Copyright for Creators
Series Lecture 1.0

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TOPICS Series Talk 1.0

- United States copyright framework
- Copyright rights of authors/creators
- Copyright exceptions including educational rights and fair use
- Registering and protecting your work
- Creative Commons and other tools for sharing
- Copyright infringement actions and liabilities
Intellectual property

- Copyrights
- Patents
- Trademarks

All covered under different federal laws
All can affect your work in different ways
We’re talking only about copyright!
But First, a Word From

"Whenever a copyright law is to be made or altered, then the idiots assemble."

Mark Twain Notebook, 1902-1903
Let’s Start With Some Common Misconceptions

- A work is not copyrighted unless it is “officially registered”
- It is fair use to copy it because the copyright owner didn’t respond to my carrier pigeon, email/letter/phone call, or, “silence equals permission”
- The appearance of a work on the web means the owner has consented to reuse or republication
- If I’m not “selling” it, I don’t have a problem
- If I’m “just” teaching with it, there’s no problem
And Some More Misconceptions

- When I load it onto my computer, I’m not making a copy.
- I’m not “publishing” anything when I put stuff up on the web.
- If the publisher is too much of an idiot to sell a digital copy, I can make one for myself.
- As the author/artist/creator, I can reuse my published work as I deem appropriate.
- If I made it for a class, I can put it up on the web.
- If my students made it for one of my classes, I can use it.
Copyright Law Protects:

- Literary Works (including articles, books, software with written documentation)
- Musical Works (including score and lyrics)
- Dramatic Works (including any accompanying music)
- Choreography and Pantomimes
- Pictorial, Graphic and Sculptural Works
- Motion Pictures and other Audiovisual Works
- Sound Recordings
- Architectural Works (including plans and drawings)
Exclusive Rights of the Copyright Holder
17 U.S.C. section 106:

- **Reproduce** the copyrighted work whether in whole or in part (making a digital copy from an analog work is “reproduction” restricted to the copyright holder)
- **Prepare derivative works** including translations or adaptations
- **Distribute copies** by sale or other transfer of ownership
- For works capable of performance, **to perform** the copyrighted work in a public place or setting
- For works capable of display, **to display** the copyrighted work in a public place or setting
The Concept of CopyRights

- People tend to think of copyright as a monolithic construct, but copyright is actually a **bundle of rights**
- You can license or assign some, but not all; you can term-limit your assignment
- Warning: you can have the copyright registered in your name, but give away all the actual rights associated with copyright ownership! (Book agreements are common examples, company agreements may impose work-for-hire)
But for the copyright exceptions...

[image of police car in the rear view mirror, removed]
Copyright Exceptions:

- **Section 107 - Fair Use**
- **Section 108 - Library Copying**
- **Section 109 (a) - First Sale Doctrine** (once Copyright holder allows release or sale of copies, a subsequent owner may sell, rent, transfer, loan or give the copy to another)
- **Section 109 (c) – Public Displays** (helps libraries, museums, galleries, etc.)
Copyright Exceptions, cont’d

- **Section 110 (1) Displays and Performances in Face-to-Face Teaching** (reciting poetry, reading plays, showing videos or films, playing music in traditional classroom settings.)
- **Section 110 (2) Displays and Performances in Distance Learning** (the “TEACH Act”)
- **Section 117 Computer Software** (allows modifications by the owner of a copy of software, as well as making of backup copy)
Copyright Exceptions, cont’d

- **Section 120 – Architectural Works** (allows the making of pictures or photographs of architectural works once they are built and visible to the public without infringing copyright of the architect. Note: images or photographs are themselves a new copyrighted work apart from the architectural design.)

- **Section 121 – Special Formats for Persons With Disabilities** (allows making of special format copies; but note the many restrictions)
Images of fine art involve separate rights issues involving the artist, the object owner, and the photographer. These are typically three separate parties.

