



Expression
Copyright

Fair Use

Eric E. Johnson

ericejohnson.com



Konomark
Most rights sharable

17 U.S.C. § 106

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

“The limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)

17 U.S.C. § 107

Limitations on exclusive rights: Fair use

“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 ... , scholarship, or research, is not an infringement of copyright.”

17 U.S.C. § 107

Limitations on exclusive rights: Fair use

Fair use factors “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.”

On fair use:

“The inquiry is necessarily a **flexible** one, and the endless variety of situations that may arise precludes the formulation of exact rules.”

Sony Corp. of America v. Universal City Studios, Inc.
464 U.S. 417, 479-80 (1984)

—

Some check-your-understanding questions on Campbell v. Acuff-Rose and fair use

Does it matter if a work is "transformative"?

Who is helped if the Δ's work is transformative?

What are the four fair use factors?

Are they from statute? From case law? Both?

Are bright line rules favored in fair-use analysis?

Some check-your-understanding questions on Campbell v. Acuff-Rose and fair use

Does it matter if a work is "transformative"?

Yes. A lot.

Who is helped if the Δ's work is transformative?

The defendant.

What are the four fair use factors?

[Listed in book & subsequent slide ...]

Are they from statute? From case law? Both?

Both.

Are bright line rules favored in fair-use analysis?

No. SCOTUS takes a strong stance against that. Inquiry is not rigid. Must be flexible.

17 U.S.C. § 107

Limitations on exclusive rights: Fair use

Fair use factors “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.”

Some check-your-understanding questions on Campbell v. Acuff-Rose and fair use

Can consideration of one factor involve other factors?

Or are they to be kept strictly separate?

—

Some check-your-understanding questions on Campbell v. Acuff-Rose and fair use

Can consideration of one factor involve other factors?

Yes.

Or are they to be kept strictly separate?

No.

While talking about one factor, the court often talks about others. And facts that go to one factor may also go to others.

Some check-your-understanding questions on Campbell v. Acuff-Rose and fair use

Which fair use factor does the court say the least about (and seem to find least significant in this situation)?

What is fair use as a procedural matter?

What distinguishes parody from satire?

Some check-your-understanding questions on Campbell v. Acuff-Rose and fair use

Which fair use factor does the court say the least about (and seem to find least significant in this situation)?

The second (nature of the copyrighted work).

What is fair use as a procedural matter?

It's an affirmative defense. The burden's on the defendant. The court makes a lot of this.

What distinguishes parody from satire?

Parody is ridiculing, commenting on the work it is copying.

Some check-your-understanding questions on Campbell v. Acuff-Rose and fair use

Must ¶ ask for permission first, before being to able to successfully raise fair use?

If ¶ asks, and is denied, can fair use still work?

Must all four factors from § 107 be explored/argued?

Some check-your-understanding questions on Campbell v. Acuff-Rose and fair use

Must ¶ ask for permission first, before being able to successfully raise fair use?

No.

If ¶ asks, and is denied, can fair use still work?

Yes. That's what happened in this case.

Must all four factors from § 107 be explored/argued?

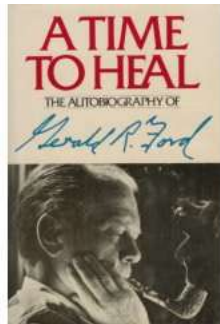
Yes.

You don't have to win all four, clearly. But SCOTUS says all must be explored. And it said that 2 Live Crew, to get summary judgment on fair use, as an affirmative defense, needed to present evidence on market effect, without which SJ was inappropriate.

Realothenicals

Harper & Row v. Nation Enters. (U.S. 1985)

Fair use?



[This is discussed within Campbell and other cases ...]

The Nation magazine got an unauthorized copy of the unpublished, forthcoming memoirs and used 300-400 words of verbatim quotes from the manuscript. Time magazine canceled its excerpt publication agreement with Harper & Row.

Harper & Row v. Nation Enters. (U.S. 1985)

Fair use?

Held: **No.**



[This is discussed within Campbell and other cases ...]

The Nation magazine got an unauthorized copy of the unpublished, forthcoming memoirs and used 300-400 words of verbatim quotes from the manuscript. Time magazine canceled its excerpt publication agreement with Harper & Row.

Harper & Row v. Nation Enters. (U.S. 1985)

Fair use?

Held: **No.**



Not a fair use. Keys: [F2] Unpublished nature favors ¶. [F3] While quotes were quantitatively insubstantial, they were “the heart of the book,” favoring ¶. [F4] The “single most important element of fair use” favored ¶ with “clear-cut evidence of actual damage.”.

Elsmere Music, Inc. v. NBC (S.D.N.Y. 1980)

Fair use?



“I Love Sodom,” a “Saturday Night Live” television parody of “I Love New York,” was held to be a

Elsmere Music, Inc. v. NBC (S.D.N.Y. 1980)

Fair use?

