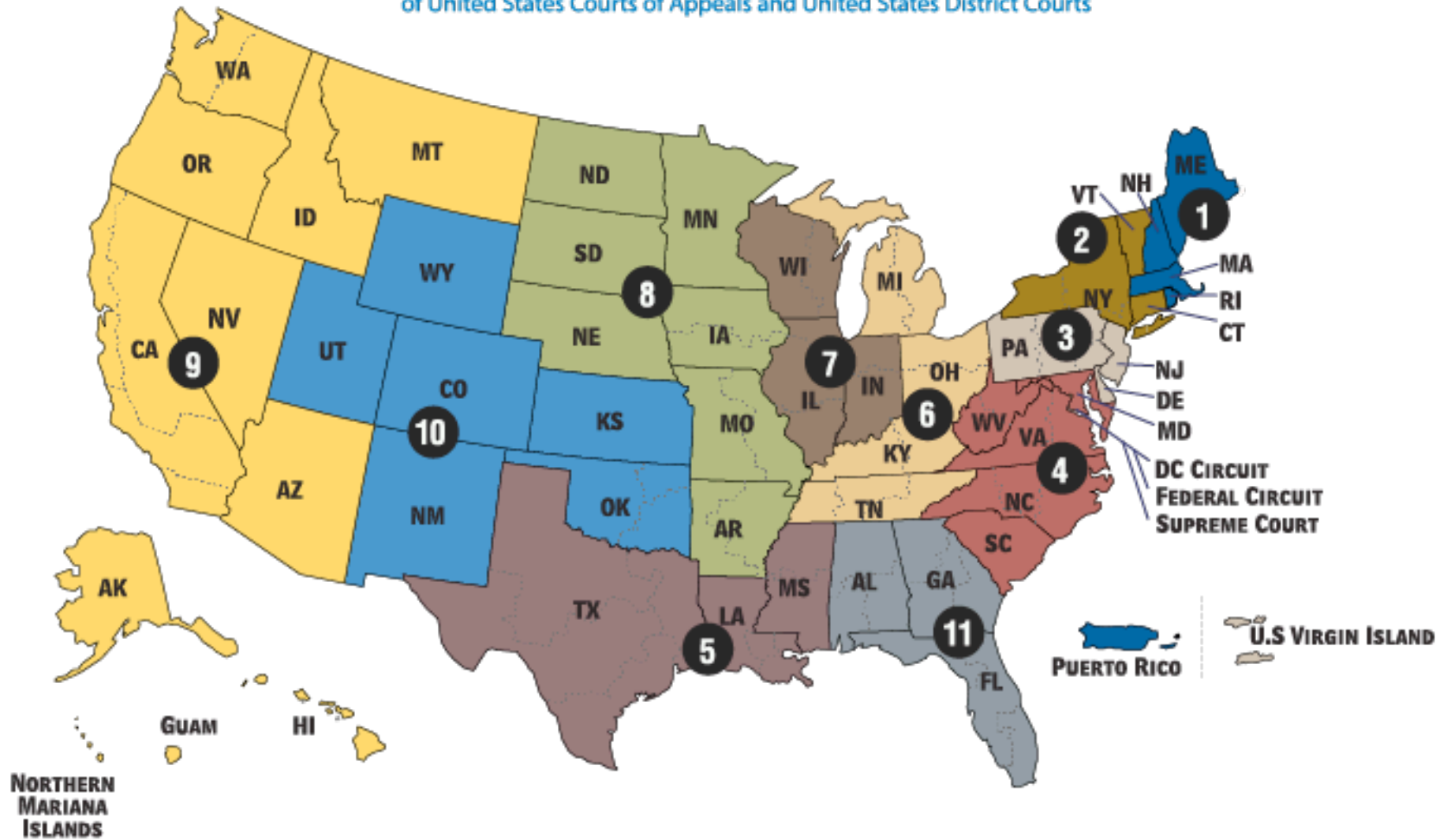
# Examples

- Supreme Court cases
  - *Sony, Harper & Row, Campbell*
- Analogous fact patterns
  - *Authors Guild v. HathiTrust, Cambridge Univ. Press*
- Local precedent
  - *Kienitz*



# Geographic Boundaries

of United States Courts of Appeals and United States District Courts



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# *Universal City Studios v. Sony Corp.,* 464 U.S. 417 (1984).