- The artist’s sale of a work of art does not usually transfer the copyright.
- The art owner has rights to the physical object.
- Museums often assert a right to restrict reproductions as a matter of contract or license under the mantle of “copyright.” (The fine print on that ticket you bought when you entered the museum or archive; the form you signed when you got permission to make copies from the archive.)
Let’s Talk about Fair Use
§ 107 Fair Use

“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”
The Fair Use Standards:

- **Purpose and character** of the use including whether the use is for educational vs. commercial purposes
- The **nature of the copyrighted work** – is it a factual or creative work
- The **amount and substantiality** of the portion to be used in relation to the work as a whole
- The **effect or impact** of the use upon the potential market for or value of the work.
Fair Use is a Case-by-Case Assessment

- Fair Use is a flexible, fact-specific standard, so no single factor is dispositive.
- Fair Use involves balancing the input from all four questions each time.
- The fact that a use might itself be commercial, or that it might impair the marketability of a work, does NOT invalidate the use as fair.
- That a use is educational (OR ARTISTIC) does NOT guarantee that it is fair.
Fair Use on the Web

- Socially useful functions such as search and information retrieval; Internet functionality:
- Support findings of transformative and legitimate uses of whole images. *Arriba Soft (9th Cir. 2003), Perfect 10 (9th Cir. 2007)*
- Size and technology tools enhance possibilities of non-competitive uses of whole works: thumbnails, links, portions of images.
- BUT NOT necessarily when display of a whole work in legible format could be licensed, and display is the purpose of the use.
Transformative Uses (A lot starts with this guy)

[album cover of Roy Orbison removed]
And actually these guys, too.
Campbell

Orbison

Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you, you're not the truth,
No one could look as good as you
Mercy
Pretty Woman, won't you pardon me,

2 Live Crew

Pretty woman walkin' down the street
Pretty woman girl you look so sweet
Pretty woman you bring me down to that knee
Pretty woman you make me wanna beg please
Oh, pretty woman
Campbell

Orbison
Pretty Woman, I couldn't help but see,
Pretty Woman, that you look lovely as can be
Are you lonely just like me?

2 Live Crew
Big hairy woman you need to shave that stuff
Big hairy woman you know I bet it's tough
Big hairy woman all that hair it ain't legit
'Cause you look like 'Cousin It'
Big hairy woman
Factor # 1 “Purpose”

The indisputably commercial nature of 2 Live Crew’s parody did not doom their defense. While this factor might weigh against them, it is but one part of a 4-part test. Further, parody and other “transformative” uses are highly protected under Fair Use, whether the use is educational or commercial: “in truth, in literature, in science and in art, there are, and can be, few, if any things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use, much which was well known and used before.”
Factor #2: “Nature of the work”

Although Orbison’s song was clearly highly creative: “This fact...is not much help in this case, or ever likely to help much, in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”
Factor #3: “Amount”

Amount as a portion of the whole: “2 Live Crew ... copied the first line of the original, but thereafter departed markedly from the Orbison lyrics.... They also copied “the bass riff and repeated it... but also produced solos in different keys, and alter[ed] the drum beat. This is not a case, then, where ‘a substantial portion’ of the parody itself is composed of a ‘verbatim’ copying of the original.”
Factor #4: “Market Impact”

“We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because ‘parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically’...the role of the courts is to distinguish between ‘[b]iting criticism that...suppresses demand [and] copyright infringement which usurps it.’”
Hello, Transformative Uses

“[t]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright.... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”
Rogers v Koons 1992: Koons loses

[images retained – educational fair use]
Blanch v Koons 2006: Koons wins

Copied just a piece, changed elements, “transformative”

[images retained, educational fair use]
“Koons is, by his own undisputed description, using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media. His stated objective is thus not to repackage Blanch's “Silk Sandals,” but to employ it “in the creation of new information, new aesthetics, new insights and understandings.”
“Copyright law thus must address the inevitable tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them— or ourselves by reference to the works of others, which must be protected up to a point. The fair-use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control.”
Apparently Key Factors

- (Sometimes) use of whole image versus a portion of an image
- “Verbatim” copying versus adding new artistic features
- Whether the new object is a “transformative” work of independent art
- Whether the new object is just a surrogate for the appropriated image and will disrupt the market opportunities of the image
- Whether the use was for political or scholarly commentary
Not Every Creative “Appropriation”

Will meet the test: “The question is whether Koons had a genuine creative rationale for borrowing Blanch’s image, rather than using it merely to “get attention or to avoid the drudgery in working up something fresh.”