Held: **Yes.**



[This is discussed within the Campbell case ...]
“I Love Sodom,” a “Saturday Night Live” television parody of “I Love New York,” was **held to be a fair use.** (aff’d by 2d Cir, cited with approval by SCOTUS)

Steinberg v. Columbia Pictures (S.D.N.Y. 1987)



Steinberg v. Columbia Pictures (S.D.N.Y. 1987)

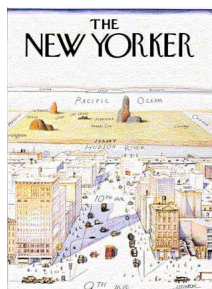


Steinberg v. Columbia Pictures (S.D.N.Y. 1987)



Fair use?

Held: **No.**



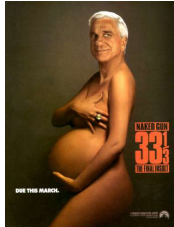
"I find meritless defendants' assertion that, to the extent that the "Moscow" poster evokes Steinberg's, that evocation is justified under the parody branch of the "fair use" doctrine ... The poster merely borrowed numerous elements from Steinberg to create an appealing advertisement to promote an unrelated commercial product, the movie. No parody of the illustration is involved, and defendants are not entitled to the protection of the parody branch of the fair use doctrine. The other factors mandated by 17 U.S.C. § 107 do nothing to mitigate this determination. The copyrighted work at issue is an artistic creation, 17 U.S.C. § 107(2), a very substantial portion of which was appropriated in the defendants' work, 17 U.S.C. § 107(3). As for the value of the copyrighted work, 17 U.S.C. § 107(4), plaintiff submitted testimony to the court to show that his reputation was injured by having the public believe that he voluntarily lent his work to a profit-making enterprise."



Leibovitz v. Paramount Pictures (2d Cir. 1998)

Fair use?

Held: **Yes.**



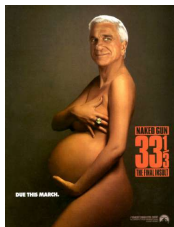
[F1] “Plainly, the ad adds something new and qualifies as a ‘transformative’ work. ... Because the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore, the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original. The contrast achieves the effect of ridicule that the Court recognized in *Campbell* would serve as a sufficient ‘comment’ to tip the first factor in a parodist’s favor.”

[F2] “Though Paramount concedes the obvious point that Leibovitz’s photograph exhibited significant creative expression, *Campbell* instructs that the creative nature of an original will normally not provide much help in determining whether a parody of the original is fair use. The second factor therefore favors Leibovitz, but the weight attributed to it in this case is slight.”

Leibovitz v. Paramount Pictures (2d Cir. 1998)

Fair use?

Held: **Yes.**

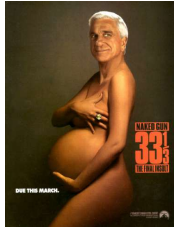


[F3] “The copying of these elements, carried out to an extreme degree ... took more of the Leibovitz photograph than was minimally necessary to conjure it up, but *Campbell* instructs that a parodist’s copying of more of an original than is necessary to conjure it up will not necessarily tip the third factor against fair use. ... [T]he reasonableness of taking additional aspects of the original depends on the extent to which the ‘overriding purpose and character’ of the copy ‘is to parody the original,’ and ‘the likelihood that the parody may serve as a market substitute ...’. That approach leaves the third factor with little, if any, weight against fair use so long as the first and fourth factors favor the parodist. Since those factors favor fair use in this case, the third factor does not help Leibovitz[.]”

Leibovitz v. Paramount Pictures (2d Cir. 1998)

Fair use?

Held: **Yes.**



[F4] “Leibovitz all but concedes that the Paramount photograph did not interfere with any potential market for her photograph or for derivative works based upon it. ... Her only argument for actual market harm is that the defendant has deprived her of a licensing fee ... [b]ut she is not entitled to a licensing fee for a work that otherwise qualifies for the fair use defense as a parody.”

[Aggregate] “The aggregate assessment necessary for an ultimate decision might be difficult in some cases if the relevant factors weighed heavily on opposite sides of the balance. However, in light of *Campbell*, with its significant depreciation of the second factor where parodies commenting on an original are concerned, we are satisfied that the balance here markedly favors the defendant.”



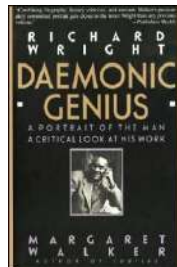
Fair use?

???



Wright v. Warner Books, Inc.
953 F.2d 731 (2d Cir. 1991)

Fair use?

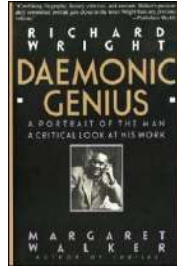


Biographer quoted from 6 unpublished letters and 10 journal entries.