“Respondents alleged that some individuals had used Betamax video tape recorders (VTR’s) to record some of respondents’ copyrighted works which had been exhibited on commercially sponsored television and contended that these individuals had thereby infringed respondents’ copyrights. Respondents further maintained that petitioners were liable for the copyright infringement allegedly committed by Betamax consumers because of petitioners’ marketing of the Betamax VTR’s.”



# *Universal City Studios v. Sony Corp.,* 464 U.S. 417 (1984).

- Factors & subfactors considered
  - Purpose and character of use
    - Non-commercial
  - Nature of copyrighted work
    - Work is one that the viewer “had been invited to witness in its entirety free of charge”
  - Amount and substantiality used
    - Entire work used
  - Effect on market
    - No harm or potential harm to market demonstrated
- Outcome: **FAIR USE**
- Takeaway: Using the entire work is sometimes fair use.



# *Harper & Row v. Nation Enters.,* 471 U.S. 539 (1985).

“In March, 1979, an undisclosed source provided The Nation Magazine with the unpublished manuscript of ‘A Time to Heal: The Autobiography of Gerald R. Ford.’ Working directly from the purloined manuscript, an editor of The Nation produced a short piece entitled ‘The Ford Memoirs -- Behind the Nixon Pardon.’ The piece was timed to ‘scoop’ an article scheduled shortly to appear in Time Magazine. Time had agreed to purchase the exclusive right to print prepublication excerpts from the copyright holders . . . . As a result of The Nation article, Time canceled its agreement.”

# *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985).

- Factors & subfactors considered
  - Purpose and character of use
    - commercial
    - in bad faith
  - Nature of copyrighted work
    - factual, but expressive
    - unpublished
  - Amount and substantiality used
    - heart of the work
  - Effect on market
    - actual market harm
- Outcome: **NOT FAIR USE**
- Takeaway: Using only a small amount of the work does not guarantee fair use.

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# *Campbell v. Acuff-Rose Music,* 510 U.S. 569 (1994).

“Campbell [a member of 2 Live Crew] wrote a song entitled ‘Pretty Woman,’ which he later described in an affidavit as intended, ‘through comical lyrics, to satirize the original work [Roy Orbison’s ‘Oh, Pretty Woman’]. . . .”

The group’s manager sought a license from Acuff Rose, the publishing company holding the rights to the original song.

“Acuff Rose’s agent refused permission . . . . Nonetheless . . . 2 Live Crew released records, cassette tapes, and compact discs of ‘Pretty Woman’ in a collection of songs entitled ‘As Clean As They Wanna Be.’” (citations omitted)

# *Campbell v. Acuff-Rose Music,* 510 U.S. 569 (1994).

- Factors & subfactors considered
  - Purpose and character of use
    - commercial
    - transformative
  - Nature of copyrighted work
    - work at “the core of the copyright’s protective purposes”
  - Amount and substantiality used
    - “no more was taken than necessary”
    - used heart of the work, but it was necessary
  - Effect on market
    - insufficient evidence (to be revisited on remand)
- Outcome: FAIR USE
- Takeaway: Commercial use can be fair.
- Takeaway: Transformative purpose can neutralize third factor.

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# *Authors Guild, Inc. v. HathiTrust,* 755 F.3d 87 (2d Cir. 2014).

“First, HathiTrust allows the general public to search for particular terms across all digital copies in the repository.”

“Second, the HDL allows member libraries to provide patrons with certified print disabilities access to the full text of copyrighted works.”



# *Authors Guild, Inc. v. HathiTrust,* 755 F.3d 87 (2d Cir. 2014).

Use #1: Full text search by general public

- Factors & subfactors considered
  - Purpose and character of use
    - search is transformative
  - Nature of copyrighted work
    - many types of works, being used for transformative purpose
  - Amount and substantiality used
    - copied entirety of works, but that was necessary to purpose
    - number of copies not excessive
  - Effect on market
    - full-text search posed no harm to the existing or potential traditional market for works
- Outcome: FAIR USE
- Takeaway: Non-parody uses can be transformative.

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# *Authors Guild, Inc. v. HathiTrust,* 755 F.3d 87 (2d Cir. 2014).

Use #2: Access for patrons with certified print disabilities

- Factors & subfactors considered
  - Purpose and character of use
    - access for print disabled is favored even though not transformative
  - Nature of copyrighted work
    - many types of works, being used for transformative purpose
  - Amount and substantiality used
    - copied entirety of works, but that was necessary to purpose
    - keeping image copies is necessary
  - Effect on market
    - market for books for print disabled is insignificant
- Outcome: FAIR USE
- Takeaway: Court can introduce new subfactors.