- Not a free pass to take what you want because you’re too lazy to create it yourself!
- Did cause the court to look specifically at Koons’ justifications.
- Raises some interesting questions about the role of judicial exploration of artistic motivations… as we’ll see shortly
Poster images of the Grateful Dead were used in greatly reduced size, integrated in an “artistic” collage format, scattered throughout a 480-page book, and the amount taken without permission was not excessive.

Fact that DK sought a license and did not agree to the price did not kill the case. “A copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its creative work.”
“A concert poster for the Grateful Dead, Jefferson Airplane, and Big Brother and the Holding Company, playing at the Hollywood Bowl.”
“A Concert Poster for the Grateful Dead, Jefferson Airplane, and Sons of Champlin playing at the Winterland Arena”
"A picture of the front and back of a concert ticket for a show at the Fillmore Theater"
“A concert poster for a Grateful Dead show on New Year’s Eve”
Bill Graham Archives

“It is readily apparent that DK’s image display enhances the reader’s understanding of the biographical text. In other instances...the images still serve as historical artifacts graphically representing the fact of significant Grateful Dead concert events selected by the ...author for inclusion in the book’s timeline. We conclude that both types of uses fulfill DK’s transformative purpose of enhancing the biographical information in Illustrated Trip, a purpose separate and distinct from the original artistic and promotional purpose for which the images were created.”
Are You Asking Yourselves, Why Did They Bother?

- *The Illustrated Trip* contained 2,000 images, virtually all identified and licensed except the seven images at issue in this case. Typical fee paid was $150.
- BGA demanded $2,500
- Why not pay $17,500 (7 x $2,500) instead of attorneys fees?
- Total permissions cost for book at that fee level would have been $5,000,000 making such a book impossible to publish.
Sedgwick Claims Mgmt v Delsman

[WANTED FOR HUMAN RIGHTS VIOLATIONS]

DAVID "MAD DOG" NORTH
2 CENTS REWARD

[images retained, educational fair use]
Not Every Fair Use Case is a “win”: E.g. Gaylord v. United States (Fed Cir 2/25/10)

US Government commissioned memorial

US Government stamp from duly licensed photograph

Outcome: No fair use, forget about the contract!

[images retained, educational fair use]
The long, long saga of Cariou v. Prince

[Cariou v Prince images retained, educational fair use]
“No one has called these his best works. For one of the paintings, Mr. Prince threw a few paint splatters on one of the Rastafarians, and placed a separate photo of a guitar in his hands. The message of the piece, Mr. Prince said in the court record, was, ‘Hey, this guy is playing the guitar.’”
Devastating decision in which judge orders both the artist and his gallery to “deliver up for impounding, destruction, or other disposition, as Plaintiff determines, all infringing copies of the photographs, including the paintings and unsold copies of the Canal Zone exhibition book, along with all tapes, plates, negatives, discs, …and other articles for making infringing copies.” Judge rejects Prince’s fair use defense entirely.

- Illustrates the risks when your fair use case depends a lot on judicial perception of your motivations.
Distinguishing between fair commentary/parody and “unfair” reuse can be complex

- Prince himself testified that he did not create his Canal Zone series as a commentary on Cariou’s work; stated he had “he had no interest in the meaning of Cariou's photographs.”
- Prince admitted he was simply using the images as “raw material” for his own work.
- Judge found his interest was primary commercial; not transformative. Case was appealed.
"If you rip out photographs from somebody else's book, put some paint on them and sell them for $10 million, it does seem to most people — and to the law — that there should be some consequences," says lawyer Dale Cendali, who filed a friend of the court brief in the appeal on behalf of the American Society of Media Photographers.
"What the court missed unfortunately in the trial court level with Richard Prince," Rutledge says, was "the work that he has made using imagery including some from Patrick Cariou's photographs says something different, something new."
Court Jester: Is Richard Prince Using the Legal System as a Medium?