Wright v. Warner Books, Inc.
953 F.2d 731 (2d Cir. 1991)

Fair use?

Held: **Yes.**



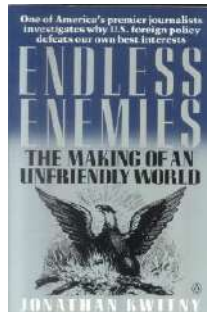
Biographer quoted from 6 unpublished letters and 10 journal entries.

Fair use. Keys: Use was informational, and less than 1% was taken.

Love v. Kwitny

772 F. Supp. 1367 (S.D.N.Y. 1989)

Fair use?



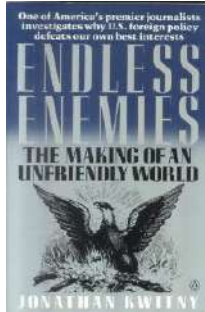
Author copied more than 50% of unpublished manuscript to prove a person's involvement in Iranian government overthrow.

Love v. Kwitny

772 F. Supp. 1367 (S.D.N.Y. 1989)

Fair use?

Held: **No.**



Author copied more than 50% of unpublished manuscript to prove a person's involvement in Iranian government overthrow.

Not a fair use. Keys: Amount taken and unpublished status.

Roy Export Co. of Vaduz v. CBS

672 F.2d 1095 (2d Cir. 1982)

Fair use?



75 seconds of a 72 minute film were used in TV news report on Charlie Chaplin's death.

Roy Export Co. of Vaduz v. CBS
672 F.2d 1095 (2d Cir. 1982)

Fair use?

Held: No.



CBS
NEWS

75 seconds of a 72 minute film were used in TV news report on Charlie Chaplin's death.

Not a fair use. Keys: The court found the portion taken substantial and the "heart" of the film.

Perfect 10 v. Google

Fair use?



Google
images

Google's image search displayed thumbnail size versions of images from website of men's magazine featuring photographs of nude/topless women. Thumbnails linked to the website, but visiting website was not necessary to access the thumbnail images.

Perfect 10 v. Google

(C.D. Cal. 2006)

Fair use?

Held: No.



Google's image search displayed thumbnail size versions of images from website of men's magazine featuring photographs of nude/topless women. Thumbnails linked to the website, but visiting website was not necessary to access the thumbnail images.

Perfect 10 v. Google

(C.D. Cal. 2006)

Fair use?

Held: No.



Not fair use. Keys: Use is “consumptive” rather than “transformative,” and “likely does harm the potential market for the downloading of P10's reduced-size images onto cell phones.”

Perfect 10, Inc. v. Google, 416 F.Supp.2d 828 (C.D. Cal. 2006)

Perfect 10 v. Google

(C.D. Cal. 2006)

Fair use?

Held: No.

REVERSED!

Not transformative. It is “consumptive” rather than “transformative,” and “likely does harm to the potential market for the downloading of P10’s reduced-size images onto cell phones.”

Perfect 10, Inc. v. Google, 416 F.Supp.2d 828 (C.D. Cal. 2006)

Perfect 10 v. Amazon [and Google]

(9th Cir. 2007)

Fair use?

Held: Yes.

Fair use.

“Google’s use of thumbnails is highly transformative. Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer ... directing a user to a source of information.”

Perfect 10, Inc. v. Amazon. com, Inc. [and Google], 508 F. 3d 1146 (9th. Cir. 2007)

Perfect 10 v. Amazon [and Google]

(9th Cir. 2007)

Fair use?

Held: **Yes.**

...

“Just as a ‘parody has an obvious claim to transformative value’ because ‘it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,’ *Campbell*, a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool.”

Perfect 10, Inc. v. Amazon. com, Inc. [and Google], 508 F. 3d 1146 (9th. Cir. 2007)

Ringgold v. Black Entertainment Television

(S.D.N.Y. 1996)

Fair use?



A poster of a quilt depicting a church picnic was used as part of the set decoration of a church on the TV sitcom "ROC." The poster was visible in frame, in the background, nine times for total of 26.75 seconds.

Ringgold v. Black Entertainment Television
(S.D.N.Y. 1996)

Fair use?

Held: Yes.



A poster of a quilt depicting a church picnic was used as part of the set decoration of a church on the TV sitcom "ROC." The poster was visible in frame, in the background, nine times for total of 26.75 seconds.

Ringgold v. Black Entertainment Television
(S.D.N.Y. 1996)

Fair use?

Held: Yes.



REVERSED!

A poster of a quilt depicting a church picnic was used as part of the set decoration of a church on the TV sitcom "ROC." The poster was visible in frame, in the background, nine times for total of 26.75 seconds.

Ringgold v. Black Entertainment Television

(2d Cir. 1997)

Fair use?

Held: No.



Poster of a quilt depicting a church picnic was used as part of the set of a church on TV sitcom "ROC." Poster was visible in frame, in background, nine times for total of 26.75 second in background.