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# *Cambridge Univ. Press v. Patton,* 769 F.3d 1232 (11th Cir. 2014).

“Three publishing houses . . . allege that members of the Board of Regents of the University System of Georgia and officials at Georgia State University . . . infringed Plaintiffs’ copyrights by maintaining a policy which allows GSU professors to make digital copies of excerpts of Plaintiffs’ books available to students without paying Plaintiffs. Plaintiffs alleged seventy-four individual instances of infringement, which took place during three academic terms in 2009.”



# *Cambridge Univ. Press v. Patton,* 769 F.3d 1232 (11th Cir. 2014).

- Factors & subfactors considered
  - Purpose and character of use
    - not transformative
    - nonprofit educational
  - Nature of copyrighted work
    - varies from work to work
  - Amount and substantiality used
    - look to quantity and quality, not to a benchmark
  - Effect on market
    - varies from work to work
- Outcome: remand for individual assessment (opinion last week)
- Takeaway: Fair use can't be reduced to a mechanical test.
- Takeaway: Non-transformative uses can be fair.

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# *Kienitz v. Scennie Nation, LLC,* 766 F.3d 756 (7th Cir. 2014).

“While a student at the University of Wisconsin in 1969, Paul Soglin attended the first Mifflin Street Block Party, whose theme (according to Soglin) was ‘taking a sharp stick and poking it in the eye of authority.’ Now in his seventh term as Mayor of Madison, Wisconsin, Soglin does not appreciate being on the pointy end. He wants to shut down the annual event. For the 2012 Block Party, Scennie Nation made some t-shirts and tank tops displaying an image of Soglin’s face and the phrase ‘Sorry for Partying.’ The 54 sales, on which Scennie Nation cleared a small profit, led to this suit, in which photographer Michael Kienitz accuses Scennie Nation and its vendor of copyright infringement.”





# *Kienitz v. Sconnie Nation, LLC,* 766 F.3d 756 (7th Cir. 2014).

- Factors & subfactors considered
  - Purpose and character of use
    - commercial (small profit), but balanced by political commentary
  - Nature of copyrighted work
    - “unilluminating”
  - Amount and substantiality used
    - very little of the original made it onto the t-shirt
  - Effect on market
    - not a substitute good
- Outcome: FAIR USE
- Takeaway: Transformiveness doesn’t rule every circuit.



# Questions?

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# Hypotheticals

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# Hypotheticals

Several hypotheticals that might implicate copyright law are given on the handout. Working in with a partner, determine whether the actions described would be permitted by fair use. If there are facts missing that would change your analysis, talk about what they are and what impact they would have.



# Hypotheticals

You are a graduate student writing a dissertation about the architecture of Chicago's neighborhoods. Some of the buildings you are writing about have been demolished or renovated, so you must rely on photographs to know how they looked in the past. You anticipate finding such photographs in a variety of locations: in historical photograph collections on museum and library websites, in digitized or microfilmed historical newspapers, and in physical format in various local archives. Some of these photographs are of the buildings only; others are photographs of people and events that happen to have the demolished buildings in the background. You would like to keep a digital copy of each photograph you find, so that you can refer to it later. You would also like to include copies of some of the photographs in your dissertation. You plan to publish your dissertation in an academic journal after you have completed your degree.



# Hypotheticals

You are a special collections librarian. Your library has recently received, as a bequest from an anthropology professor, a set of American folk tales collected in the 1950s and 1960s. The professor collected the tales herself, initially recording them in shorthand and then transcribing them into longhand. As part of the bequest, the professor transferred to the library any copyrights she had in the collection. No permission has been sought or granted from the individuals who told the tales to the professor. You would like to digitize the collection, both for preservation purposes and to provide access to the collection on your library's website.



# Hypotheticals

You are an undergraduate in a course on documentary film. For a class project, your professor has asked you to make a short biographical film. For your subject, you have chosen your roommate, who has given you his permission to make the film. He leads a choral group on campus, and you would like to include footage from the choral group's rehearsals, during which they sing several popular songs. You would also like to include footage of your roommate's conversation with another friend, captured while they watched *House of Cards* together. Finally, you would like to include a shot in which you pan the camera over your roommate's bedroom wall, on which several posters and a few printed snapshots hang.

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# Hypotheticals

You are a professor teaching a survey course on music history. You would like to scan three articles from an encyclopedia of music history and the introduction to a biography of Mozart, all of which are assigned reading for your course. You then plan to post the scanned copies on your course's password-protected website. Access to your course website is limited to you, the other course teaching staff, enrolled students, and registered auditors.