“It is a gigantic ‘eff you’ to the legal system that screwed him over,” said artist and writer Greg Allen, who has released a book of the best parts from the initial Cariou v. Prince court documents. “It’s like, ‘Come and get me. You really want to screw me over? I will infringe the Holy Grail. I will stomp on J.D. Salinger’s skull and call it art.’ And I think it’s kind of brilliant.”
The district court held that Prince’s work was not transformative as it did not comment on, relate to the historical context of, or critically refer back to the original work.

The Second Circuit overruled this interpretation:

“The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute.”
Prince’s artwork manifested a different aesthetic. Cariou’s photographs were “serene and composed”; Prince’s paintings were “crude and jarring.”

2d Cir finds the district court incorrectly focused on Prince’s provocative deposition testimony; instead gives greater emphasis to the transformation of the original work and how it would be reasonably perceived. “What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”
Cariou

- 30 images at issue
- Court finds 25 to be fair use
- Sends back to the (very hostile trial court) 5 images for review under fair use principles, including Graduation.
- Opinion is ripe with judicial discretion and future issues.
Seltzer v Green Day (9th Cir. 2013)

- Artist brought action against Green Day and concert effects provider, alleging that unauthorized use of artist’s illustration of screaming face in video backdrop of band’s stage show infringed his copyright.
- Court finds that GD’s use of artist’s illustration was transformative, and thus first factor of fair use inquiry weighed strongly in favor of GD.
- Although GD used illustration as “raw material” in construction of four-minute video backdrop, band did not simply quote or republish that illustration, but rather used illustration as component of street-art-focused music video about religion.
Green Day’s concert backdrop

[Image retained, educational fair use]
Photographer brought action against companies that developed and sold apparel products, alleging use of photograph on T-shirt violated his copyright. Parties filed cross-motions for summary judgment.

Purpose and character of use of photograph of mayor, which was taken by photographer at mayor’s inauguration, on t-shirts with phrase “Sorry For Partying” weighed in favor of use by companies that developed and sold apparel products being fair use permitted by Copyright Act.

Kienitz v Sconnie Nation (W.D.Wi 2013)
Companies were poking fun at mayor by spotlighting what they viewed as his “flip-flop” regarding the student protest block party. The T-shirt companies did not use an exact replica of photograph, but instead monochromatic outline of the image in neon green.
Mifflin Street Block Party

[image retained, educational fair use]
School district - very messy case.
Teacher buys three islands for teaching purposes from Linden Labs.
Commissioned Second Life design services but never signed a contract during relevant time period.
District claims they owned commissioned work, or at least had a perpetual license. Pay designer $5,000. Discrepant testimony makes case ridiculous.
Some Practical Fair Use Questions

- How much of the work are you using?
- Is the work scientific or creative?
- Images, text, audio, video, software?
- Is the work available for purchase or licensing for the use you require?
- Is your use “scholarly” or “artistic” or “commercial” or all of the above?
- How wide is your intended audience (e.g. class, colleagues, .www)?
Fair Use Questions, cont’d

- Do you have effective access controls so that the work is not being distributed widely? (e.g. IP or password protection)?
- Hint: the wider your intended distribution = the more copies being made and the more the owner will be losing all control over the work, the less likely is it that your use will be fair
- Is there no findable copyright owner?
Protecting and Licensing Your Work

Works are protected automatically, but many benefits to labeling and registering!

- Label it: c (your name) 201_
- Register with the Library of Congress
- Licensing: Creative Commons
  http://creativecommons.org/about
Infringement Issues

- Who is responsible? (= YOU, not VCU)
- Web-related: usually first strike is a take down notice
- Claim for “damages”
- Can be up to “triple” damages for intentional “commercial” “mis”use
- May need an attorney (will not be VCU counsel for students or faculty re personal works)
Really Important Considerations

- What do you want to do with the work?
- Is it intended to be permanent or transient? Class or .www?
- Pure display or reproductions/sales?
- How transformative is your use?
- How “necessary” is your reuse?
- What media are being used?
- How hard do you want to work at fair use?
RESOURCES

[image of Mark Twain, deleted]
Fair Use and Digital Rights

- Stanford:  
  http://fairuse.stanford.edu/

- Free Expression Policy Project at NYU Law School  
  http://www.fepproject.org/policyreports/fairuseflyer.html

- Berkman Center for Law and Society at Harvard Law School  
  http://cyber.law.harvard.edu/home/

- Electronic Frontier Foundation  http://www.eff.org/

- Center for Intellectual Property and Copyright in the Digital Environment:  
  http://www.umuc.edu/distance/odell/cip/links.html
Images, Film, Music, Multi-Media

- VRA’s Copyright Resources and Image Calculator:
  http://www.vraweb.org/resources/ipr/copyright.html
  http://www.vraweb.org/resources/ipr/dirc/index.html

- VRA Statement on the Fair Use of Images for Teaching, Research, and Study

- NINCH: http://www.ninch.org/copyright/

- Resources Library of the Center For Social Media – American University, Best Practices Guides:
  http://www.centerforsocialmedia.org/resources/

  Best Practices in Fair Use of Dance-Related Materials
  http://www.centerforsocialmedia.org/fair-use/related-materials
  /codes/best-practices-fair-use-dance-related-materials

  The Code of Best Practices in Fair Use for Media Literacy Education

  Code of Best Practices in Fair Use for Online Video
  http://www.centerforsocialmedia.org/fair-use/related-materials
  /codes/code-best-practices-fair-use-online-video
Code of Best Practices in Fair Use for Scholarly Research in Communication
http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-scholarly-research-communication

Documentary Filmmakers' Statement of Best Practices in Fair Use

Society for Cinema and Media Studies' Statement of Best Practices in Fair Use in Teaching for Film and Media Educators
http://www.centerforsocialmedia.org/fair-use/related-materials/codes//society-cinema-and-media-studies-statement-best-practices-fair-use-

Society for Cinema and Media Studies' Statement of Fair Use Best Practices for Media Studies Publishing
• http://www.centerforsocialmedia.org/fair-use/related-materials/codes/society-cinema-and-media-studies-statement-fair-use-best-practices-
Permissions Resources:

- Obtaining Copyright Permissions, University of Michigan Copyright Office

- Free Image sites: (Remember: ALWAYS read the license for special details/constraints/terms)
  - Freedigitalphotos.net: [http://www.freedigitalphotos.net/](http://www.freedigitalphotos.net/)
  - Stockvault: [http://www.stockvault.net/](http://www.stockvault.net/)

- A list of other free stock photo sites with reviews: [http://www.freestockimages.net/resource-list/](http://www.freestockimages.net/resource-list/)

- Stock photo sites that have some royalty-free images (you’ll pay, but not as much)
Online Terms of Service You Need to Know About

  - Community guidelines: [http://www.youtube.com/t/community_guidelines](http://www.youtube.com/t/community_guidelines)
  - Copyright Tips: [http://www.youtube.com/t/howto_copyright](http://www.youtube.com/t/howto_copyright)
- Google: [http://www.google.com/accounts/TOS](http://www.google.com/accounts/TOS)
- Twitter: [http://twitter.com/tos](http://twitter.com/tos)
  - Twitter Rules: [http://support.twitter.com/articles/18311-the-twitter-rules](http://support.twitter.com/articles/18311-the-twitter-rules)
Discussion!